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The Subject Matter Jurisdiction of New Mexico District Courts over Civil Cases Involving Indians

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THE SUBJECT MATTER JURISDICTION OF NEW MEXICO DISTRICT COURTS OVER CIVIL CASES INVOLVING INDIANS

I. INTRODUCTION

The large quantity of Indian lands and Indian people in New Mexico[1] increases the possibility that local attorneys will eventually litigate civil cases involving Indians as plaintiffs or defendants. Assuming that most non-Indian lawyers wish to avoid litigating such cases in tribal courts, understanding the jurisdictional basis for litigating those cases in state courts is a prime concern; it can also be a major source of confusion. While the law of state court subject matter jurisdiction over these cases is significantly different from the law in cases where Indians are not parties, these differences need not deter practitioners from undertaking such cases.

This Comment has three purposes. Through an historical analysis and synthesis of the leading New Mexico Supreme Court cases of the last twenty-five years, the Comment constructs a model by which lawyers can determine whether New Mexico state courts have jurisdiction over a particular case. The Comment also will explain the implications of the New Mexico Supreme Court's interpretation of the model in its most recent subject matter jurisdiction case, *State ex rel. Department of Human Services v. Jojola*.[2] Finally, the Comment will suggest an alternative method of analysis for future cases.

II. JURISDICTION AND SOVEREIGNTY

The United States political system is based upon dual sovereignty of state and nation.[3] Our federal system was designed to protect individual liberty by promoting conflicts between sovereigns.[4] While originally considered unworkable by some political philosophers,[5] the system has sur-

1. The federal government recognizes 25 separate reservation tribes in New Mexico, the largest and most populous of which is the Navajo. Because the Navajo reservation extends into Arizona and Utah, census figures may be imprecise, but Environmental Development Association figures indicate more than 100,000 reservation Indians inhabit over 8 million acres of tribal and federal lands. *See* U.S. Department of Commerce, Federal and State Indian Reservations—An EDA Handbook 33-35, 248-300 (1971)

2. 99 N.M. 500, 660 P.2d 590, *cert. denied*, 104 S. Ct. 49 (1983).

3. *See generally* Younger v. Harris, 401 U.S. 37, 43-44 (1971).

4. *Id.*

5. *Id.*

vived and flourished. Although the continued vitality of the federal system may be a matter for debate, the conflict between sovereigns remains a major theme in constitutional law.[6]

Sovereignty has been defined as the right of people to organize themselves into political, social, and cultural patterns,[7] and to use their land, resources, and manpower exclusively for their own needs.[8] Sovereignty depends upon the power to influence and to coerce mutually beneficial conduct on the part of individuals. This power, in turn, depends upon the ability of the sovereign to assume jurisdiction over individuals in order to enforce laws and administer justice. When individuals owing allegiance to one sovereign become involved with individuals owing allegiance to a different sovereign, conflicts of law and jurisdiction are inevitable.[9]

Jurisdictional questions concerning Indians implicate not only federal and state sovereignty, but tribal sovereignty as well. Almost every problem of Indian law involves a conflict between the sovereignty of the tribe and that of a state or the federal government.[10] These problems are exacerbated by the fact that the respective spheres of authority of the federal, state, and tribal governments have not remained static. As public policy towards Indians varies from the drive for assimilation[11] to the desire for preservation,[12] the judicial determinations of the relationship between the tribal courts and the state or federal courts have not been consistent.[13]

In the early years of our republic, the federal government pursued a doctrine of recognizing absolute tribal sovereignty. *Worcester v. Georgia*[14] is the seminal case defining the relationship between the states and the tribes. In *Worcester,* Chief Justice Marshall declared that "the several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[15]

As the land base of the Indians lessened, however, their independence likewise decreased. When the federal government first began to allow states to regulate reservation land within their borders, the states could

6. *Id.*
7. Kickingbird, Kickingbird, Chibitty & Berkley, *Indian Sovereignty,* Institute for Development of Indian Law 2 (1977).
8. *Id.* at 5.
9. *Id.*
10. *See* Canby, *Civil Jurisdiction and the Indian Reservation,* 1973 Utah L. Rev. 206.
11. *Id.* at 210-11.
12. *Id.*
13. *Id.*
14. 31 U.S. (6 Pet.) 515 (1832).
15. *Id.* at 557.

do so only where jurisdiction had been specifically granted to them by the federal government.[16] Later, the presumption was changed from denying state jurisdiction to allowing state jurisdiction; in *Williams v. Lee*,[17] the Supreme Court said in dicta that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.[18] Most recently, the restriction on state regulation was almost completely eliminated. In *Washington v. Confederated Tribes*,[19] the Supreme Court appeared to allow the application of state law, even though it would infringe on tribal self-government or pre-empt federal law, as long as there is sufficient state interest to justify the assertion of state authority.[20]

These cases illustrate a gradual erosion of tribal sovereignty. While state courts were originally denied jurisdiction over Indian country, the federal government has relaxed the standard over time. The first step in the relaxation of the ban against state court jurisdiction was to allow jurisdiction over Indian land if federally authorized; next, states were permitted to exercise jurisdiction unless the exercise was specifically prohibited; at present, the states are allowed to ignore the prohibition on jursidiction if a sufficient state interest can be articulated. The mirage of tribal sovereignty thus vanishes in the face of a sufficient state interest.

III. SUBJECT MATTER JURISDICTION IN INDIAN LAW

To dispense binding judgments upon individuals, courts traditionally have exercised two types of jurisdiction: subject matter jurisdiction and in personam jurisdiction. Subject matter jurisdiction refers to a court's competence to determine cases of the general class to which the proceedings in question belong;[21] personal jurisdiction refers to the power of a court over the person of a defendant.[22] Under traditional analysis, proper forum selection would depend upon the court in question having the competence to hear such a proceeding[23] and having jurisdiction over the defendant, effected through service of process.[24] In order to bind the defendant to the judgment, a plaintiff must allege in the complaint suf-

16. Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976).
17. 358 U.S. 217 (1959).
18. *Id.* at 219.
19. 447 U.S. 134 (1980).
20. *Id.* at 157.
21. Standard Oil Co. v. Montecatini Edison S.P.A., 342 F. Supp. 125, 129-30 (D. Del. 1972).
22. Pennoyer v. Neff, 95 U.S. 714 (1877).
23. Washington v. Confederated Tribes, 447 U.S. 134, 156 (1980).
24. *Standard Oil*, 342 F. Supp. at 129. Although beyond the scope of this Comment, service of process is also a problem in Indian Law in New Mexico. *See* State Securities, Inc. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973).

ficient jurisdiction over both the person of the defendant and the subject matter of the action.[25]

Courts of general jurisdiction, such as New Mexico state district courts,[26] have subject matter jurisdiction over all transitory actions[27] and over all local actions arising within the proper venue.[28] For example, a plaintiff who sues in tort (a transitory action) would have no trouble establishing subject matter jurisdiction in a court of general jurisdiction.[29] In an action to quiet title to land (a local cause of action), for instance, the plaintiff must bring suit in the court having venue where the land is located (unless statutorily required to do otherwise).[30] Applying these principles to cases involving Indians as parties would not appear difficult. State courts would always have subject matter jurisdiction over transitory causes of action, but never over local causes of action when the suit arose on reservation land because federal reservation land is not within state court venue.[31]

Unfortunately, subject matter jurisdiction in cases involving Indians as parties does not follow this model. Partly as a result of policy considerations, inartful judicial draftsmanship, and common law development, the current subject matter jurisdictional model in civil cases involving Indians bears no resemblance to the expected analysis. This discrepancy between the traditional analysis and the results in cases where Indians are parties stems from the United States Supreme Court case of *Williams v. Lee*.[32]

In *Williams*, the Supreme Court held that a state court did not have inherent jurisdiction when a non-Indian sued an Indian for a debt which arose on the reservation.[33] Justice Black, for the majority, articulated the issue for the court: "[T]he question is whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them."[34] The Court then found: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves."[35] Accordingly, the Supreme Court held that the state court, which had held for the non-Indian plaintiff, had to dismiss the suit for lack of jurisdiction.[36]

25. N.M. R. Civ. P. 12(b)(1).
26. N.M. Const. art. 6, § 13.
27. State ex rel. Dep't of Human Servs. v. Jojola, 99 N.M. 500, 501, 660 P.2d 590, 591 (1983).
28. *Cf.* Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).
29. *See* Heckathorn v. Heckathorn, 77 N.M. 369, 371, 423 P.2d 410, 412 (1967).
30. Moreland v. Rucker Pharmaceutical Co., 59 F.R.D. 537, 540 (D. La. 1973).
31. *See* Sheppard v. Sheppard, 104 Idaho 1, 15, 655 P.2d 895, 909 (1982).
32. 358 U.S. 217, 220 (1959).
33. *Id.* at 223.
34. *Id.* at 220.
35. *Id.* at 223.
36. *Id.*

Williams was the birth of the "infringement test." As discussed previously,[37] the standard ban on states regulating reservations was no longer completely barred, but instead was barred only if the regulation infringed upon the right of Indians to govern themselves.[38] In *Organized Village of Kake v. Egan*,[39] the Supreme Court interpreted *Williams* as expanding the scope of state jurisdiction, by construing the jurisdiction denied in *Williams* as subject matter jurisdiction, rather than territorial jurisdiction.[40] This interpretation has since been widely accepted and *Williams* is considered the landmark subject matter jurisdiction case in Indian law.[41] Yet this categorization of *Williams* is inconsistent with traditional civil procedure. Either *Williams*, or *Kake* in construing *Williams*, is analytically incorrect.[42]

Under a traditional subject matter jurisdiction analysis, *Williams* would have been decided differently. *Williams* involved a suit for debt.[43] Debt is a transitory action.[44] Transitory actions can be brought in any court of general jurisdiction.[45] The district courts of Arizona, the state where *Williams* arose, are courts of general jurisdiction and, thus, would have had subject matter jurisdiction over the suit.[46]

Arguably, *Williams* changed a traditionally transitory action in debt to a local action whenever an Indian is a defendant. Under these cases, everything that Indians do on their lands is outside the competency of state courts. This precedent, for all its confusion, adequately meets the policy of prohibiting state infringement of the rights of reservation Indians to make their own laws and to be governed by them. By forcing all

37. *See supra* notes 17-18 and accompanying text.

38. State ex rel. Dep't of Human Servs. v. Jojola, 99 N.M. 500, 502, 660 P.2d 590, 592, *cert. denied*, 104 S. Ct. 49 (1983).

39. 369 U.S. 60 (1970).

40. In *Kake*, the Thlinget Indians, a tribe without their own reservation, operated salmon traps under permits granted by the federal government. The tribe sued to enjoin the State of Alaska from enforcing a state statute prohibiting salmon traps. The Court held that the state could enforce the statute, despite language of the Alaska statehood act providing that "Indian property (including fishing rights) shall not only be disclaimed by the state as a proprietary matter but also shall be and remain under the absolute jurisdiction and control of the United States." *Id.* at 67-68. The Court held that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction," *id.*, thus casting the dispute as a federal subject matter jurisdiction versus state subject matter jurisdiction question. *Kake*, therefore, is frequently cited as the case which first interpreted *Williams v. Lee* as a subject matter jurisdiction case.

41. M. Price, American Indian Legal Problems 161 (1969).

42. Because Justice Black in *Williams v. Lee* never stated what kind of jurisdiction the Supreme Court was prohibiting, he could have been referring to territorial, subject-matter, or in personam jurisdiction. *Kake* saw *Williams* as a subject matter jurisdiction case. For a different interpretation of these cases, see Canby, *supra* note 10, at 214.

43. 358 U.S. at 218.

44. Howle v. Twin States Exp., 237 N.C. 667-70, 75 S.E.2d 732, 736 (1953).

45. Moreland v. Rucker Pharmacutical Co., 59 F.R.D. 537, 540 (D. La. 1968).

46. *See* Ariz. Const. art. 6, § 6; *see also* Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28 (1960).

disputes which arise on reservation land and have Indian defendants into tribal courts, Indian sovereignty is preserved.

IV. THE NEW MEXICO MODEL

In *Williams*, the relevant factors for the court were the race of the defendant and the location where the cause of action arose.[47] The Court never articulated why these factors were significant, nor did it give guidance to lower courts on how to interpret other fact patterns. New Mexico has been presented with cases involving the four possible combinations of *Williams* factors[48] and the results of these cases can be read as consistent with *Williams*.[49] The arguments which support this interpretation are, contrary to the assertions of critics, consistent with current protectionist policy.[50] In addition, an interpretation of precedent which renders all cases consistent is preferable to an interpretation which renders cases inconsistent, because the former gives a clearer prediction of future trends.

The two factors relied on in *Williams* each have two alternatives and thus lend themselves to a window graph which illustrates the analysis:

		Race of Defendant	
		Indian	Non-Indian
Location where the cause of action arose	On reservation	Indian defendant; cause of action arising on the reservation *Williams v. Lee* Type 1	Non-Indian defendant; cause of action arising on the reservation 2
	Off reservation	3 Indian defendant; cause of action arising off the reservation	4 Non-Indian defendant; cause of action arising off the reservation

FIGURE 1. THE STATE SUBJECT MATTER JURISDICTION MODEL

By comparing the results in cases in which the facts fall into each possible combination, the scope of the *Williams* rule can be illustrated. Moreover, the graph serves as a guide for practitioners: by "plugging in" the relevant facts of any given case, a lawyer can determine whether the state court has subject matter jurisdiction over the case.

47. 358 U.S. at 220.

48. With two binomial factors, location where cause of action arose (on or off the reservation) and race of the defendant (Indian or non-Indian), four combinations are possible.

49. The author uses "consistent" to mean that the policy considerations underlying the infringement test which led to the *Williams* holding logically produce a predictable result in other cases with different combinations of race and location.

50. *See infra* text accompanying notes 73-77.

Type 1: *Hartley v. Baca*

The first fact pattern, an Indian defendant and a cause of action arising on the reservation, mirrors the fact pattern in *Williams;* the New Mexico equivalent is *Hartley v. Baca.*[51] In *Hartley,* an Indian had an automobile accident with a non-Indian.[52] The accident occurred on the reservation.[53] The non-Indian sued the Indian for tort in state court.[54] The *Williams* precedent dictated that the suit be dismissed for lack of subject matter jurisdiction because the defendant was an Indian and the suit arose on the reservation. The New Mexico Supreme Court properly disposed of the issue by dismissing the case.[55]

The reasoning in *Hartley* was somewhat confusing. The court believed that the "infringement" test utilized a three step inquiry.[56] The *Hartley* court stated that, under *Williams,* a court must determine: 1) whether the parties involved are Indian or non-Indian; 2) whether the cause of action arose on or off the reservation; and 3) the nature of the interest to be protected.[57] The court in *Hartley* determined that the plaintiff was non-Indian and the defendant was Indian, that the cause of action arose on the reservation, and that the nature of the interest to be protected is the defendant's right to be heard in his tribal court.[58]

The *Hartley* court's approach fails to conform to the clear-cut analysis of *Williams* in three respects. First, under *Williams,* it is not whether the *parties* involved are Indians, but whether the *defendant* is an Indian which is deemed relevant. The court in *Williams* expressly stated that "it is immaterial that respondent [plaintiff in the original suit] is not an Indian."[59] Contrary to the dictum in *Hartley,* therefore, the race of the plaintiff is not a factor in subject matter jurisdiction.[60]

Second, the *Hartley* court misinterpreted *Williams* in discussing the policy underlying infringement. *Williams* held that infringement constituted state interference with "the right of reservation Indians to make their own laws and be governed by them."[61] The court in *Hartley* con-

51. 97 N.M. 441, 640 P.2d 941 (1981).
52. *Id.* at 442, 640 P.2d at 942.
53. *Id.*
54. *Id.*
55. *Id.* at 444, 640 P.2d at 944.
56. *Id.* at 443, 640 P.2d at 943.
57. *Id.*
58. *Id.*
59. 358 U.S. at 223.
60. Curiously, the New Mexico Supreme Court had decided this question properly 20 years earlier in Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961). The *Valdez* court held that a suit in state court against an Indian defendant for an automobile accident which occurred on the reservation must be dismissed for lack of subject matter jurisdiction. In *Valdez,* the plaintiff was an Indian. As the results in *Hartley* and *Valdez* were identical, yet the plaintiffs were respectively non-Indian and Indian, the race of the plaintiff must be irrelevant, as Justice Black pointed out in *Williams,* 358 U.S. at 220.
61. 358 U.S. at 220.

strued infringement to prohibit state interference with an Indian defendant's "right to be heard in his tribal court."[62] These are different rights which can even conflict. For example, suppose an Indian defendant would rather be sued in state court than Indian court. Under *Williams*, such a result is acceptable, as the state court could apply Indian law and the Indian defendant would be governed by his own law. Under *Hartley*, such a result is impossible, as the defendant must be heard in his own forum.

Third, the court in *Hartley* failed to recognize the relationship between the enunciated factors. The race of the defendant and the location where the suit arose are the only inquiries necessary. The final *Hartley* criterion, "the interest to be protected," is merely a restatement of the infringement test policy, not a new variable in the analysis. The court in *Hartley* implied that a balancing of competing interests yielded the result that, in that case, the defendant's interest in being sued in his tribal court prevailed.[63] This is inconsistent with the mandate in *Williams*. Under *Williams*, the right of Indians to govern themselves wins *in every case;* no state may infringe upon that right.[64] Under the facts of *Hartley* and *Williams*, that right can be protected only by denying state court subject matter jurisdiction. *Hartley*, therefore, is inconsistent with *Williams* in that it implies an additional third step, a policy balancing analysis on a case-by-case basis to determine jurisdiction. *Williams* merely mandates the two-step formalistic threshold determination of subject matter jurisdiction, without policy balancing. *Hartley*'s added step has come back to haunt the protectionists, as it has led to a new avenue by which to expand state court jurisdiction.[65]

Type 2: *Paiz v. Hughes*

In the second possible combination—a non-Indian defendant involved in a suit which arose on the reservation—the non-Indian has a right to be sued in his "home" forum. This was precisely what happened in *Paiz v. Hughes*.[66] In *Paiz*, as in *Hartley*, an Indian and a non-Indian collided their vehicles while on reservation land.[67] This time, however, the Indian sued the non-Indian in state court.[68] Over the defendant's protest that the court had no subject matter jurisdiction over a cause of action which arose on the reservation, the court held that jurisdiction did exist.[69]

62. 97 N.M. at 443, 640 P.2d at 943.
63. *Id.* Note that the court gave no mention of any specific competing interest.
64. 358 U.S. at 220. *Cf.* Washington v. Confederated Tribes, 447 U.S. 134, 156 (1980).
65. *See infra* text accompanying notes 119-26.
66. 76 N.M. 562, 417 P.2d 51 (1966).
67. *Id.* at 563-64, 417 P.2d at 52.
68. *Id.*
69. *Id.* at 566, 417 P.2d at 53.

The holding in *Paiz* is consistent with both *Williams* and *Hartley*. The non-Indian defendant in *Paiz* argued that a state could never assume jurisdiction over anything that happens on a reservation, regardless of whether Indians or non-Indians were involved. The New Mexico Supreme Court properly rejected this argument,[70] just as the Court in *Kake* had read *Williams* as abolishing the territorial barrier to state court jurisdiction. If, for fairness reasons, an Indian defendant should be sued in his tribal court, it follows that a non-Indian defendant should be sued in *his* state court. Moreover, a non-Indian can certainly sue another non-Indian in state court,[71] so if the race of the plaintiff is indeed irrelevant (as stated by *Williams*), then *Paiz* was correctly decided.[72]

Paiz, however, forces one to face squarely the problem discussed previously: Is the rationale of *Hartley* inconsistent with *Williams*?[73] In other words, does the right of Indians to make their own laws and be governed by them conflict with the right of a defendant to be heard in his tribal court?

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70. *Id.* at 565-66, 417 P.2d at 52.

71. This, of course, is subject to residency requirements. *See* Heckathorn v. Heckathorn, 77 N.M. 369, 423 P.2d 410 (1967).

72. Yet *Paiz* has been widely criticized on both logic and policy grounds. A leading authority on civil procedure in New Mexico argues that "*Hartley v. Baca* . . . is logically inconsistent with . . . *Paiz v. Hughes*" and that "*Paiz* . . . should be reconsidered by the supreme court. The court undercuts Indian sovereignty by accepting jurisdiction whenever Indian plaintiffs proceed in state court." Occhialino, *Civil Procedure*, 13 N.M.L. Rev. 251, 252 n.8 (1983).

This criticism deserves examination. First, *Hartley* could not be logically inconsistent with *Paiz* because the factual basis of the cases are reversed. In *Hartley*, the defendant was an Indian and the plaintiff was non-Indian; in *Paiz*, the plaintiff was an Indian and the defendant was a non-Indian. Because the rationale of the criticism is that allowing Indian plaintiffs into state court infringes upon tribal sovereignty, this complaint cannot apply to the facts in *Hartley*, where the plaintiff was not an Indian.

Yet, if race of the plaintiff were the determining factor, the more perceptive argument is that *Paiz* is inconsistent with Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961). In both *Paiz* and *Valdez* Indian plaintiffs sued in state court for an on-reservation tort. Yet the court dismissed *Valdez* for lack of subject matter jurisdiction and upheld such jurisdiction in *Paiz*.

If we assume (as Occhialino argues) that *Valdez* is correct and *Paiz* is incorrect, we still must decide why *Valdez* is right for denying an Indian plaintiff the right to sue in state court, while *Paiz* is wrong for allowing it. If we read "the right of reservation Indians to make their own laws and be governed by them" as respecting a *tribe's* right to govern its members, then we can see why individual Indians should not by-pass their tribal courts. Allowing individual Indians to pursue their actions in state courts undercuts the tribal courts' opportunities to hear the cases and, thus, infringes on tribal governmental authority.

If we interpret the right to apply to *individual* Indians as defendants, however, the distinction becomes clear, as the defendant in *Valdez* was an Indian while the defendant in *Paiz* was a non-Indian. The unfairness of subjecting an Indian defendant to a state forum appears to be the interpretation of *Williams v. Lee* given by the court in *Hartley v. Baca*. This unfairness is not implicated in *Paiz*, because the defendant was not an Indian.

The criticism of *Paiz* as inconsistent with *Hartley* thus appears to be misplaced. Both cases stand for the notion that the infringement test in *Williams v. Lee* is to be construed narrowly, applying only to Indian defendants, while not impeding Indian plaintiffs of a choice of fora.

73. *See supra* text accompanying notes 61-65.

Hartley's interpretation of *Williams* as implying concern primarily for fairness to the Indian defendant is amply supported by policy considerations. Indian plaintiffs have many reasons to want to use state courts when suing non-Indian defendants. The lack of tribal enforcement capability may render judgments obtained in tribal courts uncollectible off the reservation.[74] The difficulty in getting a state tribunal to give full faith and credit to a tribal court judgment is another problem.[75] Finally, forcing every Indian plaintiff into Indian court could violate the due process rights of a non-Indian defendant; a non-Indian defendant has the same right not to be unfairly haled into a foreign forum as does an Indian defendant.[76] By allowing Indians to sue non-Indians in the state courts, non-Indian defendants are not forced into a foreign forum.

Thus, policy considerations support reading the "right of Indians to be governed by their own laws" to apply only to Indian defendants, while protecting the right of Indian plaintiffs to select alternative forums in which to enforce their rights. Viewed this way, the Indian plaintiffs in *Paiz* situations can sue non-Indian defendants either in tribal court or in state court without infringing upon tribal sovereignty, just as a New Mexico plaintiff could sue a Colorado resident in Colorado without infringing upon New Mexico's sovereignty.[77]

Type 3: *State Securities, Inc. v. Anderson*

The third fact pattern combination consists of an Indian defendant and a cause of action which arises *off* the reservation. This pattern was the case in *State Securities, Inc. v. Anderson*,[78] where an Indian entered into a contract with a non-Indian while off the reservation.[79] The non-Indian sued for breach of contract. The supreme court held that the state court did have subject matter jurisdiction over the case: "We believe that state jurisdiction is proper in cases between Indians and non-Indians involving contractual obligations incurred off the reservation."[80] This statement has significance because the court is unconcerned about the race of the defendant or the plaintiff in the action. Whenever individuals interact off the reservation (and within the forum state), the state court has subject matter jurisdiction over the resulting suit.

74. *See generally* Moshier, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 1981 Ariz. St. L.J. 801, 818-19.

75. *Id. See also* Jim v. CIT Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

76. Canby, *supra* note 10, at 217-18.

77. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

78. 84 N.M. 629, 506 P.2d 786 (1983).

79. *Id.*

80. *Id.* at 632, 506 P.2d at 789.

Type 4: *Trujillo v. Prince*

The final combination of factors consists of a non-Indian defendant and a cause of action which arises off the reservation. This was the case in *Trujillo v. Prince*.[81] In *Trujillo*, the supreme court held that, because a non-Indian defendant was being sued in state court (his home forum) by an Indian for an auto accident which occurred off the reservation, the state court had subject matter jurisdiction to hear the suit.[82]

Returning to the window graph, we can now flesh out the influence of *Williams v. Lee:*

Location where the cause of action arose	Race of Defendant: Indian	Race of Defendant: Non-Indian
On reservation	Exclusive tribal court jurisdiction *Hartley v. Baca* Type 1	Concurrent tribal and state court jurisdiction *Paiz v. Hughes* 2
Off reservation	3 Concurrent state and tribal court jurisdiction *State Securities v. Anderson*	4 Exclusive state court jurisdiction *Trujillo v. Prince*

FIGURE 2. THE NEW MEXICO SUBJECT MATTER JURISDICTION MODEL FOR CASES INVOLVING INDIANS

Expressed in rule form, the New Mexico state courts' subject matter jurisdiction over cases involving Indians can be stated thus:

> The state courts have jurisdiction over all cases in which a non-Indian, state resident is the defendant, irrespective of where the cause of action arises, and over all cases which arise off the reservation and within the state, irrespective of the race of the defendant. The state courts lack jurisdiction over cases involving an Indian defendant when the cause of action arose on reservation land.

The state court subject matter jurisdiction model can be enhanced graphically with representation of state court jurisdiction:

81. 42 N.M. 337, 78 P.2d 145 (1938).
82. *Id.* at 344, 78 P.2d at 152.

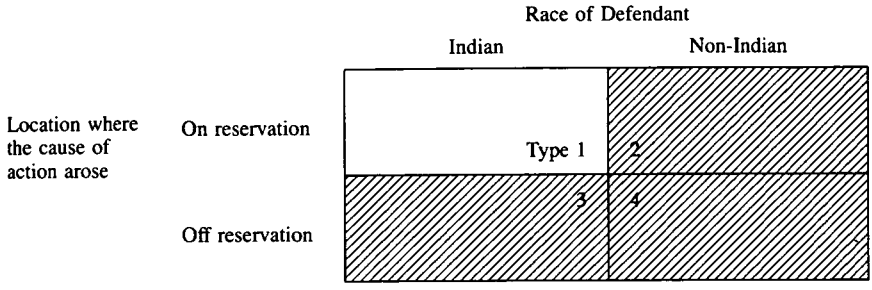

FIGURE 3. STATE COURT SUBJECT MATTER JURISDICTION

The only time the New Mexico state courts do not have subject matter jurisdiction over a case involving Indians is when the defendant is an Indian and the cause of action arose on the reservation, as in *Hartley v. Baca* and *Williams v. Lee*. The mandate in *Williams*, that state courts should not "infringe upon the rights of tribes to make their own laws and be governed by them,"[83] vests the tribal courts with at least equal jurisdiction over cases involving their members. Thus, cases involving Indians as defendants would always be subject to the jurisdiction of tribal courts. All cases which arise on the reservation are similarly within tribal court competence. Expressed graphically:

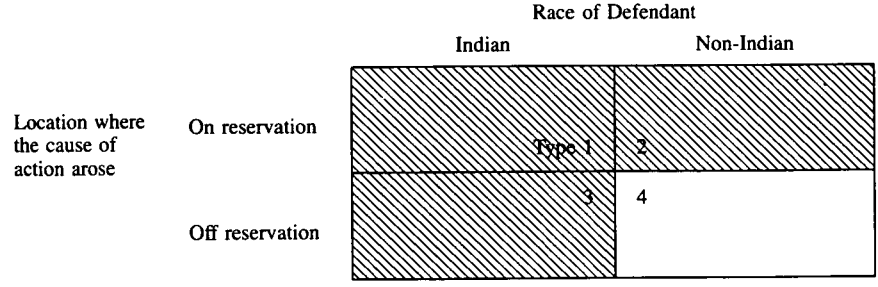

FIGURE 4. TRIBAL COURT SUBJECT MATTER JURISDICTION

When the graphs are combined, the jurisdictional parameters appear quite simple:

83. 358 U.S. at 220.

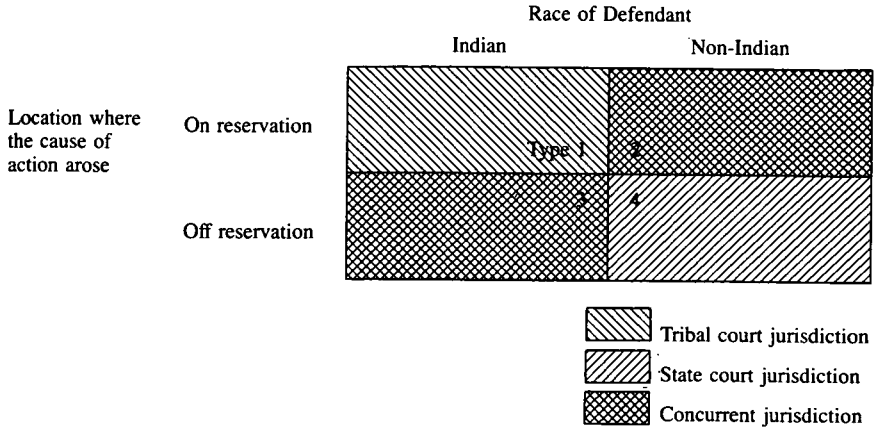

FIGURE 5. SUBJECT MATTER JURISDICTION IN NEW MEXICO CIVIL CASES INVOLVING INDIANS AS PARTIES

V. CRITICISM OF THE NEW MEXICO RULE

Commentators have failed to endorse the unconventional New Mexico approach. The New Mexico rule has been criticized on the basis that its rigidity leads to arbitrary results.[84] Under the facts in *Hartley* and *Paiz* (an automobile accident between an Indian and a non-Indian which occurred on the reservation),

> [T]he appropriate court to hear the resulting civil case would be determined by which party sued first. If the Indian sues first, the case would be sent to state court; if the non-Indian sues first, the case would be heard solely in tribal court. This illustrates the erratic allocation of civil jurisdiction between tribe and state prevailing in those states where the Indian tribe remains a jurisdiction unto itself.[85]

By comparison, if a Colorado resident is involved in an automobile accident with a New Mexico resident while both are in New Mexico, the New Mexico resident could sue the Colorado resident in either New Mexico or Colorado;[86] the Colorado resident, however, could only sue the New Mexico resident in New Mexico.[87] This situation is identical to the current state of Indian law and has never been criticized for being erratic or arbitrary.[88] Instead, this process provides a clear, logical method

84. Canby, *supra* note 10, at 223.
85. *Id.* at 206.
86. *See* N.M. Stat. Ann. § 38-1-16 (1978).
87. *See* Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (1980).
88. In fact, such a situation is justified for just the opposite reason, that it allows fairness and substantial justice. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

of forum selection by accurately defining the boundaries of state and tribal jurisdiction.

The most compelling criticism of the model is that it decides subject matter jurisdiction under principles traditionally categorized as personal jurisdiction concerns. This criticism is accurate, although better directed at *Williams,* to which New Mexico courts have merely maintained fidelity. The court in *Hartley* adulterated the subject matter jurisdiction analysis when it stated that "the interest to be protected is the defendant's right to be heard in his tribal court."[89] This is a classic personal jurisdiction consideration, but has no place in a subject matter jurisdiction analysis. If the concern is the unfairness to the defendant of being haled into a foreign forum, then the concern is independent of that forum's competency to hear cases. *State Securities* also is consistent with the traditional personal jurisdiction analysis of *Hartley* and *Paiz*. Once an Indian transacts or does business in a foreign forum, he would have a reasonable expectation of being haled into that forum and, thus, it would not violate principles of due process or fundamental fairness to bring him within the court's jurisdiction.[90] The *State Securities* court relied upon the rationale of a domestic relations case with a similar fact pattern, *Natewa v. Natewa,*[91] which argued: "Appellant cannot interpose his special status as an Indian as a shield to protect him from obligations that result from his marriage to appellee which has been entered into off the reservation."[92]

On the functional level, the infringement test is theoretically simple, but it became quite difficult to apply in practice. Determining the race of the defendant is rarely a problem, but determining where a cause of action arises is often very difficult.[93] The automobile accident cases discussed previously provided few problems, but in cases of libel, divorce, or paternity, where the cause of action arises is much less clear.[94] The problem is compounded if the Indian defendant has committed several acts, some while on the reservation and some while off the reservation, which relate to a continuing cause of action.

VI. A RECENT APPLICATION OF THE NEW MEXICO MODEL: *STATE EX REL. DEPARTMENT OF HUMAN SERVICES V. JOJOLA*

In *State ex rel. Department of Human Services v. Jojola*[95] the New Mexico Supreme Court was faced with one of the difficult unanswered

89. 97 N.M. at 443, 640 P.2d at 943.
90. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
91. 84 N.M. 69, 499 P.2d 691 (1972).
92. *Id.* at 71, 499 P.2d at 693.
93. Canby, *supra* note 10, at 225 n.140.
94. *See, e.g.,* Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972).
95. 99 N.M. 500, 660 P.2d 590, *cert. denied,* 104 S. Ct. 49 (1983).

issues in subject matter jurisdiction: Where the cause of action arises in a paternity case.[96] In *Jojola,* an Indian woman applied to the state for aid for her dependent child.[97] Pursuant to state and federal law, she named Jojola, also an Indian, as the father of the child.[98] The Department of Human Services (DHS) paid welfare payments to the mother, then sued Jojola in state court for reimbursement.[99] The district court dismissed the case for lack of subject matter jurisdiction.[100]

Under the New Mexico State Court Subject Matter Jurisdiction Model, the two relevant factors are the race of the defendant and the location where the cause of action arose. Because the defendant in the case, *Jojola,* was an Indian, the dispositive issue in the case was where the cause of action arose. If it were determined that the cause of action arose on the reservation, *Jojola* would be classified as a Type 1 case,[101] like *Hartley* and *Williams,* and the district court's dismissal for lack of subject matter jurisdiction would be affirmed. If the court determined that the cause of action arose off the reservation, however, the case would be a Type 3 case[102] and would fall under the rationale of *State Securities.* In that situation, the state courts would have subject matter jurisdiction and the district court's dismissal would be reversed.

The court in *Jojola* determined that the cause of action arose off the reservation[103] and, accordingly, that the state court had subject matter jurisdiction over the case.[104] The supreme court thus reversed the dismissal

96. *Id.* at 503, 660 P.2d at 593. The court in *Jojola* actually quoted a separate initial inquiry, whether there are any applicable federal statutes, and found none. Only after conducting this inquiry did the court conduct an "infringement" analysis. The first question is known as the "preemption" analysis, based on the notion that if the federal government has legislated procedural law of a case involving Indians, it has "preempted" state court subject matter jurisdiction as a result of federal law supremacy. *See* Tiffany Constr. Co. v. State, 96 N.M. 296, 629 P.2d 1225 (1984).

Respondent did not advance a preemption argument, although the chief justice in the case dissented on that very ground, determining that the Indian Child Welfare Act, 25 U.S.C. § 1911(a) (1978) preempted state court jurisdiction. It appears that this conclusion is erroneous, as the act provides that the term "parent," as used in the Act, "does not include the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(a).

As a logical matter, the Indian Child Welfare Act is concerned with custody of Indian children; a determination of the child's status as an Indian would be a prerequisite to determine whether the Act applies. *In re Jurious M.,* 144 Cal. App. 3d 785, 193 Cal. Rptr. 40 (1983). Thus, the paternity action must precede the application of the Indian Child Welfare Act, and accordingly, could not be "preempted" by it.

97. 99 N.M. at 501, 660 P.2d at 591.

98. *Id.* N.M. Stat. Ann. § 40-5-7 (1978) provides in part: "The proceeding to compel support and establish parentage may be brought by a parent or if the child is or is likely to be a public charge, by the state of New Mexico."

99. 99 N.M. at 501, 660 P.2d at 591.

100. *Id.*

101. *See supra* Fig. 5.

102. *Id.*

103. State ex rel. Dep't of Human Servs. v. Jojola, 99 N.M. 500, 503, 660 P.2d 590, 593, *cert. denied,* 104 S. Ct. 49 (1983).

104. *Id.*

and remanded the case to the district court for further proceedings.[105] This result appears consistent with previous precedent and illustrates the continued validity of the New Mexico approach.

Looking more deeply into the reasoning of the case, however, an entirely different interpretation emerges. The court went to considerable lengths to achieve the desired result. In order to determine that the cause of action arose off the reservation, the court in *Jojola* ignored both logic and settled principles of law. If the courts misconstrue the facts of a case before plugging those facts into a mechanical model, the model itself becomes useless. The court's fact finding in *Jojola* frustrates the purposes of the model. The *Jojola* opinion illustrates all of the problems previously discussed: confusion over the principles of subject matter and personal jurisdiction; confusion over the interpretation of *Williams* and *Hartley;* and misconstrual of the facts to be plugged into the subject matter jurisdiction model.

The opinion begins with a discussion of personal jurisdiction, although the appeal was based upon subject matter jurisdiction. The court explains personal jurisdiction by discussing subject matter jurisdiction considerations:

> [W]hen a cause of action is transitory, any court of competent jurisdiction, where jurisdiction is obtained over the defendant, may entertain the cause of action regardless of where the parties were at the time of the cause of action or *where the cause of action arose.*[106]

The court's confusion over subject matter and personal jurisdiction is the least of the problems in the opinion; however, the court's use of the above quote is peculiar, considering that it does not apply in Indian law cases after *Hartley.* The place where the cause of action arises does indeed matter; in fact, it is dispositive of jurisdiction when the defendant is an Indian, as in the *Jojola* case.

After stating traditional subject matter jurisdiction principles when discussing personal jurisdiction, the court ignored those principles when discussing subject matter jurisdiction, instead beginning its analysis with the classic infringement analysis of *Williams v. Lee:*

> [T]he question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them.[107]

The conflicting interpretations of this passage have also been discussed previously.[108] Does the statement refer to tribal power over its members

105. *Id.*
106. *Id.* at 502, 660 P.2d at 592.
107. *Id.*
108. *See supra* text accompanying notes 61-62.

both as plaintiffs and defendants, or only to the fairness to Indian defendants? *Jojola* actually presented this question to the supreme court, but a misinterpretation of subrogation principles precluded discussion and possible resolution of the problem illustrated by *Valdez* and *Paiz*.

The court's misconstruction of subrogation is amazingly clear:

> [W]hen [the Indian plaintiff] applied for public assistance for her minor child . . . she assigned her right [to sue] to DHS . . . DHS is now subrogated to [plaintiff's] position and DHS has the right to collect the support obligation directly from the father. Therefore, the cause of action is between DHS, a non-Indian, and Jojola, the putative father, an Indian.[109]

A party who is subrogated to another can sue in its own name.[110] The subrogatee, however, has exactly the same rights as the subrogator.[111] The case for jurisdictional purposes, therefore, should be treated exactly as if the Indian were still the plaintiff, as in *Valdez* and *Paiz*.

Because of the misconstruction of subrogation principles, the court did not classify the case as one with an Indian plaintiff, as in *Valdez* and *Paiz*, but rather as one with a non-Indian plaintiff and an Indian defendant, as in *Hartley* and *State Securities*. As discussed previously,[112] the rights of Indian defendants are the only rights implicated in those cases, and the differing results in those cases hinged upon where the cause of action arose. The court therefore missed an opportunity to settle the *Paiz-Valdez* controversy.

The court continued to misconstrue the concept of subrogation. Without explanation or authority, the court stated: "[T]he cause of action arose outside of the reservation when Abeita filed and obtained public assistance and assigned her support rights to DHS."[113] The court apparently determined that the right of DHS to sue could not have arisen until the Indian plaintiff transferred her right to sue by applying for public assistance. This is erroneous. Because DHS stood in the shoes of the Indian plaintiff, the right of DHS to sue arose at the same time that the original plaintiff's right to sue arose. The original plaintiff's right to sue for paternity and child support arose when she became pregnant, not when she applied for public assistance.

Once it is determined when the cause of action arises, as a matter of logic, the location of the parties at that time determines where the cause of action arises. In a paternity action, the cause of action arises at con-

109. 99 N.M. at 503, 660 P.2d at 593.
110. Martinez v. Martinez, 98 N.M. 535, 538, 650 P.2d 819, 822 (1982).
111. Employer's Fire Ins. Co. v. Welch, 78 N.M. 494, 433 P.2d 79 (1967).
112. *See supra* notes 63-65 and accompanying text.
113. 99 N.M. at 503, 660 P.2d at 593.

ception,[114] and generally, both parties will be in the same location. Accordingly, in order for an Indian or a non-Indian to sue an Indian in state court for paternity, the *act of conception* must have occurred off the reservation.[115] The district court's dismissal for lack of subject matter jurisdiction was correct because the plaintiff bears the burden of establishing subject matter jurisdiction,[116] and DHS's complaint did not contain an allegation that conception occurred off the reservation.[117] The supreme court's reversal of the district court was erroneous. More importantly, this decision could be disastrous for protectionists. By allowing the transfer of a suit by subrogation while the plaintiff is off of the reservation to change a cause of action which in reality arose on the reservation, the *Jojola* decision creates a loophole by which state courts can expand their jurisdiction over cases traditionally under the exclusive jurisdiction of Indian courts.[118]

The *Jojola* opinion ended with a policy balancing analysis, a significant departure from the usual formalistic analysis. The court relied on *Chino v. Chino*[119] for this reasoning, as did *Hartley.* In *Hartley,* however, the court stated, without further analysis, that "the interest to be protected is the defendant's right to be heard in his tribal court."[120] No doubt the

114. N.M. Stat. Ann. § 40-5-8 (1978) provides: "The proceeding [for paternity] may be instituted during the pregnancy of the mother or after the birth of the child, but except with the consent of the person charged with being the father, the trial shall not be had until after the birth of the child."

115. *See* Martin v. Juvenile Court, 172 Colo. 261, 463 P.2d 1093 (1972), *and* Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976). In both cases, the state court had subject matter jurisdiction only because conception occurred off the reservation. *Martin* and *Francisco* represent opposite fact patterns to *Jojola:* the courts held that they had subject matter jurisdiction because conception occurred off the reservation, but then held that they had no personal jurisdiction over the defendant because service of process was effected on the reservation. *Francisco,* 113 Ariz. 427, 556 P.2d 1; *Martin,* 172 Colo. 261, 463 P.2d 1093. While the *Martin* and *Francisco* opinions are explicit and on point, the problems raised by their precedents are considerable. The time of conception in some cases would be extremely difficult, if not impossible, to prove; for example, if intercourse happened in different locations during the period in question, the findings in such cases could become completely arbitrary.

116. *See supra* note 25 and accompanying text.

117. State ex rel. Dep't of Human Servs. v. Jojola, 99 N.M. 500, 660 P.2d 590, *cert. denied,* 104 S. Ct. 49 (1983); Plaintiff's Complaint at 1.

118. An example of the ramifications of the court's reasoning can be illustrated by re-examining *Williams v. Lee.* In *Williams,* the defendant bought goods from the plaintiff on the reservation but defaulted on payment. The plaintiff sued the defendant in state court. *Williams* held that the state court had no jurisdiction because the defendant was a reservation Indian and because the cause of action arose on the reservation. 358 U.S. 217 (1959).

Under the *Jojola* rationale, however, if the plaintiff assigned the delinquent account to a collection agency, the collection agency's cause of action could "arise" off the reservation, and the state court could assert jurisdiction. *Jojola* gives states the opportunity to sidestep the subject matter jurisdiction model by changing the location where the cause of action arises from on the reservation to off the reservation. This infringes upon the tribal courts' exclusive jurisdiction and, accordingly, the right of reservation Indians to make their own laws and be bound by them. Such a result conflicts with the anti-infringment policy of *Williams* and should be overruled.

119. 90 N.M. 203, 561 P.2d 476 (1977).

120. 97 N.M. at 443, 640 P.2d at 943.

defendant in *Jojola* could have made the exact same claim, relying on *Hartley.* Instead, counsel for the defendant relied, quite reasonably, on *Williams'* categorization of the interest as "the right of reservation Indians to make their own laws and be bound by them."[121] Amazingly, the court found that this interest was outweighed by the state's interest in having a convenient forum in which to litigate paternity actions against Indian defendants: "[T]o require the State of New Mexico to proceed to the various tribal courts of the State would defeat and be a burden on the aims of the public assistance program. . . . Therefore, the interest to be protected is the uniform enforcement of paternity determination and child support obligations within the State."[122]

This argument implies that a sufficient state interest will overcome tribal sovereignty and that the *Williams* "infringement" test has been overruled by the significant state interest test of *Washington v. Confederated Tribes.*[123] *Jojola* can thus be read to overrule the formalistic subject matter jurisdiction model. The court, however, concludes its policy statement with the assertion that it found "no *interference* with tribal self government as long as DHS does not assert jurisdiction within the reservation."[124]

This conclusion is based on the *Williams* test, which is a threshold test for *determining* infringement. The rest of the argument, however, assumes that such infringement has occurred, and allows it. If, as the court determined by the model analysis, there was no infringement, the significance of the state interest would be irrelevant. Nevertheless, the court in *Jojola* found both the absence of infringement and a sufficient state interest to justify infringement.

The result in *Jojola* leaves a major question unanswered. If the subject matter jurisdiction model determines infringement, yet the policy balancing analysis yields a sufficient state interest, will the court adhere to *Williams v. Lee* and dismiss, or follow *Washington v. Confederated Tribes* and allow the suit? Judging by the lengths to which the court went to find jurisdiction in *Jojola,* the *Williams* test may well be discarded in New Mexico.

Jojola remains the law in New Mexico; DHS can sue Indian defendants in state court for paternity and for failure to pay child support. DHS has declined to accept this invitation, however, and as a result of administrative policy, dropped the suit and has filed all similar suits exclusively in tribal courts.[125] In light of this action, the United States Supreme Court

121. 99 N.M. at 502, 660 P.2d at 592.

122. *Id.* at 503, 660 P.2d at 593.

123. 447 U.S. 134 (1980). *See supra* text accompanying footnotes 19-20.

124. 99 N.M. at 503, 660 P.2d at 593.

125. For a description of the policy, see 3 Dept. of Human Services, Income Support Division Program Manual § 529 (1983).

denied certiorari on the case.[126] As a result, the decision stands as an example of the lengths a court will undertake to circumvent the protection from infringement guaranteed by *Williams v. Lee*. Moreover, if the DHS administrative policy changes, the *Jojola* precedent would allow DHS to pursue paternity suits in state court in *all* cases.

The problems that occur as a result of using personal jurisdiction factors to determine subject matter jurisdiction are more fundamental than mere mislabeling. As *Jojola* indicates, the erosion of tribal sovereignty continues as a result of the imprecise language of the analysis. By categorizing subject matter jurisdiction as an interest balancing between tribe and state, the opportunity for expansion of state jurisdiction at the expense of tribal sovereignty is preserved.

One possible solution to this problem is to admit that state courts are courts of general subject matter jurisdiction and that they accordingly have subject matter jurisdiction over all cases, irrespective of the race of the parties to the suit.[127] The court could then inquire into the nature of the Indian defendant's contacts with the state—whether such contacts were sufficient to justify haling the Indian defendant into state court and would accord with notions of fair play and substantial justice.[128] The United States Supreme Court approved this practice in *Fischer v. District Court*.[129]

Critics may point out that such an approach could sound the death knell for tribal sovereignty, because all that would be required to obtain state court personal jurisdiction over an Indian defendant would be in-hand, in-state service of process,[130] or long-arm jurisdiction.[131] One possible answer to this criticism is that, for Indian defendants at least, minimum contacts analysis should replace traditional modes of acquiring in personam jurisdiction.[132] Under such a rule, an Indian defendant would not be subject to in personam jurisdiction merely by service of process but would also have to have had minimum contacts with the state off the reservation.[133] Such an approach has several advantages. First, it elimi-

126. 104 S. Ct. 49 (1983).

127. This rule would be subject to restrictions authorizing exclusive federal jurisdiction, such as bankruptcy. *See* 28 U.S.C. § 1334 (1984). As applied to the facts in *Jojola*, note that the court could have concluded that district courts have subject matter jurisdiction over paternity cases. *See* In re Adoption of Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

128. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

129. 424 U.S. 382 (1976).

130. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1877). *See also Jojola*, 99 N.M. at 502, 660 P.2d at 592.

131. *See* N.M. Stat. Ann. § 38-1-16 (1978).

132. *See* Shaffer v. Heitner, 433 U.S. 186 (1977); *cf.* Humphrey v. Langford, 246 Ga. 22, 246 S.E.2d 732 (1981).

133. Canby, *supra* note 10, at 226. For whether "minimum contacts" or strict construction of the long arm statute is the law in New Mexico, compare United Nuclear Corp. v. General Atomic Corp., 96 N.M. 155, 629 P.2d 231 (1980), with Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1978).

nates confusion about the nature of state court subject matter jurisdiction over cases involving Indians by using principles consistent with general civil procedure. Second, it protects both the individual defendant and the tribe by precluding state jurisdiction unless the defendant has availed himself of the benefits of off-reservation life. Third, the rule is not a radical departure from the type of analysis attempted in *Williams v. Lee* and its progeny, thus leaving intact most of the current common law. Finally, the switch from the traditional *Pennoyer v. Neff* notions of state power[134] to the due process of *International Shoe*[135] has been long overdue, and the Indian law arena presents the best policy arguments for its realization. If the special need to preserve tribal sovereignty can justify convoluted and illogical subject matter jurisdiction principles, it can certainly underlie a more logical, reasonable, and precise personal jurisdiction analysis.[136]

VII. CONCLUSION

As a result of *Williams v. Lee,* subject matter jurisdiction in Indian law is actually a personal jurisdiction analysis. New Mexico has consistently interpreted *Williams* literally, precluding state court subject matter jurisdiction over suits involving Indian defendants if the suit arose on the reservation.

Hartley, Paiz, Trujillo, and *State Securities* reveal that New Mexico courts have jurisdiction over all cases in which a non-Indian state resident is the defendant. The courts also have jurisdiction over all cases in which the cause of action arises off the reservation and within the state. The state courts lack jurisdiction over cases in which the defendant is an Indian and the cause of action arose on reservation land. This rule, while unconventional, is consistent with the Supreme Court decision in *Williams v. Lee.*

The lesson for practitioners who represent Indians in state court is simple: counsel for a plaintiff must allege a sufficient subject matter jurisdictional basis. If the defendant in the case is an Indian, the attorney must show that the cause of action arose off the reservation or that there is a sufficient state interest in providing a forum. Defense lawyers should argue for strict adherence to *Williams* principles, precluding a balancing

134. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

135. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

136. The question of establishing minimum contacts with the state may not satisfactorily dispose of the *Jojola* case. An act of conceiving a child on the reservation appears not to support a reasonable belief that the defendant could be expected to be haled into the state forum. Tribes generally strongly assert their interest in regulating their ethical and social institutions, thus supporting an interpretation that tribal court should be the exclusive forum. In contrast, a dependent reservation child will often require state aid, thus the state would seem to be affected even if conception occurs on the reservation.

For a discussion of an act of conception as basis of "minimum contacts," *see generally* Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980).

of tribal and state interests. In the alternative, defense counsel may assert that the state interest is always—or in the case at bar at least—outweighed by concerns for tribal sovereignty.

Recently, however, the New Mexico Supreme Court has shown exceptional creativity in determining where a cause of action arises. Unrestrained by logic or precedent, the court in the most recent case, *State ex rel. Department of Human Services v. Jojola,* created a loophole by which state courts can significantly expand their jurisdiction. The New Mexico Supreme Court also demonstrated a willingness to engage in balancing of state and tribal interests while still professing to decide jurisdiction questions by the formalist analysis. Both of these techniques mark a decline from the strict adherence to the principles of *Williams* and the continuation of the erosion of tribal sovereignty which began after *Worcester v. Georgia.*

A new analytical scheme which would admit state court subject matter jurisdiction over civil cases involving Indians as parties and which would analyze such cases based upon personal jurisdiction principles of minimum contacts and due process would eliminate the confusion inherent in the current subject matter jurisdiction analysis. It would, moreover, better protect both Indian defendants and tribal sovereignty.

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