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DEFINING INDIAN STATUS FOR THE PURPOSE OF FEDERAL CRIMINAL JURISDICTION

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> At first glance, there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not "an Indian." Yet, given the long and complex relationship between the government of the United States and the sovereign tribal nations within its borders, the criminal jurisdiction of the federal government often turns on precisely this question-whether a particular individual "counts" as an Indian.[1]

United States v. Cruz is the latest in a long line of cases where courts have tried to determine who qualifies for Indian status for purposes of federal criminal jurisdiction.[2] Determining whether an individual qualifies for Indian status under the Indian Country Crimes Act[3] and the Major Crimes Act[4] is necessary to establish whether the tribal, state, or federal government has jurisdiction in criminal cases where the crime occurs in Indian Country.[5] Currently, there is no precise formula for courts to use to determine the unequivocal meaning of Indian status.[6] In some federal Indian statutes, Congress has provided a definition or guideline for determining who qualifies for Indian status,[7] but no such definition exists for the Indian Country Crimes Act or Major Crimes Act,[8] leaving state and federal courts without guidance in making such determinations.

This comment will dissect the assorted approaches that state and federal courts have used to determine who qualifies as an Indian for purposes of federal criminal jurisdiction. The state and federal courts have used several

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1. United States v. Cruz, 554 F.3d 840, 842 (9th Cir. 2009) (citation omitted).
2. *See id.*
3. 18 U.S.C. § 1152 (2006).
4. *Id.* § 1153.
5. St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988).
6. *See id.* at 1461.
7. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 177-78 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN] (citations omitted); CONFERENCE OF WESTERN ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 53 (Clay Smith ed., 2008) [hereinafter AMERICAN INDIAN LAW DESKBOOK]; *infra* notes 39-50 and accompanying text.
8. *See* COHEN, *supra* note 7, at 177-78 (citations omitted).

different tests to approach the question, many applying similar factors[9] but nonetheless reaching varied results.[10] This comment will explore the various approaches used to define Indian status and expose the inconsistencies that arise even when courts apply the same test.

Part I provides a brief primer on relevant Indian law doctrines, outlining the history of tribal-federal relations. Part II examines the current framework for determining who qualifies for Indian status. Part III advances five approaches to the Indian-status question. The proffered options are as follows: (1) an individual-identification approach that considers the blood quantum of the individual and whether the individual self-identifies as Indian; (2) a totality-of-the-circumstances test that allows courts to consider all the facts before them, with no one factor being dispositive; (3) an adaptation of the two-prong test that most courts currently follow, originally set forth in *United States v. Rogers*;[11] (4) a threshold test that first considers whether the tribe is federally recognized before performing any type of analysis; and (5) a bright-line rule that grants the tribes the exclusive authority to determine whether an individual qualifies as an Indian, basing Indian status solely on tribal membership. While each approach has its strengths and drawbacks, the legislature must adopt a single, uniform standard with precise guidelines for all courts consistently to follow. This comment concludes in Part IV.

I. Understanding the Indian Federal Criminal Jurisdiction Statutes

A. History of Indian Federal Criminal Jurisdiction Statutes

To understand how courts have defined Indian status, it is first necessary to understand the history behind the Indian criminal jurisdiction statutes, as well as the special trust relationship between the federal government and the Indians. As the court in *United States v. Bruce*[12] eloquently stated, "The exercise of criminal jurisdiction over Indians and Indian country is a 'complex patchwork of federal, state, and tribal law,' which is better explained by history than by logic."[13]

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9. *See* United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005); LaPier v. McCormick, 986 F.2d 303, 304-05 (9th Cir. 1993); *St. Cloud*, 702 F. Supp. at 1460-61.

10. *Compare* Sully v. United States, 195 F. 113, 117, 129 (D.C.S.D. 1912) (holding that 1/8 Indian blood is sufficient to qualify for Indian status), *with* Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) (holding that 1/8 Indian blood is insufficient to qualify for Indian status).

11. 45 U.S. 567 (1846).

12. 394 F.3d 1215 (9th Cir. 2005).

13. *Id.* at 1218 (quoting Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)).

Federal criminal jurisdiction in Indian Country can be traced to colonial times when tribes had jurisdiction over all people present in Indian territory. Following the American Revolution, the federal government extended federal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.[14] In 1817, the federal government further extended federal jurisdiction to include all crimes committed in Indian Country, with the exception of those committed "by Indians against Indians," which were left to the tribe.[15] This jurisdictional extension is now codified in the Indian Country Crimes Act.[16]

The Indian Country Crimes Act does not apply to crimes committed by Indians against Indians, crimes committed by Indians that have been punished by the tribe, or crimes over which a treaty gives exclusive jurisdiction to the tribe.[17] After *Ex parte Crow Dog*,[18] in which an Indian murdered another Indian and the federal government was unable to exercise jurisdiction, Congress perceived a deficiency in the jurisdictional reach of the Indian Country Crimes Act. It thereupon passed the Major Crimes Act,[19] giving the federal government jurisdiction over Indians who commit one of fifteen major crimes against any person within Indian Country.[20] The enactment of the Major Crimes Act limited the tribal courts' jurisdiction to only misdemeanors where the offender and the victim are both Indians,[21] and gave the federal

14. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 148 (5th ed. 2009).
15. *Id.*
16. 18 U.S.C. § 1152 (2006).
17. *Id.*
18. 109 U.S. 556 (1883).
19. 18 U.S.C. § 1153 (2006).
20. CANBY, JR., *supra* note 14, at 149-50. These fifteen offenses include:
murder, manslaughter, kidnapping, maiming, a felony under 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title.
18 U.S.C. § 1153(a).
21. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 410 (2004). While tribes may prosecute serious offenses as well, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006), limited tribal court sentences to a fine of no more than $5,000 and only up to one year in prison. Federal law classifies crimes according to the years of imprisonment allowed for the punishment. Despite that the tribes could prosecute felonies such as murder, they could impose only a misdemeanor sentence, which meant that the crimes over which the tribes exercise jurisdiction could be characterized only as misdemeanors. Therefore, when a tribe prosecuted an individual for murder, it was only a misdemeanor. Washburn, *supra*, at 410-11& n.32. Recently, Congress provided tribal courts the opportunity to prosecute

government exclusive jurisdiction over the fifteen enumerated felonies committed by one Indian against another Indian.[22] Under this statute, "[t]he Indian status of the defendant is an element of the crime that must be alleged in the indictment and proved by the prosecution beyond a reasonable doubt."[23] From this, the court in *Bruce* recognized that "the question of who is an Indian bears significant legal consequences."[24] Determining whether an individual qualifies as an Indian therefore is much more than a matter of labeling, but also determines which court has jurisdiction over him. While jurisdictional confusion remains at the forefront of the discussion, the federal trust relationship requires that the federal government's role as guardian influence the ultimate choice of which test best protects the rights of the Indians.

B. Trust Relationship with the Federal Government

The federal government "has a special trust relationship with Native Americans under which the United States bears a particular responsibility for preserving and protecting the Indian people."[25] To carry out this responsibility, "Congress has 'plenary power' over Native Americans."[26] Congress has passed several laws to carry out its responsibility, including the Indian Country Crimes Act and Major Crimes Act.[27] Because these statutes are creatures of the special trust relationship with the federal government, most courts will only confer Indian status on those individuals affiliated with a federally recognized tribe.[28]

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individuals for felonies with the enactment of the Tribal Law and Order Act of 2010. This amendment to the Indian Civil Rights Act now allows tribal courts to impose sentences with an increased fine of no more than $15,000, and increased sentencing of up to three years in prison. 25 U.S.C. § 1302(a)(7)(C). For tribal courts to take advantage of this increased sentencing, however, the individual previously must have been convicted for a similar offense that would be punishable by imprisonment of more than one year were it prosecuted in state or federal court. *Id.* § 1302(b). In addition, under the Tribal Law and Order Act of 2010, tribal courts may not impose a total punishment of more than nine years for all offenses being prosecuted. *Id.* § 1302(a)(7)(D). This means that even if the individual committed ten separate crimes carrying a sentence of one year for each crime, the tribal court is limited to sentencing the individual to nine years in prison. Despite that tribal courts now have some increased sentencing power, they are still significantly limited as to the punishments they can impose.

22. Washburn, *supra* note 21, at 411.
23. CANBY, JR., *supra* note 14, at 183.
24. United States v. Bruce, 394 F.3d 1215, 1222 (9th Cir. 2005).
25. St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988).
26. *Id.*
27. *Id.*
28. CANBY, JR., *supra* note 14, at 10; *see* INDIAN ENTITIES RECOGNIZED AND ELIGIBLE TO

William Canby explains that "[i]n the jurisdictional context, individual status follows tribal status, and there can be no Indian without a tribe."[29] If the tribe to which an individual is claiming membership is not federally recognized or has lost its recognition, the federal government does not have a protective responsibility and the Indian Country Crimes Act and Major Crimes Act will not apply.[30] This special relationship also goes the other way – Indians have a special status as wards of the federal government, and it is under this protective status that federal jurisdiction is based. An Indian's special status may therefore terminate if an individual who is racially Indian decides to sever tribal relations and assume a non-Indian lifestyle.[31]

C. Why Does It Matter?

When a crime occurs in Indian Country, the legal status of the defendant and the victim determine which court may exercise jurisdiction.[32] Whether the tribal or the federal court has jurisdiction over the case can significantly alter the outcome and punishment received.[33] Tribal courts historically are much less formal than the federal and state courts in their practices and procedures.[34] Moreover, with the passage of the Indian Civil Rights Act of 1968 and its recent amendments through the Tribal Law and Order Act of 2010, tribal courts are limited to sentences not exceeding one year's imprisonment and a $5,000 fine,[35] or three year's imprisonment and a $15,000 fine if certain prerequisites are satisfied.[36] An individual facing prosecution for a crime carrying sizeable state or federal court penalties would thus ostensibly rather face trial in a tribal court where the penalties are capped. But while tribal court would appear to be more favorable to many defendants, there are also times when a defendant instead may wish to be tried in state or federal court. For instance, if a defendant committed a crime that is strongly admonished by tribal members, he presumably would not wish to be tried in front of an

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RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS, 60 Fed. Reg. 40,218 (Aug. 11, 2009), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc002655.pdf (providing a list of the 564 federally recognized tribes).

29. CANBY, JR., *supra* note 14, at 10.

30. *Id.*

31. State v. LaPier, 790 P.2d 983, 986 (Mont. 1990).

32. *See* Washburn, *supra* note 21, at 410.

33. *See* CANBY, JR., *supra* note 14, at 190.

34. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 560 (1976).

35. CANBY, JR., *supra* note 14, at 190.

36. *See supra* note 21.

adverse tribunal.[37] That individual may perceive himself to be more likely to receive a fair trial in federal court. To avoid bestowing defendants with the ability to influence sentencing through favorable forum selection, it is important for Congress to provide a single, uniform test to be followed by all courts in reaching determinations of whether an individual qualifies for Indian status.

II. Defining Who Is an Indian

A. How Indian Is Defined in Federal Statutes

There is no single statutory definition for Indian to be used for all federal purposes. Some statutes include a definition of Indian, while others provide no such definition, leaving the determination to the courts.[38] For those statutes that do contain a definition for Indian, the definitions vary greatly among them.[39] Courts left with the task (in the absence of an explicit statutory definition for "Indian") of inventing their own definition must decide which formulation is appropriate in the given context.

Under the Indian Self-Determination Act of 1975,[40] Indian is defined as "a person who is a member of an Indian tribe."[41] The definition of "Indian tribe," however, limits the Act's reach to only members of "those tribes recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[42]

The Indian Reorganization Act[43] defines Indian for purposes of land ownership and allotment. The definition is based solely on ancestry and reads as follows:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

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37. This hypothetical assumes that the crime committed would be unlikely to elicit a sentence exceeding the prescribed maximum tribal sentence were it tried in federal court.

38. COHEN, *supra* note 7, at 177.

39. *Id.*

40. 25 U.S.C. §§ 450-458 (2006).

41. *Id.* § 450b(d).

42. COHEN, *supra* note 7, at 178.

43. 25 U.S.C. §§ 461-479 (2006).

> For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.[44]

Under this definition, there is no requirement that the individual be affiliated with a tribe if he has the requisite amount of Indian blood.

The Indian Child Welfare Act[45] provides an entirely different definition, defining an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[46] Curiously, "[t]he term 'member' is not further defined, and whether the term is to be limited to officially enrolled members, or instead encompasses individuals who are not formally enrolled but are recognized to be members of the tribal community, has yet to be resolved."[47]

The Indian Financing Act[48] provides yet another definition for Indian. It states that "'Indian' means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs."[49]

All of these statutory definitions for Indian vary depending on the context of the law. Some federal statutes, however, do not provide any definition for Indian, such as the Indian Country Crimes Act and Major Crimes Act, which leave the definitional question for the courts to determine.

B. How State and Federal Courts Define Indian Status for Criminal Jurisdiction

There is no single, precise test that the state and federal courts universally employ to determine Indian status. There is one test, however, that frequently emerges in the cases and that the courts have applied in various capacities. This two-prong test was first developed in *United States v. Rogers*.[50] Courts have with less frequency used other tests, including a threshold test, as well as the tests set forth in *United States v. Pemberton* (which considers whether the

44. *Id.* § 479.
45. 25 U.S.C. §§ 1901-1963 (2006).
46. *Id.* § 1903(4).
47. COHEN, *supra* note 7, at 178-79.
48. 25 U.S.C. §§ 1451-1543 (2006).
49. *Id.* § 1452(b).
50. 45 U.S. 567, 572-73 (1846).

individual identifies himself as Indian)[51] and *LaPier v. McCormick* (which asks a threshold question before performing any type of analysis).[52]

1. United States v. Rogers *Two-Prong Test*

The defendant in *United States v. Rogers* was a white man who voluntarily moved to Cherokee country and made it his domicile. He "incorporated" himself into the tribe, and the Cherokee tribe "recognized" and "adopted" him. He "exercised all the rights and privileges of a Cherokee Indian" and "became a citizen of the Cherokee Nation."[53] Although the Cherokee tribe recognized Rogers as a member of the Cherokee Nation and entitled him to all the privileges associated with tribal membership, the Court found that he was not an Indian.[54] The Court explained that the Indian status exception was intended for those individuals "who by the usages and customs of the Indians are regarded as belonging to their race."[55] The Court noted that Indian "does not speak of members of a tribe, but of the race generally, -of the family of Indians."[56] State and federal courts have lifted the holding in *Rogers* to formulate a two-prong test for determining Indian status.[57] The first prong requires that the defendant have Indian blood, and the second requires that the defendant have tribal or federal recognition as an Indian.[58]

a) First Prong: Indian-Blood Requirement

The first prong of the *Rogers* test requires a showing of Indian blood, but gives no indication of what degree of Indian blood is in fact required. Courts use interchanging language in this prong, leading to disparate results with respect to what constitutes the appropriate degree of Indian blood.[59]

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51. United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005).

52. LaPier v. McCormick, 986 F.2d 303, 304-05 (9th Cir. 1993).

53. *Rogers*, 45 U.S. at 571.

54. *Id.* at 573.

55. *Id.*

56. *Id.*

57. Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 186 (2006).

58. United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); State v. LaPier, 790 P.2d 983, 986 (Mont. 1990); Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982).

59. *See* United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (requiring *some* Indian blood to qualify for Indian status); State v. Reber, 171 P.3d 406, 410 (Utah 2007) (requiring *significant* Indian blood to qualify for Indian status); Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) (requiring *substantial* Indian blood to qualify for Indian status).

Some courts require that the individual possess a *significant* amount of Indian blood.[60] The courts requiring a *significant* degree of Indian blood have found that individuals possessing 165/512[61] and slightly less than one-quarter (1/4)[62] Indian blood meet the *significant*-Indian-blood requirement. In another case, a court found that one-sixteenth (1/16) Indian blood was insufficient to satisfy the *significant*-Indian-blood requirement.[63] The court noted that in a previous case, it held that "a person 'with less than one-half Indian blood [can qualify as having] a significant degree of Indian blood'" but that it had "found no case in which a court has held that 1/16th Indian blood . . . qualifies as a 'significant degree of Indian blood.'"[64]

Other courts have applied a different standard, requiring the individual to possess *some* Indian blood.[65] Under this requirement, courts have found that individuals possessing 3/32[66] and 15/32[67] of Indian blood satisfied the *some*-Indian-blood requirement of the first prong. Two other courts found that one-fourth (1/4) Indian blood constituted having *some* Indian blood.[68] These courts provided no guidance as to why they found these percentages of Indian blood to be sufficient. The court in *United States v. Bruce* attempted to clarify specifically what is required under the first prong, explaining,

> The first prong requires ancestry living in America before the Europeans arrived, but this fact is obviously rarely provable as such. . . . Because the general requirement is only of "some" blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong.[69]

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60. *See, e.g.*, Lewis v. State, 55 P.3d 875, 878 (Idaho Ct. App. 2002); *LaPier*, 790 P.2d at 986; *Goforth*, 644 P.2d at 116; *Reber*, 171 P.3d at 410.

61. *See LaPier*, 790 P.2d at 986-87.

62. *See Goforth*, 644 P.2d at 116.

63. *See Reber*, 171 P.3d at 410-11.

64. *Id.* at 410 (alteration in original) (quoting State v. Perank, 858 P.2d 927, 933 (Utah 1992)).

65. *See, e.g.*, United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988).

66. *Stymiest*, 581 F.3d at 762.

67. *St. Cloud*, 702 F. Supp. at 1460.

68. *See Dodge*, 538 F.2d at 786-87 (citing Makah Indian Tribe v. Clallam Cnty., 440 P.2d 442 (Wash. 1968)).

69. United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005).

The *Bruce* court held that an individual who possessed one-eighth (1/8) Indian blood met the *some*-Indian-blood requirement.[70]

Requiring an individual to have only *some* Indian blood appears to be a much more lenient standard than requiring *significant* Indian blood. It appears that an individual only possessing one-sixteenth (1/16) Indian blood may be able to meet the first prong in a court requiring a person to have *some* Indian blood, but not in a court requiring *significant* Indian blood.

In other courts, an individual is required to possess a *substantial* amount of Indian blood to qualify for Indian status.[71] *Substantial* logically seems to require an amount greater than *significant* and most certainly greater than *some*. The court in *Vialpando v. State* attempted to define what qualifies as a *substantial* amount of Indian blood. The court first looked to Webster's Dictionary, which defined *substantial* as "being that specified to a large degree . . . or relating to the main part of something."[72] The court also looked to another case in an attempt to define *substantial*, which stated that

> the word "substantial" is a relative and not exact term subject to a rule of thumb. It is susceptible of different meanings according to the circumstances of its use. In considering the word, it must be examined in its relation and context, and its meaning gauged by all the surrounding circumstances.[73]

These definitions indicate the ambiguity that can result from using a term with no definitive meaning. Based on its understanding of the term *substantial*, the *Vialpando* court found that an individual with one-eighth (1/8) Indian blood did not meet the *substantial*-Indian-blood requirement.[74] Alternatively, another court found that an individual with a full-blooded Indian mother and a half-blooded Indian father satisfied the *substantial*-Indian-blood requirement.[75] Courts requiring *substantial* Indian blood appear to have a much more rigorous requirement than other courts. This fact is evidenced by a court requiring *some* Indian blood finding 3/32 to meet that requirement,[76]

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70. *Id.* at 1224, 1227.

71. *See, e.g.*, Pero v. Pero, 99 F.2d 28, 31 (7th Cir. 1938); Vialpando v. State, 640 P.2d 77, 79-80 (Wyo. 1982).

72. *Vialpando*, 640 P.2d at 80 (quoting WEBSTER'S DICTIONARY 2280 (3d ed. 1966)).

73. *Id.* (quoting Smith v. City of Fort Dodge, 160 N.W.2d 492, 498 (1968)).

74. *Id.*

75. *Pero*, 99 F.2d at 31.

76. *See* United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009).

but a court requiring a *substantial* amount finding one-eighth (1/8) to be insufficient.[77]

Despite the already well-documented inconsistencies, other courts have adopted yet another interpretation of the first prong, requiring a *sufficient* degree of Indian blood.[78] Under this standard, the *Cruz* court found 29/128 Indian blood to be a *sufficient* amount of Indian blood to satisfy the first prong.[79] The court provided no explanation as to why 29/128 met the *sufficient*-Indian-blood requirement – just a statement that the defendant satisfied the first prong of the test.[80]

The state and federal cases collectively seem to indicate that a blood requirement of more than one-sixteenth (1/16) will be required to satisfy the first prong of the *Rogers* test.[81] The different terminology used by each court – whether it be *sufficient*, *significant*, *substantial*, or *some* – indicates a varying degree of Indian blood required for the first prong. While the blood requirement is interpreted and applied with little consistency, the second prong of the *Rogers* test generates an even greater degree of inconsistency in its application and the resulting conclusions.

b) Second Prong: Recognized as an Indian by a Tribe or the Federal Government

The second prong of the *Rogers* test has been described as "a sufficient non-racial link to a formerly sovereign people."[82] Courts have made clear that, by itself, having some Indian blood is not sufficient to establish Indian status because federal criminal jurisdiction is based on status rather than race.[83] The language used by most courts in the second prong is consistently the same, requiring that the individual be "recognized as an Indian by a tribe or the federal government."[84] Yet, the factors used to determine the second prong and the weight given to those factors varies greatly among the courts.[85] Some

77. *See Vialpando*, 640 P.2d at 80.

78. *See e.g.*, United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009).

79. *See id.* at 843, 845-46.

80. *Id.* at 846.

81. *See Stymiest*, 581 F.3d at 762; *Cruz*, 554 F.3d at 846; State v. LaPier, 790 P.2d 983, 986-87 (Mont. 1990); State v. Reber, 171 P.3d 406, 410 (Utah 2007).

82. St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

83. *Id.*

84. *Stymiest*, 581 F.3d at 762; United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001) (quoting Scrivner v. Tansy, 68 F.3d 1234, 1241 (10th Cir. 1995); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); *LaPier*, 790 P.2d at 986.

85. *See infra* notes 89, 90, 105-06, 121-25, 127-31 and accompanying text.

courts guide their analysis using the factors set forth in *St. Cloud v. United States*, while others conduct their own form of analysis.[86]

(1) Courts Using the St. Cloud *Factors*

In *St. Cloud v. United States*, the court examined four factors, in declining order of importance, to guide its analysis as to whether the individual had tribal or federal recognition as an Indian: "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life."[87] The court explained that "[t]hese factors do not establish a precise formula for determining who is an Indian. Rather, they merely guide the analysis of whether a person is recognized as an Indian."[88] In evaluating the four *St. Cloud* factors, some courts have strictly adhered to examining the factors in declining order of importance,[89] while others have considered the factors collectively.[90]

Under the first factor, courts consider whether the individual is enrolled in a tribe.[91] This is the most important factor to consider, and for some courts, being an enrolled member of a tribe is itself sufficient to satisfy the second prong of the test.[92] Other courts have emphasized that while "[t]ribal enrollment is 'the common evidentiary means of establishing Indian status, [] it is not the only means nor is it necessarily determinative.'"[93] One reason for tribal enrollment not necessarily being "determinative" is that many courts will only confer Indian status on those individuals enrolled or associated with a federally recognized tribe. Even if the individual is enrolled in a tribe, federal recognition of the tribe is required both for the trust relationship to exist and

86. *See infra* notes 87-89, 127-30 and accompanying text.

87. *St. Cloud*, 702 F. Supp. at 1461.

88. *Id.*

89. *See, e.g.*, United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009); *LaPier*, 790 P.2d at 986.

90. *See, e.g.*, United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009) (explaining that the factors should not be considered in any order of importance "unless the defendant is an enrolled tribal member, in which case that factor becomes dispositive").

91. *St. Cloud*, 702 F. Supp. at 1461.

92. *See, e.g.*, *Stymiest*, 581 F.3d at 764; Lewis v. State, 55 P.3d 875, 878 (Idaho Ct. App. 2002).

93. United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) (quoting United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979)).

for the individual to be recognized as an Indian for purposes of federal criminal jurisdiction.[94]

In the absence of actual membership in a federally recognized tribe, courts will consider in their examination of the first factor whether the individual is eligible for or has ever sought enrollment in a federally recognized tribe.[95] In a case arising in Idaho, the court noted that the individual did not have any interest in enrolling in the tribe until after his conviction in the criminal case,[96] suggesting that the defendant only sought Indian status because it was favorable to his circumstance. While seeking enrollment in a federally recognized tribe may be a "plus factor" in some cases, courts are wary of the potential for abuse.

Overall, most courts using the *Rogers* test have indicated that "enrollment in a tribe is not an absolute requirement for recognition as an Indian."[97] If the individual is not enrolled in a federally recognized tribe, the courts will examine the remaining three factors to determine whether he still qualifies for Indian status.[98]

Under the second factor, courts consider whether the federal government formally or informally recognizes the individual by providing him with assistance reserved only for Indians.[99] In one case, an individual received educational assistance and health benefits through Native American programs. Some of these programs, however, were not reserved only for Indians, rendering the receipt of such benefits insufficient to fully satisfy the second factor.[100] In another case, the individual received federal housing assistance, but the court noted that such assistance was provided only because he was married to a tribal member.[101] Courts have also considered whether the individual has ever sought federal assistance on account of his Indian status. If no such assistance has been sought, the evidence weighs against the individual qualifying for Indian status.[102] If the individual is unable to show

94. *See St. Cloud*, 702 F. Supp. at 1466.

95. *See Lewis*, 55 P.3d at 878; State v. LaPier, 790 P.2d 983, 987 (Mont. 1990).

96. *Lewis*, 55 P.3d at 878.

97. *Id.*; *Stymiest*, 581 F.3d at 766 ("[E]nrollment 'is not the only means [of establishing Indian status] nor is it necessarily determinative.'") (alteration in original) (quoting United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005)); *LaPier*, 790 P.2d at 987 ("[T]hat Mr. LaPier is not enrolled in any tribe may not be determinative of Indian status.").

98. *See* State v. Sebastian, 701 A.2d 13, 24-25 (Conn. 1997); *LaPier*, 790 P.2d at 987.

99. *St. Cloud*, 702 F. Supp. at 1461.

100. *See LaPier*, 790 P.2d at 988.

101. *St. Cloud*, 702 F. Supp. at 1462.

102. *See, e.g.*, *Lewis*, 55 P.3d at 878.

an application for or receipt of federal assistance reserved only for Indians, he must be able to make a strong showing under the last two factors to qualify for Indian status.[103]

Under the third factor, courts consider whether the individual has enjoyed any benefits of tribal affiliation.[104] The *St. Cloud* court found the third factor satisfied because the defendant had "participated in a tribal alcohol treatment and counseling program" and "obtained employment" with the help of the tribe.[105] The *Cruz* court, on the other hand, urged the necessity of conducting an analysis from both the individual and tribal perspective.[106] In *Cruz*, the defendant "attended [] public school on the reservation" and "worked as a firefighter for the federal Bureau of Indian Affairs," but both were "open to non-Indians."[107] The court noted that the defendant was eligible for tribal benefits, but had never taken advantage of them.[108] The court explained that "mere eligibility for benefits is of no consequence under [the factors]."[109] Ultimately, the court decided that while the tribe recognized Cruz as an Indian, Cruz's failure to take advantage of the tribal benefits indicated that he did not self-identify as an Indian.[110]

Under the fourth and final factor, courts consider whether the individual has "social recognition as an Indian through living on a reservation and participating in Indian social life."[111] One court found that an individual satisfied the fourth factor by living on the reservation, participating in tribal social life and community, and considering himself an Indian.[112] In another case, the court found that the defendant had only partially satisfied the fourth factor.[113] Although he lived on the reservation as a child and at the time of his arrest, he had never participated in Indian social life, such as attending festivals and social activities or practicing Indian religion.[114] Yet another court found that a defendant did not establish his racial status as an Indian because,

103. *See* United States v. Cruz, 554 F.3d 840, 849-50 (9th Cir. 2009).
104. *St. Cloud*, 702 F. Supp. at 1461.
105. *Id.* at 1462.
106. *Cruz*, 554 F.3d at 850.
107. *Id.* at 847.
108. *Id.* at 846.
109. *Id.* at 847.
110. *See id.* at 848.
111. St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988).
112. *Id.* at 1462.
113. *Cruz*, 554 F.3d at 848.
114. *Id.*

among other factors, the defendant did not live on the reservation, but instead in a trailer adjacent to the reservation.[115]

Other elements courts consider under the fourth factor include whether the individual identifies himself as Indian to others[116] and whether the individual has been arrested by tribal authorities throughout his life.[117] This latter type of evidence is important because tribes do not have jurisdiction to punish non-Indians and therefore may punish only Indians.[118] Consequently, demonstrating that an individual has been arrested by tribal authorities throughout his life is strong evidence of tribal recognition.[119] The court in *Bruce* explained that "[t]he assumption and exercise of a tribe's criminal jurisdiction, while not conclusive evidence of Indian status, significantly bolsters the argument that [the defendant] met her burden of producing sufficient evidence upon which a jury might rationally conclude that she was an Indian."[120] While an individual may satisfy any number of the factors, the courts consider all the evidence collectively to determine whether an individual qualifies for Indian status.

Although most courts consider many of the same elements in determining whether the individual satisfies the *St. Cloud* factors, courts do not always give the same weight to each factor, thus reaching inconsistent holdings. The court in *Stymiest* found that the defendant satisfied the second prong of the *Rogers* test despite that he satisfied only the third and fourth *St. Cloud* factors. He lived and worked on the reservation, submitted himself to tribal arrests, and identified himself as an Indian to others.[121] The court in *Bruce* similarly found that a defendant failing to meet the first or second *St. Cloud* factors was Indian because she lived on the reservation, was treated by Indian Health Services, and had been arrested by tribal authorities during her life.[122] Conversely, the court in *Cruz* was unwilling to confer Indian status on a defendant who attended school and worked on the reservation, was eligible for tribal benefits,

115. Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982).

116. United States v. Stymiest, 581 F.3d 759, 766 (8th Cir. 2009) (finding that an individual met the fourth *St. Cloud* factor because, in addition to living on the reservation, he also identified himself as an Indian to others, including Indian Health Services, his Indian girlfriend, and other Indians with whom he socialized on the reservation).

117. *See id.*; United States v. Bruce, 394 F.3d 1215, 1226-27 (9th Cir. 2005).

118. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 1022-23 (1978).

119. *Bruce*, 394 F.3d at 1227.

120. *Id.*

121. *Stymiest*, 581 F.3d at 766.

122. *Bruce*, 394 F.3d at 1227.

and had lived on the reservation as a child.[123] The court determined that the defendant had not satisfied the three most important factors and had only partially satisfied the fourth.[124] The court stated that "[t]he first three factors could not realistically be deemed more important than the fourth if a partial satisfaction of the fourth could outweigh the complete failure to satisfy any of the first three."[125] The holdings in these cases illustrate the inconsistency that can result from courts in the same circuit, even when using the same factors to evaluate the second prong.[126]

(2) Analysis Other than St. Cloud

Some courts that have used the *Rogers* test did not use the *St. Cloud* factors to guide their analysis for the second prong. These courts did not consider specific factors, but instead considered all of the evidence collectively before reaching a decision as to whether the individual qualified for Indian status.

In *State v. Perank*, the court did not have as detailed an analysis under the second prong as those courts using the *St. Cloud* factors. The court, however, believed there was sufficient evidence provided to find the second prong of the *Rogers* test satisfied.[127] The court found the defendant had lived as an Indian "by maintaining social, political, and spiritual relations as an Indian."[128] The court did not bind itself to considering only the *St. Cloud* factors, and as a result placed more emphasis on the defendant's involvement in the Indian lifestyle through taking part in Indian rituals.[129] The court also noted that the defendant previously was convicted in tribal court.[130] These few pieces of evidence were sufficient to find that the defendant qualified as an Indian.[131] By failing to structure its analysis, however, the same court could easily

123. United States v. Cruz, 554 F.3d 840, 846-47 (9th Cir. 2009).

124. *Id.* at 848.

125. *Id.* at 849.

126. For more examples of courts applying the factors inconsistently, see Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) (refusing to confer Indian status on defendant because he only partially satisfied one of the factors, and noting that defendant "seeks the best of two worlds and would have this court place him in limbo, not subject to prosecution by either the federal government or the state"); Lewis v. State, 55 P.3d 875, 878 (Idaho Ct. App. 2002) (finding that living on the reservation for a short time and once attending an Indian festival was not enough to meet the second prong of the *Rogers* test).

127. State v. Perank, 858 P.2d 927, 933 (Utah 1992).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

produce inconsistent holdings – the precise consequence the courts need to avoid.

The court in *United States v. Keys*[132] similarly opted against using the *St. Cloud* factors, but instead addressed how the analysis under the second prong should be conducted when the individual is a child.[133] The child in this case was two years old and, though not enrolled in a tribe, was eligible for enrollment. The court explained that the child's "lack of enrollment at the age of two does not control the determination of her 'Indian' status."[134] In reaching this conclusion, the court noted that "[i]f an adult or older child is eligible to enroll in an Indian tribe but fails to do so, perhaps an inference can be drawn that the individual intentionally chooses not to affiliate politically with the tribe."[135] In this case, however, the court determined that because she "was a two-year old and incapable of enrolling herself, no such inference can be drawn."[136]

Eligibility for enrollment is similarly important to keep in mind as courts are evaluating whether adults meet the second prong of the test. Courts have held that enrollment is not necessary to satisfy the second prong of the test.[137] But if the individual is not enrolled in a tribe and is eligible for enrollment, one must ask, Why have they not enrolled?

State and federal courts frequently use the *Rogers* test to determine whether an individual has Indian status for federal criminal jurisdiction. Each court applies the test differently, leading to inconsistent holdings. That the courts use the *Rogers* test with the most frequency does not speak to its utility. Other courts have followed approaches that may provide a better framework for defining Indian status.

2. United States v. Pemberton *Test*

In *United States v. Pemberton*, the Eighth Circuit Court of Appeals used a slightly different test than the *Rogers* court. While the tests are similar, the approach to the second prong differs. The *Pemberton* test states that "defendants who hold themselves out to be Indians and who are of Indian blood are Indians under § 1153."[138] The *Rogers* test "asks whether the

132. 103 F.3d 758 (9th Cir. 1996).
133. *See id.* at 761.
134. *Id.*
135. *Id.* at 760.
136. *Id.*
137. *E.g.*, Lewis v. State, 55 P.3d 875, 878 (Idaho Ct. App. 2002).
138. United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005).

defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."[139] The two tests appear to be asking the same questions, but the court in *Pemberton* interpreted the non-racial prong differently. The *Pemberton* court asked whether the individual identified himself as an Indian – not whether a tribe or the federal government did. For this reason, the court held that enrollment in a tribe is not "necessarily determinative" of an individual's Indian status. What matters to the *Pemberton* court is not whether a tribe recognizes the individual as an Indian, but whether that individual holds himself out to be an Indian through his actions.[140]

Using this approach, the *Pemberton* court found that the defendant identified himself as an Indian. In so finding, the court noted that Pemberton's parents were Indians and that "his mother was an enrolled member."[141] Pemberton also "attended grade school and high school on the reservation," and lived on the reservation for a significant period of time.[142] Pemberton testified that although he was not an enrolled member of a tribe, he "considered himself an Indian."[143] These findings were sufficient for Pemberton to satisfy the non-racial prong of the analysis and qualify for Indian status.[144]

The *Pemberton* court did not provide any guidance for how to determine whether an individual has sufficient Indian blood to satisfy the first prong of the test. The language provided by the court indicates that the defendant must be "of Indian blood,"[145] which seems to be a much more lenient standard than under the *Rogers* test. The only semblance of a benchmark that can be gleaned is that Pemberton's parents were both Indian, which was sufficient to meet the Indian-blood requirement in this case.[146]

Together, the *Pemberton* and *Stymiest* cases demonstrate the Eighth Circuit's inconsistent analysis in determining Indian status. Unlike the *Pemberton* court, the court in *Stymiest* used the *Rogers* test to guide its analysis of whether an individual qualifies for Indian status.[147] The conflicting

139. United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009).
140. *Pemberton*, 405 F.3d at 660.
141. *Id.*
142. *Id.*
143. *Id.* at 658.
144. *Id.* at 660.
145. *Id.*
146. *Id.*
147. United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009).

tests within a single circuit present further evidence of the inconsistencies in the judicial attempt to define Indian status.

3. LaPier v. McCormick *Test*

In *LaPier v. McCormick*, the Ninth Circuit evaluated the factors in the second prong with a slightly different approach, using a threshold test. The Ninth Circuit acknowledged that what should be a routine analysis is complicated by the ambiguous definitions for who qualifies as an Indian.[148] The court stated that a threshold question must first be answered, which asks whether "the Indian group with which [the defendant] claims affiliation [is] a federally acknowledged Indian tribe."[149] If the answer is no, the Ninth Circuit avers that the inquiry ends because "[a] defendant whose only claim of membership or affiliation is with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes."[150] The court explained the policy behind this reasoning, stating that "in dealing with Indians," the federal government has a special responsibility toward a "certain social-political group[]" and not primarily the Indian race.[151] The court noted that "legislation treating Indians distinctively" is based on "the unique legal status of Indian tribes under federal law," where the federal government assumed a "guardian" status to act "on behalf of [the] federally recognized Indian tribes."[152] "It is therefore the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country."[153] The Ninth Circuit determined that it is to be left to the political branches to determine whether such a special relationship exists with a tribe.[154]

Recognizing the need for the existence of the trust relationship for federal criminal jurisdiction, the court found that the individual did not have Indian status because the tribe to which he was claiming affiliation was not federally

148. LaPier v. McCormick, 986 F.2d 303, 304 (9th Cir. 1993).

149. *Id.* at 304-05; *see also* State v. Sebastian, 701 A.2d 13, 26 (Conn. 1997).

150. *LaPier*, 986 F.2d at 305.

151. *Id.* (quoting United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974)).

152. *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

153. *Id.*

154. *Id.*; *see also Sebastian*, 701 A.2d at 29 (stating that where a tribe has an application pending for federal recognition, it is not the responsibility of a state court in criminal prosecution to determine whether the tribe will be federally recognized, but instead the agency to which Congress delegated the responsibility to make that determination).

recognized.[155] The court explained that "while LaPier may be an Indian in an anthropological or ethnohistorical sense, he is not an Indian for purposes of criminal jurisdiction."[156]

C. Tribal Requirements for Membership

To determine how to define "Indian" for purposes of criminal jurisdiction, it is also important to understand how tribes define who is eligible for membership in their individual tribes. One must remember that there is a difference between the terms "Indian" and "tribal member." Courts use the term Indian to refer to those individuals who qualify under certain statutes. A tribal member, on the other hand, is an individual that the tribe has accepted into membership based on the requirements set forth by each tribe.[157] The requirements for membership vary among the tribes. Some tribes have a specific blood requirement for membership eligibility, while others accept any degree of Indian blood.[158] Most tribes list their requirements for membership in their tribal constitutions.[159]

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155. *LaPier*, 986 F.2d at 306 (stating that "[t]he Little Shell Band of Landless Chippewa Indians of Montana is not a federally acknowledged tribe of Indians").

156. *Id.*

157. AMERICAN INDIAN LAW DESKBOOK, *supra* note 7, at 49.

158. *See Tribal Membership*, OKLA. INDIAN LEGAL SERVS. INC., http://thorpe.ou.edu/OILS/blood.html (last visited Feb. 20, 2011).

159. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 86 (1993). The Blackfeet Tribe of the Blackfeet Indian Reservation of Montana's constitution confers membership to "any blood member of the Blackfeet Tribe" born prior to the membership amendment who maintains a legal residence on the reservation from birth. An amendment also gives membership to "[a]ll children having one-fourth (1/4) degree of Blackfeet Indian blood or more born after the adoption of [the] amendment to any blood member of the Blackfeet Tribe." BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION CONST. art. II, § 1, cl. b, *available at* http://thorpe.ou.edu/constitution/blackfeet/bfcontTOC.html. The St. Croix Chippewa Indians of Wisconsin provides membership in its constitution to those individuals with one-half (1/2) or more Indian blood born to members who live on the St. Croix Indian Reservation. Its constitution also notes that those who were not living on the reservation when the constitution was adopted may apply for membership so long as they relinquish membership with any other tribe in which they may also be enrolled. ST. CROIX CHIPPEWA INDIANS OF WISCONSIN CONST. art. III, *available at* http://thorpe.ou.edu/IRA/croixcons.html. The Ute Mountain Tribe of the Ute Mountain Reservation similarly requires individuals to have one-half (1/2) or more of Ute Indian blood and be born to any member of the tribe. UTE MOUNTAIN TRIBE OF THE UTE MOUNTAIN RESERVATION CONST. art. II, § 1, cl. b, *available at* http://thorpe.ou.edu/IRA/utemtcons.html. Membership in the Turtle Mountain Band of Chippewa Indians is available to descendants of people whose name is on the tribe roll and who

Tribes generally have less stringent requirements to qualify for membership than the requirements set forth by the courts as necessary to qualify for Indian status for purposes of criminal jurisdiction. Most tribes recognize an individual as an Indian so long as he has Indian blood, though the amount of Indian blood required varies among the tribes.[160] An approach simply requiring Indian blood differs greatly from any of the approaches set forth by the courts, which examine a variety of factors in addition to considering whether the individual has Indian blood. It is the vast differences between the application of these factors that result in inconsistent findings for who qualifies as an Indian for purposes of federal criminal jurisdiction.

III. Alternatives or Suggested Approaches

There are many different tests and approaches used by the courts to define Indian status, and, as already demonstrated, the variant tests result in inconsistent holdings. To provide a more effective and consistent method for deciding whether an individual qualifies as an Indian, it is necessary to develop an approach uniformly to be followed by all courts.

There are several different approaches that potentially could be used as the universal test for determining Indian status. First, there is an individual-identification test that first considers the individual's blood quantum and then whether the individual self-identifies as Indian. Second, there is a totality-of-the-circumstances test, where no single factor is dispositive in determining the individual's Indian status. Third, there is a variation of the *Rogers* test already used by many courts. Fourth, there is a threshold test that first considers whether the tribe is federally recognized before examining the individual's

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possess one-fourth (1/4) or more Indian blood. There is a further requirement that descendants cannot be domiciled in Canada. TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS CONST. art. III, § 1, cl. b, *available at* http://thorpe.ou.edu/constitution/Turtlemtn/TMconst.html. The Cherokee Nation has much less stringent requirements for membership, making it available to those with any degree of Cherokee Indian blood who are descendants of a tribal member. TRIBAL MEMBERSHIP, *supra* note 158. The Colorado River Indian Tribes have different requirements for membership depending on whether the individual's parent was residing on the reservation at the time of his birth. Every child born to a Colorado River Indian tribe member is eligible for membership so long as his member parent was living on the reservation at the time of his birth. If the member parent was not living on the reservation at the time of his birth, the child must have one-half (1/2) or more Indian blood to be eligible for membership. COLORADO RIVER INDIAN TRIBE CONST. art. II, § 1 *available at* http://thorpe.ou.edu/IRA/colcons.html.

160. *See* TRIBAL MEMBERSHIP, *supra* note 158.

characteristics. The final option is a bright-line test, leaving it to the various tribes to determine whether an individual qualifies for Indian status.

A. Individual-Identification Approach

The first type of test that could be employed is the individual-identification approach. Under this test, the court would first consider whether the individual has any Indian blood, followed by a second inquiry examining whether the individual self-identifies as Indian. Considering these two factors in concert, the court can make a determination as to whether the individual qualifies for Indian status. The Eighth Circuit used a similar approach in *United States v. Pemberton*, where the court relied heavily on the admission by the defendant that he considered himself an Indian.[161]

This test provides for a simple analysis by the courts. The first question is straightforward – a person either does or does not have Indian blood. The second inquiry is equally straightforward – a person either does or does not consider himself an Indian. Other factors, such as whether the defendant receives tribal benefits or leads an Indian lifestyle, are not considered. It is for the individual to decide whether he considers himself an Indian.

While the individual-identification approach may provide a quick and simple analysis for the courts, it essentially allows the defendant to control his own jurisdictional fate. Whichever jurisdictional determination is more favorable to the defendant dictates his response to whether he considers himself an Indian. This type of power and control should not be afforded to an individual facing conviction. Whether an individual qualifies as an Indian is for a non-partisan body to decide, to prevent opening doors to possible allegations of fraud and abuse. While this test places some limitations on the individual because he still must satisfy a blood requirement, such limitations do not preclude the potential for abuse. If an individual does have Indian blood, he could claim that he does or does not consider himself an Indian, depending on which court would likely provide a more favorable outcome. Those individuals who possess no Indian blood immediately would be precluded from claiming Indian status because they do not satisfy the first prong of the test. Whether those individuals consider themselves Indians would be irrelevant.

By allowing defendants to control their fate through self-proclaimed Indian status, the individual-identification approach would prove the least successful and would allow for the greatest manipulation of the courts. Whether an

161. United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005).

individual truly considers himself an Indian would become increasingly difficult to certify on account of competing motivations. Self-identification as an Indian could be a factor to be considered along with others, but should not singlehandedly be dispositive of whether someone qualifies for Indian status.

B. Totality-of-the-Circumstances Approach

Another approach is a totality-of-the-circumstances test, under which a court would consider the individual's ancestors, his tribal identification, and his lifestyle. No single factor would be dispositive – they would all be considered collectively.[162] After considering the totality of the circumstances, the court would be able to determine whether the individual qualifies for Indian status.

The totality-of-the-circumstances approach would allow those individuals living an Indian lifestyle but not satisfying the requisite blood requirement to achieve Indian status. Individuals would be able to compensate for their inadequate amount of Indian blood by demonstrating that they have maintained an Indian lifestyle by living on the reservation, participating in tribal activities, and taking advantage of services reserved solely for Indians. This approach would allow individuals immediately foreclosed under other tests because of their inadequate blood amount to qualify for Indian status, while simultaneously allowing courts the ability to siphon those individuals possessing the requisite blood but failing to maintain an Indian lifestyle. Robert N. Clinton explains that "[t]he assumption made to justify the totality of the circumstances test is that special jurisdictional arrangements for Indians exist solely to protect them as individuals until such time as they take on the habits of civilization, and assimilate into the population as a whole."[163]

Courts would evaluate all the circumstances in concert, giving courts much more freedom, which could be interpreted as a strength or a drawback. Courts would be able to examine the evidence as they see fit and come to a conclusion they believe to be just, but by giving the courts so much deference, there is yet again the potential for inconsistent and subjective holdings.

While the totality-of-the-circumstances approach is appealing when one contemplates reservation inhabitants with low blood quantums, there is concern with affording courts the power to deny Indian status to a full-blooded enrolled tribal member who decided to assume a non-Indian lifestyle. Such individuals, who are generally recognized as Indians, would be denied Indian status because they have chosen to integrate into the "mainstream" population.

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162. Clinton, *supra* note 34, at 517-18.

163. *Id.* at 518.

Clinton writes that this type of approach captures too narrow a view of the reasons for federal jurisdictional arrangements, and that the choice to assume a "non-Indian lifestyle should not be dispositive of [one's] status as an Indian."[164]

The totality-of-the-circumstances approach provides the courts a wide range of discretion in deciding whether an individual qualifies as an Indian for federal criminal jurisdictional purposes. A court can take all factors into consideration but still give more weight to those factors it considers more important. The approach also allows the court to fashion more exceptions because it ultimately has unbridled discretion. For instance, an individual who may not have the requisite blood to meet the racial component under another approach would still be able to have Indian status if living an Indian lifestyle. Minor technicalities would not prevent those individuals who truly are "Indian" from having that status for jurisdictional purposes. The totality-of-the-circumstances approach, however, would likely produce the most inconsistent results of all the approaches. There are no guidelines to be followed by the courts, which will only lead to more disparate holdings.

It is clear from the long line of cases discussed that courts should not be afforded such unrestrained freedom because it engenders erratic results. Each court will ultimately place more emphasis on one factor than another and the choice of that heavily weighted factor will vary from court to court. Some courts may find that having a high blood quantum is the most important factor, while other courts may place the greatest weight on whether the individual is enrolled in a tribe. The totality-of-the-circumstances test would only perpetuate the problem of inconsistent holdings and would provide no constructive guidance for the courts to determine whether an individual qualifies for Indian status.

C. United States v. Rogers *Test*

Another alternative would be to use a variation of the test already followed by many courts: the *Rogers* test. The test includes two prongs. The first requires that the individual "have some degree of Indian blood" and the second requires that the individual "be recognized as an Indian by the Indian tribe and/or the Federal government."[165] If the courts adopt this approach, more definite guidelines must be established.

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164. *Id.* at 519.

165. United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984).

The courts have used *substantial*, *sufficient*, *significant*, and *some* in their descriptions of the requisite amount of Indian blood.[166] These terms are vague and provide little guidance, leading to inconsistent holdings. Some courts have tried to clarify exactly what the terms mean. The court in *Bruce* stated that evidence of an ancestor identified as an Indian would be adequate to prove Indian blood.[167] This explanation only further complicates the process because the courts are now left to determine whether the defendant's ancestor was identified as an Indian – a task equally if not more difficult than proving the defendant himself is identified as an Indian, especially if that ancestor is no longer alive.

Congress should set a minimum blood-quantum requirement. While courts did vary, it appears that having more than one-sixteenth (1/16) Indian blood should be the minimum requirement for the first prong of the *Rogers* test. The individual must be able to provide some concrete proof to establish his degree of Indian blood. Mere testimony stating what degree of Indian blood the individual has, without more, should be deemed insufficient.

In an Oklahoma Court of Criminal Appeals case, the appellant was allowed to prove his Indian-blood quantum by providing his parents' testimony that he had slightly less than one-quarter (1/4) Indian blood.[168] Allowing an individual to prove his degree of Indian blood through testimony alone opens the door to inaccurate representations of blood quantum to achieve a status that is most personally advantageous at that time. In addition, that the appellant's parents provided the testimony[169] further undermines its credibility because an individual's parents ostensibly have far greater incentive to lie to protect their children. While it may seem a hefty burden, there should be verified documents from the tribe or the government that provide reliable and accurate proof of the individual's degree of Indian blood.

Under the second prong (whether the individual has been recognized as an Indian by a tribe or the federal government), courts have vacillated in their analysis. The analysis needs to be structured. Applying the factors set forth in *St. Cloud v. United States* would provide an expedient formula for the courts to follow.

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166. *See, e.g.*, United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009); United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009); State v. Reber, 171 P.3d 406, 410 (Utah 2007); Vialpando v. State, 640 P.2d 77, 79 (Wyo. 1982).

167. United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005).

168. Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982).

169. *Id.*

> In declining order of importance, these factors are: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.[170]

Courts have examined these factors differently, but should consider them in *declining* order of importance, placing the most emphasis on whether the individual is enrolled in the tribe. William Canby notes that "enrollment is often the key to acceptance as a member of the tribal community, and it provides by far the best evidence of Indian status."[171] Enrollment in a federally recognized tribe is likely sufficient for an individual to satisfy the second prong. Proof could be provided through presentation of a tribal-identification card or testimony from the tribe verifying the individual's enrollment.[172]

One strength of the *Rogers* test is familiarity. Many courts already use the test, which would make its universal application easier to implement. While this test is more complex, it is structured and would likely lead to consistent findings by the courts if the courts strictly adhered to the guidelines, considering the factors in *declining* order of importance. By setting a minimum blood requirement, courts would no longer be left with the sensitive and largely arbitrary decision of whether an individual has sufficient blood to qualify for Indian status. By permanently implementing the *St. Cloud* factors as part of the second prong, courts no longer have to wrestle with the question of what exactly determines whether an individual is recognized as an Indian by a tribe or the federal government.

Before, courts were basing their decisions on what factors they deemed important, resulting in inconsistent, subjective holdings. By placing the factors in *declining* order of importance, it reminds the courts that being enrolled in a tribe is the strongest evidence that an individual qualifies for Indian status. Even if the individual is not enrolled in a tribe, the other factors provide the courts with guidance concerning how to structure their analysis.

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170. St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

171. CANBY, JR., *supra* note 14, at 11.

172. *See* United States v. Ramirez, 537 F.3d 1075, 1082-83 (9th Cir. 2008) (allowing enrollment to be proven through presentation of a tribal-identification card, certificates indicating eligibility for enrollment and that his name had been placed on the membership roll, and an explanation from the tribe that defendant lived on the reservation where only members of the tribe were allowed to live).

The *Rogers* test allows for what the bright-line test does not – a consideration of more than one aspect in formulating a status determination. First, the courts can make a race-based decision considering only the individual's amount of Indian blood. The second prong allows the courts to evaluate the individual from a non-racial perspective, examining his lifestyle and determining whether the federal government or a tribe recognizes him as Indian. Providing this two-step process helps ensure that individuals receiving Indian status are both racially Indian and have embraced the Indian lifestyle by living on the reservation or enrolling in a tribe. These dual requirements make it more difficult for an individual to claim Indian status as a matter of convenience.

The adapted *Rogers* test nonetheless has its drawbacks. First, by setting the minimum Indian-blood requirement at greater than one-sixteenth (1/16), there is the potential that tribal members could fail to satisfy the congressionally mandated minimum amount for Indian status, despite that their tribes do not require such a high percentage for membership. For instance, the Cherokee Nation grants membership to those with any degree of Cherokee Indian blood.[173] Therefore, an individual who is a member of the Cherokee Nation and meets the second prong of the test potentially would be unable to meet the first prong of the test if his degree of Indian blood were one-sixteenth (1/16) or less.

Another drawback is that the second prong of the *Rogers* test could still be applied inconsistently. While the factors do provide guidance, the determination of whether an individual's activities and lifestyle are sufficient to qualify him for Indian status is subjective. In *United States v. Cruz*, the majority found that an individual did not qualify for Indian status because he did not take advantage of available tribal benefits.[174] The dissent argued the contrary – that the individual did qualify for Indian status because the proper test is whether the tribe recognized him as an Indian.[175] The dissent found that he never took advantage of the benefits immaterial; that they were available to him was dispositive.[176] Conversely, in *United States v. Bruce*, an individual who barely satisfied one of the factors was found to have Indian status.[177] The

173. TRIBAL MEMBERSHIP, *supra* note 158.

174. United States v. Cruz, 554 F.3d 840, 848 (9th Cir. 2009).

175. *Id.* at 852 (Kozinski, J., dissenting).

176. *Id.*

177. United States v. Bruce, 394 F.3d 1215, 1226-27 (9th Cir. 2005) (individual partially satisfies fourth factor by living on Indian reservation but does not fully participate in Indian social life beyond that).

dissent fiercely disagreed, claiming the majority's ruling allowed the individual, based on the same set of facts, to claim he was not an Indian,[178] depending on which was more convenient. The court in *Goforth v. State* did not allow the individual the ability affirmatively to claim either status, explaining that a determination that the defendant did have Indian status would effectively give the defendant the ability to declare Indian heritage as a matter of convenience when it was necessary to avoid state criminal action.[179]

Courts must make certain that they are not affording an individual the opportunity to claim Indian status only as a matter of convenience. Under the *Rogers* test, courts are still charged with the responsibility of determining whether an individual qualifies as an Indian.[180] While this approach appears fair, the problem still remains that a small group of presumably non-Indian arbiters unfamiliar with the Indian circumstance are making the determination as to whether they believe the individual before them qualifies as an Indian.

A final drawback to consider is the test's complexity in application. It will take substantial time and resources for a court to gather and evaluate the necessary information, taking into account policy considerations and trying to formulate its own definition of what exactly constitutes an "Indian" lifestyle. With all of these concerns, one must consider the possibility of a better test to evaluate whether an individual qualifies for Indian status.

D. Threshold-Question Approach

Another option is the threshold-question approach, similar to the one used by the court in *LaPier v. McCormick*, under which courts ask an initial threshold question before engaging in further analysis. Courts first ask whether "the Indian group with which [the defendant] claims affiliation [is] a federally acknowledged Indian tribe."[181] If the answer is no, the inquiry ends and the individual does not qualify for Indian status because the federal government only assumed the responsibility to protect those tribes that are federally recognized.[182] The criminal jurisdiction statutes carrying out the federal government's responsibilities therefore would not apply.

If the individual claims affiliation with a federally recognized tribe, the court must then determine whether the individual is enrolled in that tribe. If so, the inquiry ends and the individual receives Indian status because tribal

178. *Id.* at 1231 (Rymer, J., dissenting).
179. 644 P.2d 114, 116 (Okla. Crim. App. 1982).
180. United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984).
181. LaPier v. McCormick, 986 F.2d 303, 304-05 (9th Cir. 1993).
182. CANBY, JR., *supra* note 14, at 10.

membership in a federally recognized tribe is the most palpable evidence of Indian status.[183] If the individual is not enrolled in the tribe, the court should conduct a two-part inquiry similar to that found in the *Rogers* test, first considering the degree of Indian blood and then examining whether the individual is recognized as an Indian by a tribe.[184] To guide this analysis, the courts can consider whether the individual has received any benefits from the government reserved only for Indians, whether he is socially recognized as an Indian through his activities, and whether he is enjoying the benefits of tribal affiliation. These factors should all be considered together in making the decision.

One of the strengths of the threshold-question approach is that it provides a step-by-step inquiry, moving on to the next step only when the previous has been satisfied. This can prove to be time-saving for courts that may otherwise conduct a full analysis only to realize the tribe in which the individual is claiming affiliation is not federally recognized. Federal recognition of the tribe appears to be the most important factor because the special trust relationship between the federal government and the Native Americans is the very reason these criminal jurisdiction statutes exist.[185] This approach allows federal recognition to be addressed before considering any other factor. Moreover, making the threshold question its own separate inquiry places greater importance on federal recognition and helps courts to avoid confusing the importance of each factor. If the individual is not an enrolled member of a federally recognized tribe, the court is able to consider the remaining factors equally, all the while remembering that the individual is not enrolled in a tribe and strong evidence is therefore required to justify conferring Indian status upon him.

The threshold-question approach leaves open the possibility that an individual may claim Indian status only when it is personally beneficial. It also opens the door to a larger number of individuals being able to claim Indian status because there is no membership or eligibility-for-membership

183. *See id.* at 11.

184. Courts are careful not to conflate tribal enrollment and tribal recognition. They appreciate that individuals are often recognized as "Indian" by the tribes despite lack of official enrollment. *See* Lewis v. State, 55 P.3d 875, 878 (Idaho Ct. App. 2002) ("[E]nrollment in a tribe is not an absolute requirement for recognition as an Indian."); United States v. Stymiest, 581 F.3d 759, 766 (8th Cir. 2009) ("[E]nrollment 'is not the only means [of establishing Indian status] nor is it necessarily determinative.'") (alteration in original) (quoting United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005)); State v. LaPier, 790 P.2d 983, 987 (Mont. 1990) ("[T]hat Mr. LaPier is not enrolled in any tribe may not be determinative of Indian status.").

185. St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988).

requirement. The requirement is simply that one be affiliated with a federally recognized tribe.[186]

While the threshold-question approach does provide a simple step-by-step inquiry, it nonetheless has the potential to provoke a long, drawn-out, subjective analysis, leading to inconsistent holdings. The threshold-question approach also presents some of the same drawbacks as the adapted *Rogers* approach. Although the court is supposed to weigh the evidence evenly, there is still the potential for a court to place more emphasis on one factor than another. There is also the problem attendant to having an unspecified blood requirement, elaborated above in the discussion of the *Rogers* test. If the legislature fails to set a specific requirement for Indian blood, the courts are left with the question of what is adequate. As evidenced by the case law, courts have failed to reach a consensus in determining a standard for whether an individual has the requisite degree of Indian blood.

E. Bright-Line Test

A final alternative to consider in determining Indian status for purposes of federal criminal jurisdiction is a bright-line test, which would simply ask one question: whether the individual is a member of a federally recognized tribe. If the individual is a member of a federally recognized tribe, he qualifies for Indian status. This approach would leave the decision in the hands of the tribes. It is similar to the one espoused by the dissent in *Bruce*, which reduced the inquiry simply to "whether the individual is enrolled or eligible for enrollment in a federally recognized tribe."[187] There is a possibility that the inquiry could be expanded to include those individuals eligible for membership in a federally recognized tribe, but it is important for the courts to keep in mind a notable point made by the court in *United States v. Keys*: "[i]f an adult or older child is eligible to enroll in an Indian tribe but fails to do so, perhaps an inference can be drawn that the individual intentionally chooses not to affiliate politically with the tribe."[188] While this may not be the case for all individuals eligible for enrollment but not enrolled, it is certainly a notable consideration for the courts.

One strength of a bright-line test is that the courts would not be responsible for determining whether an individual qualifies as an Indian. As the court in *United States v. Cruz* stated, "[T]here appears to be something odd about a court of law . . . deciding whether a specific individual is or is not an

186. *LaPier*, 986 F.2d at 304-05.

187. United States v. Bruce, 394 F.3d 1215, 1225 (9th Cir. 2005).

188. United States v. Keys, 103 F.3d 758, 760 (9th Cir. 1996).

'Indian.'"[189] Determining whether a specific individual racially belongs to a certain group is not within the province of the courts' expertise and should be left to the Indians or specific tribe. The tribe knows best whether an individual has Indian blood or has been living an Indian-lifestyle. How might a court, presumably comprised of non-Indians, know what it means to live an Indian lifestyle?

Another strength of a bright-line approach is its ability to prevent individuals from claiming Indian status as a matter of convenience. If an individual is allowed to claim Indian status without enrolling in a tribe, he could just as easily claim non-Indian status as a matter of jurisdictional convenience. An individual should not claim Indian status as a subterfuge to jurisdiction, but rather because it is who he is and the lifestyle he has embraced.

Under the bright-line approach, courts would not be left with the task of determining whether a certain percentage of blood is adequate for Indian status. How is a non-tribal court to determine what exactly is the arbitrary cut-off between having and not having enough Indian blood? Tribes have documented conceptions of how much blood is adequate for Indian status because most tribes set forth in their constitutions the necessary percentage for membership in the tribe.[190]

Importantly, leaving the decision to each particular tribe would allow them to exercise their sovereignty. Tribes have already established clear, definite membership requirements, which allows for both consistency and objectivity. There is no new information that would need to be gathered or created. When a court is presented with an individual claiming Indian status, it would simply have to defer to the tribe to determine whether that individual is a member.

The bright-line approach would also eliminate race as a factor for determining Indian status. Several courts have expressed that race should not be used in determining whether an individual qualifies as an Indian. In *United States v. Antelope*,[191] the Supreme Court of the United States explained that the regulation of Indians is based on their "unique status . . . as 'a separate people' with their own political institutions," and the question of whether an individual qualifies as an Indian therefore is a political rather than a racial inquiry.[192] Further, the Court explained that the "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because

189. United States v. Cruz, 554 F.3d 840, 842 (9th Cir. 2009).

190. Dussias, *supra* note 159, at 86.

191. 430 U.S. 641 (1977).

192. *Id.* at 646 (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)).

they are enrolled members" of a federally recognized tribe.[193] Because the inquiry is instead a political question, the tribes should be afforded the opportunity to determine their own membership, which is best evidenced by an individual's enrollment in a tribe.[194]

A tribe failing to enroll an individual or failing to consider him eligible for enrollment should be sufficient evidence that the individual does not qualify for Indian status. In Justice Rooney's concurring opinion in *Vialpando v. State*, he expressed his belief that "[r]ace or national origin should not be a determinant affecting the status of any individual."[195] If the federal government continues to promote tribal sovereignty, the tribes should be provided the opportunity to exercise that sovereignty by making the determination of who are their own members and citizens, evidenced through enrollment in a tribe. Whether an individual has enough blood to qualify as an Indian is not a question for the state and federal courts to decide. The determination should be left to the tribe to acknowledge whether an individual is or is not a member of its tribal community.

While the simplicity of this approach is appealing, it also precludes the consideration of circumstances that may have prevented an individual from being able to join a tribe. Some tribes will not let an individual receive membership – even if he otherwise qualifies – if that individual was previously a member of another tribe.[196] While the individual may have a large degree of Indian blood and still practice an Indian lifestyle, he is unable to obtain membership because of the tribe's laws. This type of individual, who would clearly appear to be an Indian, would be unable to receive Indian status because of tribal law, and not because the individual is not truly an Indian.

An individual may also be prevented from enrolling in a tribe because of a refusal by the enrolling officer, as in *Pero v. Pero*.[197] As the court expressed in *Pero*, a "refusal by the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."[198] An individual's Indian status cannot be determined by the refusal of another individual to place his name on the tribal roll.

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193. *Id.* at 646.
194. CANBY, JR., *supra* note 14, at 11.
195. Vialpando v. State, 640 P.2d 77, 81 (Wyo. 1982) (Rooney, J., concurring).
196. St. Cloud v. United States, 702 F. Supp. 1456, 1458 (D.S.D. 1988).
197. 99 F.2d 28 (7th Cir. 1938).
198. *Id.* at 31.

Another reason an individual may not have tribal membership is because she is too young to enroll. In *Keys*, the child was only two years old and not capable of enrolling herself in a tribe.[199] The child cannot be penalized for the failure of her mother or father to enroll her in a tribe when she was too young to do so herself. In this type of situation, there could be an age exception to the bright-line rule: if the individual is below a certain age, her failure to enroll in a tribe will not automatically preclude Indian status. In such a case, the test is no longer a bright-line rule because subsequent analysis will be necessary to determine whether the individual is eligible for membership.

A point of contention under the bright-line test is reiterated throughout the cases, which indicate that membership in a tribe is not necessary for Indian status. The majority in *Bruce* disputed the suggestion to base Indian status solely on tribal membership;[200] however, the majority was unable to provide a solid justification for its opinion. The majority did agree that this type of test would provide a simpler framework to determine Indian status. Its argument for not using the test was simply that it was not the test it had adopted. It further explained that until Congress or the Supreme Court revised the second prong of the *Rogers* test, it would be "bound by [its] prior jurisprudence."[201] The explanation provided by the *Bruce* court suggests that even though most courts believe that enrollment is not required, Congress can change that and require tribal membership through statute.[202]

Although courts have espoused that membership is not required to qualify as an Indian, the dissent in *Bruce* makes a valid point that should be contemplated. Courts have held that if a tribe is terminated or loses federal recognition, the members of that tribe no longer have Indian status. The same courts have also noted that even if an individual is not enrolled in a tribe or eligible for enrollment, he could nonetheless qualify for Indian status. The dissent in *Bruce* finds this suggestion illogical.[203] If an individual who lived his life as an enrolled tribe member loses his status as an Indian simply because his tribe is terminated, then an individual who is not enrolled or eligible to enroll should not still be afforded the opportunity to qualify for Indian status. Indian status should be available only to those who are enrolled in a tribe or deemed eligible for enrollment by the tribe. By using the bright-

199. United States v. Keys, 103 F.3d 758, 760-61 (9th Cir. 1996).
200. United States v. Bruce, 394 F.3d 1215, 1225 (9th Cir. 2005).
201. *Id.*
202. *See id.*
203. *Id.* at 1234 (Rymer, J., dissenting).

line test, the analysis would be simplified and result in more consistent holdings.

IV. Conclusion

Congress has put the courts in an unenviable position, leaving them to make subjective determinations of whether an individual qualifies as an Indian for purposes of federal criminal jurisdiction. There is currently no single definition provided under the Indian Country Crimes Act or Major Crimes Act for courts to follow when conducting their analysis. Courts have tried to develop their own tests, and as a result, the holdings have been inconsistent. Even courts applying the same test evaluate the factors differently and ultimately reach inconsistent conclusions. A uniform approach must be adopted, as conferring Indian status is more than a simple labeling – it is a determination with sizeable legal consequences. Congress must determine what definition of Indian best meets the goal of fostering judicial consistency, and subsequently provide guidance to the courts regarding how to conduct the evaluation. There are many approaches that could be used, but a single, uniform approach must be selected to ensure dependable holdings consistent with the underlying purpose of the criminal jurisdiction statutes.