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Equitable and Declaratory Relief under the Indian Civil Rights Act

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EQUITABLE AND DECLARATORY RELIEF UNDER THE INDIAN CIVIL RIGHTS ACT

Insofar as the availability of equitable or declaratory relief under the Indian Civil Rights Act of 1968[1] has not been definitively explored, this note will consider that topic and its possible ramifications on tribal autonomy. Before passage of this Act, tribal governments were under no constitutional restraints in the exercise of their power over tribal members.[2] Although this prior situation might be viewed as highly offensive by the average Anglo-American, the fact remains that the Indian Civil Rights Act of 1968 will, to a large extent, undermine the autonomy of the Indian tribes. Its affect will be to usurp yet another area from the already limited jurisdiction of the tribal courts, and make the federal courts the final arbiter. This note will discuss the availability of equitable and declaratory relief under the Act, and suggest possible ways in which its undermining impact on tribal autonomy can be minimized.

I. JURISDICTION OF THE FEDERAL COURTS

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1. Act of April 11, 1968, Pub. L. No. 90-824, tit. II, 82 Stat. 77 (*codified at* 25 U.S.C. §§ 1302-1303 (1970)), the text of which is as follows:

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

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

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

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

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

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

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

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

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

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

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

§ 1303. *Habeas Corpus*

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

2. *See* Talton v. Mayes, 163 U.S. 376 (1896) (Sixth Amendment right to grand jury); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (First Amendment freedom of religion); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958) (Fifth Amendment due process); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963) (Sixth Amendment right to counsel).

A. Habeas Corpus as an Exclusive Remedy

The Indian Civil Rights Act vested individual Indians—subject to the jurisdiction of tribes exercising the powers of self-government—with substantially all[3] of the constitutional guarantees contained in the Bill of Rights and the Fourteenth Amendment to the United States Constitution. While it has been repeatedly held that the Constitution of the United States does not apply to tribes exercising the powers of self-government,[4] the Ninth Circuit hinted that it would intervene where the action of the tribe had become "so summary and arbitrary as to shock the conscience of the federal court."[5] Thus, the Act has been referred to as an extrication of the individual Indian from a "legal no man's land"[6] created by such prior decisions.

The Act, however, does not mention remedies other than to provide that the writ of habeas corpus shall be available in the federal courts to test the legality of the detention of any person by order of an Indian tribe.[7] It has been argued that since no other remedy is mentioned, Congress intended to limit the jurisdiction of the federal courts to reviewing writs of habeas corpus.[8] This argument has not met with any success. Unless on its face the words of an act are "so free from doubt [that] they must be taken as the final expression of the legislative intent,"[9] the legislative history must be examined for evidence of Congressional purpose.[10] Yet, the legislative history of the Act is not clearly dispositive of the exclusivity of the habeas corpus remedy. Although it has been argued that "[t]he Senate committee expresses no intention to limit remedies to habeas corpus,"[11] this conclusion appears to have been based on a general reaction to the committee reports; no specific language is cited in its treatment of remedies.

Various statements by several Congressmen, however, militate against the limitation of remedies to habeas corpus through recognition of the existing dearth of protection:

[A]s the hearings developed and as the evidence and tes-

3. The main part of the statute incorporates amendments one and four through eight of the Bill of Rights with the following exceptions: establishment of religion is not prohibited; the right to counsel is guaranteed only at the defendant's own expense; the imposition of a penalty or punishment for any one offense is limited to imprisonment for a term of six months or a fine of $500, or both; there is no right to indictment by a grand jury and the petit jury assures a jury of six members in all cases involving the possibility of imprisonment. 25 U.S.C. § 1302 (1970).

4. *See* note 2 *supra.*

5. Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969); *accord,* Colliflower v. Garland, 432 F.2d 369 (9th Cir. 1965).

6. Solomon v. LaRose, 335 F. Supp. 715, 718 (D. Neb. 1971).

7. 25 U.S.C. § 1303 (1970).

8. Loncassion v. Leekity, 334 F. Supp. 370, 372 (D. N.M. 1971).

9. Caminetti v. United States, 242 U.S. 470, 490 (1917).

10. *Id.*

11. Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343, 1371 (1969) [hereinafter cited as HARV. COMM.].

> timony were taken, I believe all of us who were students of the law were jarred and shocked by the conditions as far as the constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights. There was a failure to conform to many of the elemental and traditional safeguards. The Constitution simply was not applicable.[12]

The Congressmen were very much aware of the wide range of rights encompassed by the Act:

> [I]n the sixth title of the bill [later condensed and amended into the present three sections] we have a very splendid document which will protect the rights of the American Indians in many ways and bring those rights up to date. . . .[13]

The importance of the rights, and the historical record of an established policy of the federal judiciary refusing to apply any constitutional prohibitions against the tribes, suggests that Congress intended this Act as a reversal of that policy. The limited remedy of habeas corpus would not meet that goal.

In the first case to be decided under the Act, *Dodge v. Nakai*[14], the court found that a remedy by way of injunction was appropriate relief and habeas corpus was not even discussed. In the latest case discussing the exclusivity of habeas corpus[15] the court stated:

> It does not follow that Congress intended section 1303 [writ of habeas corpus] to be the exclusive jurisdictional basis for enforcement. Such a finding would render nugatory the rights secured by provisions (1), (5) and (8) of [the Indian Civil Rights Act.][16]

If the only means available for enforcement of the Act were through a habeas corpus proceeding, the Act would have indeed been an empty gesture since review of tribal action by a writ of habeas corpus was already partially established in 1965. In *Colliflower v. Garland*,[17] the petitioner, an Indian and a member of the Gros Ventre Indian tribe, had been sentenced to five days in jail for disobeying an order of the tribal court. The Ninth Circuit found that the reservation had been established under an order of the Secretary

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12. 113 CONG. REC. 35473 (daily ed. Dec. 7, 1967) (remarks of Senator Hruska of Nekraska).
13. *Id.*
14. 298 F. Supp. 26 (D. Ariz. 1969).
15. Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1969).
16. *Id.* at 719, *see* Loncassion v. Leekity, 334 F. Supp. 370, 372 (D. N.M. 1971), "[I]f enforcement of the Act were limited to habeas corpus proceedings, some provisions of the Act would be unenforceable and thus meaningless."
17. 342 F.2d 369 (9th Cir. 1965).

of the Interior, that the Indian police and judges were federally funded; and, that the tribal code was based on regulations promulgated by the Bureau of Indian Affairs. Based on these facts, the court stated that the Indian courts on that particular reservation were at least in part, "arms of the federal government,"[18] and held that, under these circumstances, it was proper for the court to issue the writ of habeas corpus.[19] Although the availability of writs under *Colliflower* might be limited to the twelve Courts of Indian Offenses,[20] the Ninth Circuit, as stated earlier, had intimated that it would assume jurisdiction where the action of the tribe was "so summary and arbitrary as to shock the conscience of the federal court."[21]

B. Jurisdiction under 28 U.S.C. §§ 1343(4) and 1331

The Indian Civil Rights Act does not refer to any jurisdictional statute under which claims brought pursuant to its provisions may be heard. Nonetheless, the courts have found jurisdiction by virtue of two sections of the United States Code granting federal district courts original jurisdiction.[22] Of these cases, *Dodge v. Nakai*[23] and *Spotted Eagle v. Blackfeet Tribe*,[24] most clearly develop the argument that the federal district court's original jurisdiction to protect civil rights should extend to Indians.[25] Both cases relied on *Jones v. Mayer*[26] as authority that "a positive statutory declaration of a right to commence an action is not required"[27] to initiate an action under such a jurisdictional grant.[28] In *Jones*, the district court sustained its jurisdiction to redress an alleged violation of a federally protected right accruing from a discriminatory refusal of the plaintiff's offer to buy a house. Although the statute, declaratory of the rights of citizens, does not authorize the filing of a civil action, the Supreme Court stated:

> The fact that [this statute] is couched in declaratory terms

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18. *Id.* at 379.
19. *Id.*
20. HARV. COMM. at 1357, n. 64.
21. Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969).
22. 28 U.S.C. § 1343(4) (1970):
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> . . . .
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1331(a) (1970):
> (a)The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

23. 298 F. Supp. 26 (D. Ariz. 1969).
24. 301 F. Supp. 85 (D. Mont. 1969).
25. 28 U.S.C. § 1343(4) (1970).
26. 392 U.S. 409 (1968).
27. Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 89 (D. Mont. 1996). *See also* Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968).
28. 28 U.S.C. § 1343(4) (1970).

> and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy.[29]

In *Sullivan v. Little Hunting Park, Inc.*,[30] the Supreme Court reaffirmed this position and arguably extended its reasoning to provide original jurisdiction[31] for claims arising under the civil rights statutes[32] guaranteeing equality in the formation of contracts with no provision for a remedy.[33] Cases cited by the Supreme Court in *Jones*[34] provide evidence of a strong presumption against construing a statute so as to create a legal right while denying a remedy.

Two district courts have rejected claims based on original civil rights jurisdiction.[35] In *Luxon v. Rosebud Sioux Tribe*,[36] the district court had relied extensively on *Pinnow v. Shoshone Tribal Council*.[37] Without any express reference to such original jurisdiction the court in *Pinnow* stated that since §1303 was the only provision providing for federal jurisdiction, in the absence of express congressional authority conferring jurisdiction on the federal court, it "must refrain from assuming jurisdiction where it has none."[38] However, the Eighth Circuit reversed the lower court in *Luxon*. This is instructive insofar as it perceived that:

> The Tenth Circuit based its affirmance [of Pinnow] upon the trial court's findings that the complaints, themselves, failed to state facts which showed a denial of due process or equal protection rather than on the ground that the district court had no jurisdiction.[39]

Thus, the proposition that the Act comes within the category of

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29. Jones v. Mayer, 392 U.S. 409, 414, n. 13 (1968).
30. 396 U.S. 229 (1969).
31. Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968) (citing 88 S.Ct. at 2189-2190, n. 13); *accord*, Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969).
32. 42 U.S.C. § 1981 (1970):
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982 (1970):
> All citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

33. The Fifth Circuit Court of Appeals, in Mizell v. North Broward Hospital District, 427 F.2d 468, 472 (5th Cir. 1970) stated:
> Jones v. Mayer, of course, dealt with section 1982 which, so far as here pertinent, is precisely like section 1981 in that it makes no provision for 'civil damages or any other form of relief . . . .'

34. Jones v. Mayer, 392 U.S. 409 (1968).
35. 28 U.S.C. § 1343(4) (1970).
36. 337 F. Supp. 243 (D. S.D. 1971), *rev'd.*, 455 F.2d 698 (8th Cir. 1972).
37. 314 F. Supp. 1157 (D. Wyo. 1970); *aff'd. sub. nom.*, Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).
38. 314 F. Supp. 1157, 1160 (D. Wyo. 1970).
39. Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 700 (8th Cir. 1972).

civil rights for which a civil action may be implied in law for purposes of invoking jurisdiction is well established.

Jurisdiction may also be established under a federal provision[40] providing the district courts with jurisdiction over civil actions where the matter in controversy exceeds $10,000, and arises under the Constitution, laws or treaties of the United States. One court, entertaining a claim arising under the Act, has found jurisdiction to exist exclusively under this section[41] and several cases have relied on the section as a ground for jurisdiction in the alternative.[42]

Pinnow and *Groundhog v. Keeler*, the two cases dismissing actions under this jurisdictional basis are not strong authority that the $10,000 provision does not provide jurisdiction for claims brought within its provisions. In affirming the lower court's dismissal in *Pinnow*, the Tenth Circuit relied exclusively on the plaintiff's failure to establish either a denial of equal protection or due process.[43] In *Groundhog*, apart from the claim's lacking substance, counsel for the plaintiff apparently only asserted that the claim was one arising under the Constitution of the United States[44] and did not assert, as he should have, that it arose under the laws of the United States.

The Indian Civil Rights Act clearly meets the criteria of being a law of the United States; the amount in controversy requirement will generally be established by the pleadings. (The plaintiffs in *Spotted Eagle* also sought damages, but could only satisfy the requisite amount by aggregating their claims, a practice held impermissable by the Court in *Snyder v. Harris*[45]). The remaining problem, then, is the requirement that the federal question be "substantial;" this presents a unique dilemma because the section embodying this requirement[46] includes some of the most litigated, and most important, phrases in American jurisprudence.[47] In determining whether the federal question presented is "substantial," the courts will no doubt be forced to rely upon the principle of *stare decisis*. Thus, the court in the *Dodge* case relied upon the test espoused in *Cohens* v. *Virginia*,[48] holding that a case arises under the Constitution or laws of the United States "whenever its correct decision depends on the construction of either."[49]

While this requirement of "substantiality" is a judicially imposed

40. 28 U.S.C. § 1331(a) (1970), quoted in note 21 *supra*.
41. Loncassion v. Leekity, 334 F. Supp. 370 (D. N.M. 1971).
42. *See e.g.*, Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968).
43. Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157 (D. Mont. 1970), *aff'd sub. nom.*, 453 F.2d 278 (10th Cir. 1971).
44. Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).
45. 394 U.S. 322 (1969).
46. 25 U.S.C. § 1302 (1970).
47. *E.g.*, "freedom of speech", "probable cause", "equal protection" and "due process".
48. 19 U.S. (6 Wheat.) 264 (1821).
49. *Id.* at 298; *see also* Dodge v. Nakai, 298 F. Supp. 17, 21 (D. Ariz. 1968).

doctrine of self-restraint, its limiting effect on cases presented under the Act will no doubt be minimal in light of the highly litigable nature of the language employed. And even though courts may be justified in many instances in applying the principle of *stare decisis*, they should not do so before giving strong consideration and deference to the unique character of the various tribal governmental systems.

C. Incursions on the "Internal Affairs" Doctrine

Until 1968, the federal courts had held that they had no jurisdiction over what were termed intra-tribal controversies.[50] One example of what constitutes an intra-tribal controversy is found in *Martinez v. Southern Ute Tribe*[51] where the court held that the tribe had complete authority to determine all questions of its own membership as a political entity. There is now a strong indication, however, that the federal courts will assume jurisdiction over cases which had previously been labelled as strictly internal affairs and left to the exclusive jurisdiction of the tribal courts.

In Pinnow v. Shoshone Tribal Council,[52] the plaintiffs sought a review of the enrollment procedures of the Shoshone and Arapahoe tribes. The tribal enrollment ordinances, approved by the Secretary of the Interior, required that in order to become an enrolled tribal member the applicant must possess one-quarter degree of Indian blood. The children of the plaintiffs possessed less than the requisite amount of Indian blood. While the district court stated that the situation involved an intra-tribal controversy and, hence, was not within the jurisdiction of the federal courts, the Court of Appeals for the Tenth Circuit stated "it may well be that tribal enrollment practices are now subject to the statutory requirements of equal protection and due process as provided in 25 U.S.C. §1302 (8)."[53] The court, however, did not decide whether such a restraint existed, but held that the amended complaints and affidavits failed to disclose any denial of due process or equal protection. Incursion into the "internal affairs" doctrine was also intimated in *Luxon v. Rosebud Sioux* Tribe,[54] where the plaintiff sought to run for tribal council, but was precluded from doing so by the tribal constitution which renders employees of the Public Health Service ineligible for candidacy. Without passing upon the merits, the Court of Appeals sustained its jurisdiction and stated:

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50. Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157, 1160 (D. Wyo. 1970), *aff'd sub. nom.*, 453 F.2d 278 (10th Cir. 1971).
51. 249 F.2d 915 (10th Cir. 1957).
52. 314 F. Supp. 1157 (D. Wyo. 1970), *aff'd. sub. nom.*, 453 F.2d 278 (10th Cir. 1971).
53. Slattery v. Arapahoe Tribal Council, 453 F2d 278, 281 (10th Cir. 1971).
54. 455 F.2d 698 (8th Cir. 1972).

> The district court refused injunctive relief and dismissed the action on the ground that it lacked jurisdiction 'to hear intratribal controversies.' This certainly was true prior to the passage, in 1968, of the Indian Bill of Rights, 25 U.S.C. §§1302-03. . . . However, since the enactment of these constitutional safeguards, as part of the Civil Rights Act of 1968, that conclusion does not necessarily follow.[55]

While not deciding whether the case involved an internal affair of the tribe, the court in *Groundhog v. Keeler* noted:

> It is also clear from such report that Congress was concerned primarily with tribal administration of justice and imposition of penalties and forfeitures, and not with the specifics of tribal structure and officeholding.[56]

If this is so, then review of intra-tribal controversies would seem to be largely unwarranted. Incursion into these affairs, which were previously left to the tribes, will effectively sabotage any policy regarding Indians couched in terms of "self-determination."

The single case decided since passage of the Act rejecting federal jurisdiction over an intra-tribal controversy in *Hein v. Nickolson.*[57] In this case the plaintiff alleged that she had been an enrolled member of the Colville Confederated Tribes until her 1956 marriage to a Canadian Indian. By Canadian law, the plaintiff automatically became a member of her husband's tribe as a result of her marriage; and she was disenrolled by the Colville Confederated Tribe. After plaintiff's husband died she remarried a non-Indian and consequently forfeited her membership in the Canadian band of Indians. In October of 1969 the plaintiff applied for membership in the Colville Confederated Tribe, but her application was denied.[58] The federal district court dismissed plaintiff's action, alleging a denial of equal protection under the Act, or lack of subject matter jurisdiction "because a dispute involving membership in a tribe does not present a federal question."[59] The government's brief in support of the motion to dismiss is instructive:

> The Indian Bill of Rights is new legislation, and has been law for less than three years. As a result, the decisions interpreting the Act are relatively few in number. However, those cases have shown a reluctance on the part of the Courts to interfere in intra-tribal matters when no deprivation of

55. *Id.* at 699.
56. 442 F.2d 674, 682 (10th Cir. 1971).
57. Civil No. 3459 (E.D. Wash., Nov. 30, 1971).
58. Amended complaint at 2-3, Hein v. Nickolson, Civil No. 3459 (E.D. Wash., Nov. 30, 1971,
59. Hein v. Nicholson, Civil No. 3459 (E.D. Wash., Nov. 30, 1971).

> rights has been clearly alleged. In each case in which a Court has ruled jurisdiction existed under the Indian Bill of Rights, clear and serious deprivations of rights were alleged.[60]

Thus, there is a possibility that infringements upon the internal affairs doctrine can be limited to those situations where the deprivation of rights is "clear and serious."[61] The delineation as to what constitutes a "clear and serious" deprivation of rights will presumably be left to the courts. If so, it is important that the federal courts reassert a doctrinal basis for the protection of tribal autonomy in cases arising under the Act.

Several rulings by the Department of the Interior would seem to militate in favor of reviewing actions of the tribe which were previously considered internal. One controversy involved classification for the purpose of tribal membership. The Jacarilla Apache Tribe had revised its constitution, placing more restrictive membership requirements on illegitimate children than were placed on persons born in legal wedlock. After stating that such action by a tribe prior to 1968 was unlikely to have been questioned, the Deputy Solicitor found that such classification was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was, therefore, repugnant to the equal protection clause of the Indian Civil Rights Act.[62]

Another memorandum of the Department concerned the Blackfeet ordinance requiring that applications for tribal enrollment be filed within one year of birth. The Assistant Solicitor of Indian Legal Activities stated that the strict requirement, without provision for exception due to "error or disability," "*may well*" violate the due process clause of the Civil Rights Act.[63] He then recommended that the ordinance be amended. While tribal ordinances have always been subject to Secretarial approval,[64] the standards for such approval will now be much stricter. At any rate, it seems anomalous that a tribe, which is considered as a semisovereign entity, should have to submit its proposed ordinances to the Secretary for his approval.

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60. Brief of United States in support of motion to dismiss, at 4, Hein v. Nicholson, Civil No. 3459 (E.D. Wash., Nov. 30, 1971).
61. *Id.*
62. Op. Dep. Sol., M-36793, 76 I.D. 353 (1969).
63. Memo. Ass't Sol. (March 11, 1969) (*emphasis added*).
In a letter of the Assistant Secretary (Feb. 25, 1971) the Shoshone Business Council Enrollment Ordinance No. 8(1-b), which provides that "[T]he father of the applicant must be an Indian and at least one parent of the applicant must be an enrolled member of the Shoshone Indian Tribe," was disapproved as violative of the equal protection provision of 25 U.S.C. § 1302(8) since it prohibited the enrollment of a child of a Shoshone woman and a non-Indian, but allowed the enrollment of a child of a Shoshone man and a non-Indian woman. *But see* Labine v. Vincent, 401 U.S. 532 (1971), *reh den.*, 402 U.S. 990 (1971).
64. *E.g.*, 25 U.S.C. § 476 (1970).

The Department has, however, decided that a tribal ordinance which prohibits all aerial crop spraying within the confines of the Fort Hall Indian Reservation is not in violation of the due process requirement of the Act. The Assistant Secretary of the Interior upheld the ordinance "as being prohibitory rather than regulatory," and found "no reason to differ with the policy decision made by the tribes."[65] For purposes of ascertaining whether there has been a denial of due process, this distinction is secondary to the effect on the person or thing regulated.

If followed, the policy decisions made by the tribes will be controlling only when they happen to coincide with an Anglo policy decision. Thus, the "internal affairs" exception, a judicially-created doctrine of self-restraint, has fallen victim to a policy of Congressional intervention as expressly articulated by the Act.

II. THE SOVEREIGN IMMUNITY OF THE TRIBE[66]

The preceding analysis pertains only to subject-matter jurisdiction. Jurisdiction over the person will involve the bringing of an Indian tribe before a court of law, and this raises the issue of tribal immunity.

A. Indian Tribes are Immune from Suit In the Absence of Congressional Consent

As sovereign dependent nations, American Indian tribes, subject to the plenary power of Congress, are immune from suit in any court unless Congress has expressly consented to the suit. This principle was well established by 1895.[67]

> The civilized Nations in the Indian Territory are probably better guarded against oppression from this source [suits by individuals] than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent.[68]

This principle was reaffirmed as recently as 1967 in *Twin Cities*

65. Memo. Ass't. Secretary, M-36836, 78 I.D. 229 (April 19, 1971); Op. Sol. M-36840. The Eighteen-Year-Old Vote Amendment as Applied to Indian Tribes (Nov. 9, 1971) is one of the few examples of an attempt to strike a balance between the "internal" affairs of the tribe and other activities considered external. Here, Section I of the 26th Amendment was stated to apply to tribal elections called by the Secretary of the Interior pursuant to the Indian Reorganization Act or other federal acts, but it was held not to apply to Indian tribes in purely tribal elections.

66. This section is based largely on S. Bobo Dean's Brief for the Association on American Indians as Amicus Curiae, Joshua v. Goodhouse, Civil No. 4469 (D. N.D., April 17, 1971).

67. Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895).

68. *Id.* at 376.

Chippewa Tribal Council v. Minnesota Chippewa Tribe,[69] a case which involved the validity of a tribal election held for the purpose of amending a tribal constitution and bylaws pursuant to the Federal Indian Reorganization Act.[70] In upholding the dismissal for lack of jurisdiction, the Court of Appeals rejected the plaintiff's claim of "federal question" jurisdiction,[71] stating:

> This argument overlooks defendant Minnesota Chippewa Tribe's sovereign immunity, protecting it from suit in the federal courts. Indian tribes under the tutelage of the United States are not subject to suit without the consent of Congress . . . and 28 U.S.C. §1331 does not operate to waive sovereign immunity. . . ."[72]

The result is the same even where the Indian Reorganization Act (IRA) is not involved. In *Green v. Wilson*,[73] the Ninth Circuit Court of Appeals held that a tribe was immune from suit where the plaintiff challenged the validity of a tribal constitution adopted and approved under federal authority and regulations issued thereunder.[74] Thus, the courts have recognized the immunity of non-IRA tribes, as well as IRA tribes, in these suits.

Finally, this result is not changed under the "federal instrumentality" theory as articulated in *Colliflower v. Garland*[75]. In *Joshua v.* Goodhouse,[76] the plaintiff requested a declaratory judgment that the amendment to the constitution and bylaws of the Devils Lake Sioux Tribe be declared null and void, and, in addition, requested an injunction against any further action by defendant, Thomas Siaka, as chief judge of the tribe.[77] The defendant, as chief judge of the Devils Lake Sioux Tribal Court, was an employee of the United States, being employed by the Bureau of Indian Affairs.[78] In its Order of Dismissal, the court stated that "[t]he United States has not consented to suit herein and has appropriately claimed sovereign immunity in asserting a defense of its employee, Thomas Siaka."[79] It is submitted that in this last situation where the defendant would be covered by the Federal Tort Claims Act,[80] if it were

69. 370 F.2d 529 (8th Cir. 1967).
70. 25 U.S.C. § 476 (1970).
71. 25 U.S.C. § 476 (1970); 28 U.S.C. § 1331 (1970).
72. Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 531 (8th Cir. 1967).
73. 331 F.2d 769 (9th Cir. 1964).
74. 25 U.S.C. § 2 (1970).
75. 342 F.2d 369 (9th Cir. 1965).
76. Civil No. 4469 (D. N.D., April 17, 1971).
77. Complaint for Plaintiff, at 4, Joshua v. Goodhouse, Civil No. 4469 (D. N.D., April 17, 1971)
78. Joshua v. Goodhouse, Civil No. 4469, at 1 (D. N.D., Judgment of dismissal, Dec. 11, 1970).
79. *Id.* at 2.
80. 28 U.S.C. §§ 2671 *et seq.* (1970).

to be applied,[81] the United States should be precluded from claiming immunity.

B. Enactment of the Indian Civil Rights Act Does Not Constitute Consent to Suit

The passage of the Indian Civil Rights Act does not constitute Congressional consent to suits against the tribes. The impact of the Act on the doctrine of immunity has been considered in several cases.[82] In Spotted Eagle v. Blackfeet Tribe[83] the court concluded that it had jurisdiction over the defendant tribe in a suit to enforce rights claimed under the Act. It reached this result by applying the federal provision[84] giving the district courts jurisdiction of civil actions instituted for the protection of civil rights discussed above. The court also concedes, however, that the opinion ". . . intimates nothing with respect to the doctrine of judicial immunity, nor official immunity from suit."[85] Hence, the court does *not* conclude that the Indian Civil Rights Act, together with civil rights original jurisdiction[86] constitutes Congressional consent to suit against Indian tribes. Even a very liberal reading of the section suggests no broader interpretation than that the district courts were to be given jurisdiction over the subject matter of such suits. It may well be that in the cases decided under the Act, the distinction between subject matter jurisdiction and personal jurisdiction was overlooked.

In the latest case which discusses immunity, *Longcassion v. Leekity*,[87] the court conceded that there was no express waiver of immunity in the Act itself, but asserted that the waiver must be implied since to hold otherwise would render the Act "an unenforceable admonition."[88] This pronouncement, not supported in the decision by cases or legislative history, was not essential to the outcome of the case. The Zuni Pueblo had expressly waived its immunity by the terms of an agreement between it and the Bureau of Indian Affairs; in addition to which, the court expressly refused to

81. *See* Halle v. Saunooke, 246 F.2d 293 (4th Cir. 1957). Plaintiffs, injured when a bridge, located on the reservation and maintained by the tribe, collapsed, sought recovery from the individual Indian operators, the Indian tribe and the United States in its capacity as trustee and guardian of the tribe. In dismissing the action because the Federal Tort Claims Act did not authorize such a suit, the court noted that plaintiffs might recover under the Act ". . . if they can show damages resulting from any negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment." *Id.* at 298.

82. Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157 (D. Wyo. 1970), *aff'd sub. nom.*, Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971); Loncassion v. Leekity, 334 F. Supp. 370 (D. N.M. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969).

83. 301 F. Supp. 85 (D. Mont. 1969).

84. 28 U.S.C. § 1343(4) (1970).

85. 301 F. Supp. 85, 91 (D. Mont. 1969).

86. 28 U.S.C. § 1343(4) (1970).

87. Loncassion v. Leekity, 334 F. Supp. 370 (D. N.M. 1971).

88. *Id.* at 373.

decide whether the claim would have been sustainable under the Act.[89]

The Indian Civil Rights Act itself mentions nothing in regard to tribal immunity, and as stated in *Thebo v. Choctaw Tribe of Indians*:[90]

> The intention of Congress to confer such a jurisdiction [taking away tribal immunity] upon any court would have to be expressed in plain and unambiguous terms.[91]

The one established exception to the doctrine of immunity is that while an employee acting within the scope of his employment may not be sued,[92] the officer may be sued as an individual, for commission of a tort, if he acts outside the scope of his authority.[93] Therefore, in suits brought pursuant to the Act, the defendant must have acted outside the scope of his authority.

In summary, since the immunity of the tribe exists only at the caprice of Congress, any consistent judicial interpretation of the Act as limited by tribal immunity, could result in a congressional amendment to the Act waiving this defense, and rendering this discussion moot. However, the same considerations which motivated Congress to reverse its prior termination policy[94] and demand tribal consent as a condition precedent to state assumption of jurisdiction over the reservations[95] suggests that perhaps tribal consent is also appropriate here.

III. DECLARATORY RELIEF UNDER THE ACT

A. The Appropriateness of the Relief

The Declaratory Judgment Act[96] empowers any federal court, when presented with an actual controversy over which it has jurisdiction, to "declare the rights and other legal relations of any interested party seeking such declaration." However, the Declaratory Judgment Act itself creates no jurisdiction.[97] Moore states:

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89. *Id.* at 375, n. 8.
90. 66 F. 372 (8th Cir. 1895).
91. *Id.* at 376.
92. Barr v. Mateo, 360 U.S. 564 (1959); Davis v. Littell, 398 F.2d 83 (9th Cir. 1968).
93. Dugan v. Rank, 372 U.S. 609 (1963).
94. *See e.g.*, Act of March 3, 1893, ch. 209, § 1, 27 Stat. 635 (*codified at* 25 U.S.C. § 283 (1970)).
95. Act of August 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588.
96. 28 U.S.C. § 2201 (1970):
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
97. Groundhog v. Keeler, 442 F.2d 674, 677 (10th Cir. 1971).

> It is not alone sufficient that a justiciable controversy be present; plaintiff must fit his case within one of the jurisdictional statutes.[98]

Recently the Second,[99] Fourth[100] and Sixth Circuits[101] have found jurisdiction, under provisions granting the federal courts original jurisdiction,[102] a sufficient jurisdictional basis for granting declaratory relief in certain civil rights cases.

Three cases have considered declaratory relief under the Declaratory Judgment Act.[103] In Dodge v. Nakai,[104] although neither the plaintiffs nor the court specifically mentioned the Declaratory Judgment Act, in addition to damages the plaintiffs sought "such further relief as to the court may seem appropriate."[105] The court responded by declaring "that the August 8th order constitutes an unlawful bill of attainder."[106] The situation is *Spotted Eagle v. Blackfeet Tribe*[107] and *Lefthand v. Crow Tribal Council*[108] is more elucidating. Plaintiffs in the former case had asked the court for a judgment which would, inter alia, "3. Nullify the Law and Order Code of the Blackfeet Tribe."[109] The opinion, speaking only of subject matter jurisdiction, (the case was settled out of court when the tribe constructed a new jail containing facilities for the treatment of alcoholics), stated:

> The court does have jurisdiction under 28 U.S.C.A. §1343(4) where an Indian claims damages and *equitable* relief as against the Indian tribe and officers of the tribe. . . .[110]

In *Lefthand*, plaintiff sought a declaratory judgment concerning alleged irregularities in the tribal government. Citing *Spotted Eagle*, the court agreed that "it may fashion an equitable remedy where [a] right exists."[111] The action was dismissed, however, the court finding that the equities did not militate in favor of a remedy and that the case did not clearly present the interests of the plaintiff and defendant as being adverse.[112] Significantly, each case found

98. 6A MOORE'S FEDERAL PRACTICE 3135 (2d ed. 1971).
99. Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971).
100. Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).
101. Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970).
102. 28 U.S.C. § 1343(4) (1970).
103. Lefthand v. Crow Tribal Council, 329 F. Supp. 728 (D. Mont. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).
104. 298 F. Supp. 26 (D. Ariz. 1969).
105. *Id.* at 28.
106. *Id.* at 34.
107. 301 F. Supp. 85 (D. Mont. 1969).
108. 329 F. Supp. 728 (D. Mont. 1971).
109. Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 87 (D. Mont. 1969).
110. *Id.* at 89 (*emphasis added*).
111. Lefthand v. Crow Tribal Council, 329 F. Supp. 728, 731 (D. Mont. 1971).
112. *Id.*

subject matter jurisdiction under 28 U.S.C. §1343(4), the civil rights-jurisdictional statute.

It is submitted that the remedy of declaratory relief is particularly appropriate to maintaining tribal autonomy while, at the same time, protecting federally guaranteed rights. Absent access to the federal courts, tribal judges, frequently lacking in either formal legal education or the assistance of professional counsel,[113] would be confronted with the task of construing some of the most complex clauses of the Constitution. Alternatively, if the federal courts manipulate the tribal justice system through the unrestrained exercise of their injunctive power,[114] the effect would be to leave the tribal courts the most subservient of federal instrumentalities. Such action would frustrate Congressional intent:

> Discussion of the Indian Bill of Rights showed no intent to use the statute as an instrument for modifying tribal cultural attitudes in order to facilitate assimilation of Indians into the non-Indian community. In fact, the committee showed a positive intent to avoid requirements injurious to the tribes' capacity to function as autonomous governmental units.[115]

The goal of preservation of tribal autonomy received endorsement most recently in *Kills Crow v. United States*[116] where the Eighth Circuit affirmed the district court's refusal to give a lesser-included-offense instruction in a prosecution under the Major Crimes Act.[117] Although the opinion articulated multiple rationles, the court specifically noted that the requested instruction, by incorporating offenses not within the Act, would have the effect of eroding the criminal jurisdiction of the tribal courts.

Furthermore, the use of declaratory relief seems most amenable to the educating function of the tribal courts as set forth in *United States v. Clapox*:[118]

> These "courts of Indian offfefnses" are . . . mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it whom it sustains the relation of guardian.[119]

Although *Clapox* speaks from another era, today it could be read as describing the position of the tribal court as somewhere between

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113. M. PRICE, CASES AND MATERIALS ON INDIAN LAW 191-192 (Mimeo. ed. 1971).
114. *See* notes 147-217 and accompanying text, *infra*.
115. HARV. COMM., at 1359.
116. 451 F.2d 323 (8th Cir. 1971).
117. 18 U.S.C. § 1153 (1970).
118. 35 F. 575 (D. Ore. 1888).
119. *Id.* at 577.

the federal concern for procedural due process and civil rights and the tribal tradition of customary, informal justice.[120]

Declaratory relief, judiciously applied, can serve the ends of both the federal and tribal systems. Through this vehicle, fine points of law can be settled where judicial professionalism is at its maximum—in the federal courts. The federal courts' declaration of rights then leaves the tribal judge, sensitive to his dual responsibilities, free to mold that declaration in such a way that it becomes a part of the tribal justice system with a minimum of disruption to tribal tradition. Within this context, current developments in the area of declaratory relief will be reviewed.

B. The Impact of Younger v .Harris

The first question to be confronted is the limitation placed on declaratory relief by *Younger v. Harris*,[121] a case in which the plaintiffs sought both injunctive and declaratory relief against a state criminal prosecution. Although denying both declaratory and injunctive relief in the case presented, the Supreme Court stated:

> We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.[122]

In *Zwickler v. Koota*[123] a case not mentioned in the *Younger* opinion, the Supreme Court reversed a dismissal by the district court of plaintiff's plea for injunctive and declaratory relief against a state statute prohibiting the dissemination of anonymous campaign literature. The district court had dismissed because it had determined that injunctive relief was not available. The Court said:

> We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.[124]

The *Zwickler* case was cited with approval by the Supreme Court in *Wisconsin v. Constantineau*,[125] a case holding abstention improper where the challenged statute was not demonstrably vague, and the only interest served would be to await decision by a state court. Thus, where the state proceeding has not commenced, re-

120. Shepardson, *Problems of the Navajo Tribal Courts in Transition*, 24 HUMAN ORGANIZATIONS 250 (1965).
121. 401 U.S. 37 (1971).
122. *Id.* at 41.
123. 389 U.S. 241 (1967).
124. *Id.* at 254.
125. 400 U.S. 433 (1971).

gardless of the propriety of an injunction, declaratory relief appears to be available.

One limitation upon this kind of relief is that a declaratory judgment cannot be used to secure mere advisory opinions.[126] It is submitted that when federal courts are presented with petitions for declarations of rights arising under the Act, they should consider developments in state-federal civil rights controversies as a source of doctrines applicable by analogy. In addition, the federal courts should adopt a standard of liberality in granting the declaratory relief where the alternative remedies would result in a greater impingement on tribal sovereignty; this remedy should be encouraged by a permissive standard of exigent adversity.

C. The Doctrines of Exhaustion and Abstention

Declaratory relief need not be an exclusive remedy, and may be considered whether or not "other forms of relief are appropriate."[127] Speaking of the 1964 Civil Rights Act, the Supreme Court in *Katzenbach v. McClung*[128] suggested a circumstance wherein a lack of exclusivity would bar declaratory relief:

> But even though rule 57 . . . permits declaratory relief although another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided.[129]

The Court noted that the 1964 Act provided a statutory proceeding for determining rights and duties arising thereunder. By a parity of reasoning *McClung* militates against a similar restriction on declaratory relief under the Act, for it provides no such means for adjudicating rights and duties; habeas corpus was not designed for this purpose.

Exhaustion of state remedies has not been held to be a condition precedent to declaratory relief in civil rights cases. In *Moreno v. Henckel*[130] the court said:

> The district court not only abstained, but dismissed the complaint on the ground that a remedy was available to the plaintiffs in the Texas courts. That is not the law. "The fact that a state remedy is available is not a valid basis for federal court abstention."[131]

126. United Public Workers v. Mitchell, 330 U.S. 75 (1947); Poe v. Ullman, 367 U.S. 497 (1961).
127. Powell v. McCormack, 395 U.S. 486, 518 (1969).
128. 379 U.S. 294 (1964).
129. *Id.* at 296.
130. 431 F.2d 1299 (5th Cir. 1970).
131. *Id.* at 1300.

Few cases draw a clear line between exhaustion and abstention. Exhaustion has been held not to be a prerequisite to action under two federal statutes.[132] In another district court case, failure to exhaust state judicial or administrative remedies was not found to constitute a jurisdictional barrier.[133]

> A litigant must normally exhaust state "legislative" or "administrative" remedies before challenging the state action in federal court. He need not normally exhaust state "judicial" remedies.
>
> n.6: However, where plaintiff is suing for a deprivation of civil rights, under 28 U. S. C.A §1343, and his claim is based entirely on federal law, he need not exhaust even state "administrative" remedies.[134]

The reason behind this policy has been recently stated by the Second Circuit, "[w]here the civil rights complaint is framed in terms of facial unconstitutionality, courts have held exhaustion inapplicable since accelerated relief is the essence of the action."[135]

Abstention is similarly disfavored in civil rights cases.[136] The Supreme Court in *Zwickler* stated:

> [W]e again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. After examining the purpose of the Civil Rights Act, under which that action was brought, we concluded that "[w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate that same claim in a state court." For the "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."[137]

The *Zwickler* case's condemnation of abstention was quoted with approval by the Court in 1971, "[w]here there is no ambiquity in the state statute. . . ."[138] This language is suggestive of the propriety of abstention where "answers to questions concerning unclear state law may well be dispositve of [the] controversy."[139]

Despite this disfavor of exhaustion and abstention, it has been

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132. Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971) (42 U.S.C. § 1983 (1970); 28 U.S.C. § 2201 (1970)).

133. Karr v. Schmidt, 320 F. Supp. 728 (W.D. Tex. 1970), *cert. denied*, 401 U.S. 930 (1971).

134. C. WRIGHT, FEDERAL COURTS 187 (2d ed. 1970).

135. Hobbs v. Thompson, 448 F.2d 456, 461 (2d Cir. 1971).

136. Moreno v. Henckel, 431 F.2d 1299, 1301 (5th Cir. 1970).

137. 389 U.S. 241, 251 (1967).

138. Wis. v. Constantineau, 400 U.S. 433, 439 (1971).

139. Hill v. Victoria County Drainage District No. 3, 441 F.2d 416, 417 (5th Cir. 1971); *accord*, Miller v. Miller, 423 F.2d 145 (10th Cir. 1971).

held that, "[w]here habeas corpus is an available remedy, it becomes unnecessary to consider whether declaratory relief may be granted."[140] Thus, although a plaintiff may allege a denial of civil rights under the Act, he will be unlikely to receive declaratory relief if he has a remedy under the Act's habeas corpus provision.[141] The significance of this exception was enhanced by *Settler v. Lameer*[142] which held that habeas corpus[143] would be available to test the legality of detention by the tribe even where the defendant had paid a fine and was released.

If the applicability of exhaustion or abstention to civil rights cases depends upon the readiness of state courts to construe the statute in order to avoid the constitutional issue, then the doctrines are particularly applicable where the tribal court stands in the shoes of the state court because no limiting construction may be possible. *In Settler v. Yakima Tribal Court*,[144] because the approval of the Secretary of the Interior was necessary before the tribal code could be changed, the court concluded that the tribal court system could not be modified without federal consent. The only other case arising under the Act which takes a position on the requirement of exhaustion of tribal remedies is *Dodge v. Nakai*.[145] Although the court heard the case despite plaintiffs' failure to exhaust tribal remedies, it noted that under other circumstances it would "require plaintiffs to exhaust remedies available within the tribal government framework. . . ."[146] The reasons articulated in *Dodge* for requiring exhaustion reflect the "internal affairs" limitation and respect for the independence of the tribal courts. While the doctrines of abstention and exhaustion will be appropriate under some circumstances, it is submitted that both precedent and the unique character of the tribal system militate against the use of these doctrines as a bar to obtaining declaratory relief. Thus, when presented with a petition for declaratory relief by a plaintiff faced with at least probable adversity, a federal court should consider its superiority over the tribal justice system in terms of judicial professionalism as a compelling reason for hearing the case. In this way, the court may effectuate Congressional policy fostering an independent tribal justice system by articulating its declaration of rights in sufficiently flexible

140. Pruitt v. Campbell, 429 F.2d 642 (4th Cir. 1970); Ruip v. Kentucky, 400 F.2d 871 (6th Cir. 1968), *cert. denied*, 395 U.S. 911 (1969).
141. 25 U.S.C. § 1303 (1970).
142. 419 F.2d 1311 (9th Cir. 1969).
143. 25 U.S.C. § 1303 (1970).
144. 419 F.2d 486 (9th Cir. 1969). The court's point is well taken. An examination of tribal constitutions revealed only one—the Isleta Pueblo—specifically authorizing the tribal court to overrule actions of the tribal council. The tribal courts do not function within a framework of checks and balances or separation of powers. Interview with Mr. Jack D. Ross, Department of the Interior, Office of the Solicitor, Indian Civil Rights Task Force, March 26, 1972.
145. 298 F. Supp. 17 (D. Ark. 1968).
146. *Id.* at 26.

terms so as to permit its application as precedent on the reservation without destroying the tribal tradition of customary, informal justice.

IV. INJUNCTIVE RELIEF AS AN EQUITABLE REMEDY

A. Injunctive Relief as Applied to Judicial Officers

Injunctions have been issued under the Act enjoining the enforcement of an exclusion order,[147] interference with access to the tribal administration,[148] and further proceeding of the tribal court until the defendants were permitted to retain professional counsel.[149]

Since the Act proscribes interference by the tribe with the rights guaranteed thereunder, it is probable that equitable relief will be most frequently sought against tribal officers, particularly judges and policemen. Federal interference with state court proceedings is limited by the Anti-Injunction Act,[150] prohibiting injunctions except where expressly authorized by statute in order to protect jurisdiction or to effectuate its judgments. No case has applied the Anti-Injunction Statute to the tribal courts. The Ninth Circuit twice considered the applicability of the act to the territorial courts of Hawaii, and both times failed to reach the question.[152]

However, without applying the statute, the Supreme Court discussed deference to territorial courts in *Stainback v. Mo Hock Ke Lok Po*,[153] an action seeking an injunction against the compulsory teaching of a foreign language in the Hawaiian public schools:

> Entirely aside from the question of the propriety of an injunction in any court, territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of

147. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).

148. Wasson v. Gray, Civil No. 9223 (D. N.M., Nov 18, 1971) (temporary restraining order granted); Claw v. Armstrong, Civil Action No. C-2307 (D. Colo., Sept. 16, 1970); Reagan v. Blackfeet Tribal Court, Civil No. 2850 (D. Mont., July 7, 1969).

149. Towersap v. Fort Hall Tribal Court, Civil No. 4-70-37 (D. Idaho, Dec. 28, 1971). *See* Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971) (temporary injunction granted, the court finding that it was probable that the tribal council had exceeded its authority in excluding plaintiffs, elected members of the council, and had hence denied them due process).

150. 28 U.S.C. § 2283 (1970):

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

151. A tribe is not a "state" within the language of the Constitution. Worcester v. Ga., 31 U.S. (6 Pet.) 515 (1832).

152. Ackerman v. International Longshoreman's & Warehouseman's Union, 187 F.2d 860 (9th Cir. 1951), *cert. denied*, 342 U.S. 859 (1953); Alesna v. Rice, 172 F.2d 176 (9th Cir.), *cert. denied*, 338 U.S. 841 (1949).

153. 336 U.S. 368 (1949).

> discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course.[154]

This language was quoted with approval in *Ackerman v. International Longshoreman's & Warehousemen's Union*,[155] where the court refused to enjoin a criminal prosecution by Hawaiian officers. Assuming that by virtue of its appearance in *Ackerman*, the Supreme Court's language applies to the enjoining of a prosecution, it presents criteria with which to weigh this remedy with regard to the tribal courts.

In *Younger v. Harris*[156] the Supreme Court applied the Anti-Injunction Statute to reverse a lower court's order granting an injunction against prosecution under a statute arguably unconstitutional on its face.[157] The court went to some length to limit *Dombrowski v. Pfister*[158] which had liberalized the standards for the enjoining of state court prosecutions on constitutional grounds. In addition to the Anti-Injunction Statue,[159] the court relied on the traditional equitable requirements of an inadequate remedy at law and irreparable injury. The Court demanded sensitivity to the interests of both state and national governments.[160] In articulating standards for intervention, the Court noted:

> Certain types of injury, in particular, the cost, anxiety and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term.[161]

Even assuming the inadequacy of the tribal court system to assert a federal right under the Act in a manner requiring the narrowing or voiding of tribal council action, the reasoning of *Younger* still militates against federal injunctive interference with tribal court prosecutions. The emphasis in *Younger* on disabilities common to the "single criminal prosecution" is inescapable. Even in circumstances where the defendant might prevail because of a state statute's *prima facie* unconstitutionality, practicality dictates disabilities beyond those of a "single criminal prosecution," because few state courts of general criminal jurisdiction are in the habit of settling constitutional questions. Thus, the defendant will in all likelihood content himself with laying a constitutional basis for

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154. *Id.* at 383-384 (*citations omitted*).
155. 187 F.2d 860, 868-869 (9th Cir. 1951), *cert. denied*, 342 U.S. 859 (1953).
156. 401 U.S. 37 (1971).
157. *Id.*
158. 380 U.S. 479 (1965).
159. 28 U.S.C. § 2283 (1970).
160. Younger v. Harris, 401 U.S. 37, 44 (1971).
161. *Id.* at 46.

appellate review as he shoulders the burden of the single prosecution.

The defendant before a tribal court is in a similar position. The disabilities borne by both state and tribal courts at the first level are not distinguishable. And although the state court defendant has assurance of a state appellate court to hear constitutional arguments, the tribal court defendant, despite the absence of a like body in the tribal justice system, can move to the federal system either by virtue of habeas corpus or on jurisdiction based on certain civil rights controversies.[162]

The discussion of comity by the Court in *Younger* also supports this argument, as "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[163] The tribes have, even more clearly than the individual states, an interest in dispensing justice unique in form if not in content. This interest will be best served if the limitations of *Younger* operate to protect a tribal court from federal injunctive intervention. Furthermore, the very imposition of basic Anglo-American standards of procedural due process is an attempt to enhance their stature within the judicial hierarchy.

How, then, should a federal court respond to the admittedly real danger that a tribal court, because of its limited professionalism, will be both unable and unwilling to resolve matters of federal right? Although *Younger* holds that a declaratory judgment against a statute involved in a pending prosecution is also inappropriate,[164] it is suggested that the distinction in expertise between the tribal and state courts favors this remedy. If a defendant in a pending tribal prosecution is permitted to seek declaratory relief before a federal court, and his claim is found to be meritorious, he will return to the tribal proceeding with a declaration of that right. Meanwhile, the tribal court is not as completely powerless as it would be if the proceeding had been enjoined. The tribal system has not been forced to an ignominious halt. Behind the gloss of the tribal court, informal societal pressures may still work to achieve a result more consistent with tradition. Finally, if the tribal court exercises its remaining discretion in such a way as to produce an egregious violation of federal rights, the fined or incarcerated defendant retains his access to the federal system through the habeas corpus provisions of the Act and through the federal court's civil rights jurisdiction.[165] This procedure is submitted as a maximization of tribal autonomy with a minimum of disability to the defendant,

162. 28 U.S.C. § 1343(4) (1970).
163. Younger v. Harris, 401 U.S. 37, 44 (1971).
164. *Id.* at 41, n. 2.
165. 28 U.S.C. § 1343(4) (1970).

really no different than that suffered by the state criminal defendant as restricted by *Younger*.

Whatever flexibility remains for the tribal court to decide a case where one of the parties has secured a federal declaration of his rights, the impact on the tribal judicial officials is significantly reduced if injunctions are not issued against them. As between the parties, the declaratory judgment is *res judicata*. And although a tribal court ignoring the federal declaration risks nearly certain reversal, the force of the federal declaration is that of *stare decisis*. Thus the prosecutor remains free to bring, and the court free to hear the action, although had an injunction been issued, officers all along the judicial system would risk contempt and imprisonment for so acting. Thus not only has the prestige of the tribal court been spared by limiting relief to a declaration, but also the controversy may then be resolved through traditional influences.

Apart from the limitation in *Younger* on enjoining state criminal proceedings, no other doctrinal obstacles remain in the way of injunctive relief for civil rights violations. Although in *Monroe v. Pape*[166] and *Pierson v. Ray*[167] the Supreme Court held municipalities and judges respectively to be immune from damages in civil rights cases, immunity is inapplicable to the injunctive remedy. In *Koen v. Lang*[168] the Court distinguished *Pierson*:

> Defendants cite no case in which the common law doctrine of judicial immunity, as discussed in *Pierson*, has been extended to suits requesting purely equitable relief. Indeed, the very rationale of the *Pierson* decision stands against them. Indeed, in the history of the common law, judges and other quasi-judicial officers have been held subject to equitable and quasi-equitable actions — for example, writs of mandamus and prohibition.[169]

However, in *Joshua v. Goodhouse*,[170] plaintiff sought *inter alia*, an injunction against defendant tribal judge prohibiting his enforcement of an amendment to the tribal constitution. In granting defendant's motion to dismiss, the court stated that defendant Siaka, as chief judge of the Devils Lake Sioux Tribal Court, was entitled to judicial immunity for acts performed in good faith in his capacity as chief judge.[171] This result, in the context of injunctive relief

166. 365 U.S. 167 (1961).
167. 386 U.S. 547 (1967).
168. 302 F. Supp. 1383 (E.D. Mo. 1969), *aff'd*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).
169. *Id.* at 1387; *accord*, Hadnott v. Ames, 394 U.S. 358 (1969).
170. Civil No. 4469 (D. N.D., April 17, 1971).
171. Joshua v. Goodhouse, Civil No. 4469 (D. N.D., Judgment of Dismissal, Dec. 11, 1970).

as distinguished from damages, seems to be unsupported by the rationale of *Koen*. The consequences of injunctive relief are no more egregious than those of consistent appellate reversal.

B. Injunctive Relief as Applied to Non-Judicial Officers

The officials subject to injunctive remedies include the prosecuting attorney and the police commissioner.[172] State and federal police have been a consistent target of equitable actions, the most notable case being *Lankford v. Gelston*,[173] where the Baltimore police had conducted more than three hundred illegal searches of homes in the black district within a nineteen day period. Further searches of the property of the plaintiffs and those similarly situated based on uncorroborated anonymous tips were enjoined. Injunctions have been issued against police brutality,[174] seizures without a prior hearing,[175] and coercion of persons with physical similarities to that of the suspect in order to fill-in lineups.[176] The availability of equitable relief against police abuse, particularly in the area of search and seizure, is significant in redressing similar rights under the Act. Although, as has been suggested, an initial declaration of rights would maximize tribal autonomy, where, as in *Lankford*, the abuse is in accord with a routine practice and plan conceived by high officials, ample precedent supports injunctive relief by analogy to the state-federal relationship. Nor does the tribe's status as a sovereign appear to create any immunity from injunctive relief. In suits under the Civil Rights Act of 1871,[177] cities[178] and municipal corporations have been held to be proper parties.[179] The investigation of a state legislative committee has been found to be within the equitable jurisdiction of the federal courts.[180]

C. Summary of Injunctive Relief Under the Act

Federal injunctive interference in state criminal prosecutions has been greatly restricted by the Supreme Court's application

172. Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970).
173. 364 F.2d 197 (4th Cir. 1966).
174. Hairston v. Hutzler, 10 Crim. L. Rptr. 2189 (W.D. Pa., Nov. 18, 1971).
175. Leslie Tobin Imports, Inc. v. Rizzo, 305 F. Supp. 1153 (E.D. Pa. 1969).
176. Butcher v. Rizzo, 317 F. Supp. 899 (E.D. Pa. 1970).
177. 42 U.S.C. § 1983 (1970):

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

178. Schell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969).
179. Dailey v. City of Lawton, 425 F.2d 1073 (10th Cir. 1970); Service Employees International Union, AFL-CIO v. County of Butler, Pa., 306 F. Supp. 1080 (W.D. Pa. 969).
180. Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963). Whatever the immunity held by the government entity, the rationale of suing the entity's agent as an individual preserves a cause of action. *Ex parte* Young, 209 U.S. 123 (1908).

of the Anti-Injunction Statute in *Younger v. Harris*.[181] No case has held the tribal courts to be within the ambit of this statute. The Court's reasoning in *Younger*, however, would not distinguish between the disabilities suffered by the state defendant in a single prosecution as opposed to the tribal defendant. Each must expect to prevail on the statute's *prima facie* unconstitutionality before a higher tribunal. Furthermore, the Court's discussion of comity analogously supports deference to the tribe's interest in preserving a unique justice system. It is submitted that this interest can be furthered only if federal courts refuse to enjoin tribal court proceedings, but at the same time agree to enter declaratory judgments where facts of particular exigency demand relief. Outside the realm of criminal prosecutions, ample precedent within the state-federal sphere upholds the propriety of injunctive relief against judicial and non-judicial officers. Since neither sovereign nor judicial immunity has been successfully asserted as a defense against an injunction, arguably, tribal immunity would not preclude the granting of injunctive relief.

V. RECOVERING DAMAGES UNDER THE ACT

A. The Damage Remedy as Applied to the Tribe

Federal district courts have twice considered whether damages are recoverable from the tribe for violations of the Act.[182] Relying on *Jones v. Mayer*,[183] the court in *Spotted Eagle v. Blackfeet Tribe*[184] found civil rights jurisdiction[185] but broke new ground by determining damages under that jurisdiction. Federal district courts are given jurisdiction over civil actions *authorized by law to be commenced by any person for the protection of civil rights*.[186] While the court noted that it had pendent jurisdiction over the damage claims against the officers as individuals, it indicated that the damage claims would not arise from the Civil Rights Act itself,[187] and that the substantive source of the right to damages was, in fact, uncertain:

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181. 401 U.S. 37 (1971).
182. Loncassion v. Leekity, 334 F. Supp. 370 (D. N.M. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969).
183. 392 U.S. 409 (1968).
184. 301 F. Supp. 85 (D. Mont. 1969). Because the court found itself confronted by a statute providing neither for remedies nor jurisdiction, it relied on the Supreme Court's treatment of 42 U.S.C. § 1982—a statute similar on both points—in the *Jones* case. Although in *Jones* the Court left open the question of an implied right to damages, in a later case arising under § 1982 it awarded damages. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).
185. 28 U.S.C. § 1343(4) (1970).
186. Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 91 (D. Mont. 1969).
187. 25 U.S.C. §§ 1302 *et seq.* (1970).

> In Bell v. Hood . . . the district court held that the right to damages for the unlawful search, etc., was a common law right arising out of state law. If this case should ever go so far an interesting problem would arise as to the source of any law giving plaintiffs a right to damages as against the tribe or its officers.[188]

Spotted Eagle is distinguishable, however, since the court in *Jones* failed to reach the issue of an implied damage remedy under the jurisdictional provision.[189] *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*,[190] where the Supreme Court held that there was an implied right to damages, had yet to be decided.

In the other damage case decided under the Act, *Loncassion v. Leekity*,[192] the plaintiff sued the Zuni Pueblo for injuries suffered when a tribal policeman allegedly acted negligently in shooting the plaintiff, a minor, when he sought to escape arrest for being drunk. The court found jurisdiction,[193] citing *Spotted Eagle* to support the argument that the asserted violation of rights created by the Act was a claim arising under the laws of the United States.[194] Noting the similarity between the Fourth and Fifth Amendments and sections of the Act,[195] the court held that damages were recoverable under the Act based on the Supreme Court's treatment of Fourth Amendment violations in *Bell v. Hood* and *Bivens*. The court quoted the Bell case:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.[196]

As to subject matter jurisdiction including a damage remedy, the court's reliance appears to be soundly placed. In *Bivens*, the Supreme Court reversed the district court's finding that it lacked jurisdiction over a damage claim against federal officers for an allegedly unlawul search. Although the Court acknowledged that the Fourth Amendment does not in so many words provide for enforcement through an award of money damages as a consequence of its violation,[197] it stated that its creation of a damage remedy, "should hardly seem a surprising proposition"[198] in light of the

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188. Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 91, n. 16 (D. Mont. 1969).
189. 28 U.S.C. § 1343(4) (1970).
190. 403 U.S. 388 (1971).
191. 327 U.S. 678 (1946).
192. 334 F. Supp. 370 (D. N.M. 1971).
193. 28 U.S.C. § 1331(a) (1970)
194. Loncassion v. Leekity, 334 F. Supp. 370, 372 (D. N.M. 1971)
195. 25 U.S.C. § 1302(2), (8) (1970)
196. Loncassion v. Leekity, 334 F. Supp. 370, 374 (D. N.M. 1971)
197. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971).

historical availability of damages for invasions of personal interests in liberty.

The *Loncassion* court attempted to settle the question of personal jurisdiction over the tribe which was left open in *Spotted Eagle*. The court attributes the tribe's exemption from suit to a congressional attempt to preserve tribal self-government and cultural autonomy. While conceding that "[t]he Act does not, in so many words, provide that a tribe may be sued under its provisions nor does it explicitly waive sovereign immunity as a defense,"[199] the court concludes that "to hold otherwise would render the Act an unenforceable admonition."[200] However, this pronouncement is not dispositive of tribal immunity under the Act.

This analysis of tribal immunity in a case arising under the Act constitutes a departure from clear precedent and is based on unsound reasoning. An equally well established corollary of tribal immunity is the requirement of express congressional waiver, demanding the construction of ambiguous terms in the tribe's favor.[201] No such language appears on the face of the Act or in its legislative history;[202] nor can the *Bivens* case, despite its strong assertion of remedies for violation of federal rights, be considered as dispositive of the issue. Although noting that official immunity had been relied on by the lower court, the Supreme Court expressly refused to consider the issue.[203]

Furthermore, a construction of the Act as a waiver, justified by the necessity of remedies, ignores both the operation of equitable remedies, and, more importantly, the possibilities for both compensation and deterrence achieved through individual liability. Thus, even though the tribe remains immune, the plaintiff is not without a remedy against the officer as an individual. An apparent necessity for forcing the tribe into court should not imply a waiver of all immunity where remedies short of damages will sufficiently redress grievances. This argument is principally supported by the policy behind the immunity which exempts only certain wealth of the tribe —its land base—to preserve it for future generations of dependent beneficiaries. This policy has been articulated in the following words:

> As rich as the Choctaw Nation is said to be in land and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all

198. *Id.* at 395.
199. Loncassion v. Leekity, 334 F. Supp. 370, 373 (D. N.M. 1971).
200. *Id.*
201. Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895); *see* the discussion of tribal immunity, *supra*, text accompanying notes 66-95.
202. *See* note 1 *supra*. *Cf.* HARV. COMM. at 1359-1360.
203. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397-398 (1971).

> the demands which private parties chose to prefer against it.[204]

Notably, the Court in *Bivens* did not create a remedy without first articulating the need for sensitivity to countervailing considerations: "The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress."[205] The overriding federal policy against alienation of tribal lands is such a consideration.

Assuming the possibility of individual liability, the tribal agent will demand insurance as a condition of employment in order to mitigate the possibility that he will be rendered impecunious by a judgment. Because the agent is sued in his individual capacity, immunity is not a defense.[206] Thus as to compensation, the limits of the insurance must realistically reflect possible judgments. As to deterrence, premiums paid by the tribe will reflect claims made against the insurer. Thus, to minimize expenditures, the tribe will be strongly motivated to control violations of the Act through reasonable care in the selection and training of its agents. This factor will also operate as a deterrent against the individual officer because his misdeeds will jeopardize his employment. Thus, the operation of this individual liability raises the Act above the *Loncassion* court's characterization of it as an "unenforceable admonition,"[207] and negates the need to infer a congressional waiver of immunity.

B. The Damage Remedy as Applied to Individuals

Both the *Spotted Eagle* and *Loncassion* cases also examined the individual liability of tribal agents for violations of the Act. The first clause of the Act, "No tribe in exercising powers of self-government shall . . .",[208] militates against individual liability. The court in *Spotted Eagle* so concluded, noting that the Act, like the Fourth and Fifth Amendments, is negative in form and is directed against the tribe as a governmental entity.[209] However, the court relied on the district court's remand of *Bell v. Hood*:

> [B]ut the rights described in the Fourth and Fifth Amendments are not 'federally protected' against invasion by individuals. As said before, those amendments only 'fed-

204. Thebo v. Choctaw Tribe of Indians, 66 F. 372, 376 (8th Cir. 1895).
205. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971).
206. However, the policy against alienation of tribal lands is inoperative because the individual Indian's land allotment is immunized from a judgment execution based on a transaction occuring prior to the issuance of patent in fee by 25 U.S.C. § 354 (1970). *See* Mullens v. Simmons, 234 U.S. 192 (1914).
207. Loncassion v. Leekity, 334 F. Supp. 370, 373 (D. N.M. 1971).
208. 25 U.S.C. § 1302 (1970).
209. Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 89 (D. Mont. 1969).

erally protect' rights from invasion by the federal government.[210]

In reaching the opposite conclusion on the issue of individual liability under the Act, the court in *Loncassion* noted the similarity between the Act and the Fourth and Fifth Amendments, but relied on *Bivens* as reflecting applicable law: violation of Fourth Amendment rights by a federal agent acting under color of his authority creates a federal common law action for damages.[211] Because the court found that the freedom from unreasonable interference and use of excessive force by police officers accrued from Fourth Amendment rights, individual liability of the tribal policeman was based on the *Bivens* rationale.

Individual liability of the tribal officer for violations of federally guaranteed rights under the Act appears to be an accurate application of *Bivens*. Because the federal courts will never be forced to create a common law tort against abuse by state officers insofar as the action of state officers in violating constitutional safeguards pursuant to state law is prohibited by federal statue,[212] *Bivens* might be limited to federal officers over whom the federal courts have a supervisory control. Such a limitation on *Bivens* should not prevent recovery against most tribal police officers. *Settler v. Yakima Tribal Court*[213] and *Colliflower v. Garland*[214] have found federal habeas corpus jurisdiction to hear the petition of a person incarcerated by a tribal court because these courts function, at least in part, as "arms of the federal government."[215] To support its characterization of the tribal courts, the court in *Colliflower* stated: "Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains partial control over them."[216]

Although the defendants in *Settler* had sought to distinguish *Colliflower* on the basis of federal funding, the court further elucidated the characterization as including "the historical origin of the tribal courts and their scope of authority."[217] Since tribal policemen are officers of the court, they would be included in the "federal instrumentality" theory applicable to the twelve Courts of Indian Offenses, and probably wherever the nexus between the tribal justice system and the federal government was clear in both origin and current control.

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210. *Id.* at 90 (citing 71 F. Supp. 813, 818 (S.D. Cal. 1947)).
211. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971).
212. 42 U.S.C. § 1983 (1970), cited *supra* note 177.
213. 419 F.2d 486 (9th Cir. 1969).
214. 342 F.2d 369 (9th Cir. 1965).
215. *Id.* at 379.
216. *Id.*
217. Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969).

VI. PENDENT JURISDICTION

In three cases federal district courts have heard claims extraneous to the Act under the doctrine of pendent jurisdiction.[218] Alleging excessive use of force by a tribal policeman, plaintiff in *Loncassion v. Leekity*[219] sought damages from the Pueblo and the policeman individually. The court sustained its jurisdiction,[220] finding the requisite amount in controversy and that the action involved a claim arising under the laws of the United States.[221]

The plaintiff also asserted rights as a third-party beneficiary to a contract between the Bureau of Indian Affairs and the Pueblo concerning the latter's assumption of police services. It was alleged that the Pueblo had breached their contract by negligently hiring and training the officer. The court concluded that "[t]hese allegations state a claim upon which relief can be granted, which the court may hear as a pendant claim."[222] Since the court had already decided that the Pueblo had waived its immunity through the contract,[223] it apparently felt plaintiff's claim thereunder to be within the jurisdiction of the state courts.

Plaintiffs in *Spotted Eagle v. Blackfeet Tribe*[224] sought equitable and declaratory relief and damages against the tribe and its officers. After finding that it had equitable jurisdiction over the tribe and its officers,[225] the court cited *United Mine Workers v. Gibbs*[226] as authorizing pendent federal jurisdiction for damage claims arising under state law, where there is a federal claim of sufficient substance to confer subject matter jurisdiction on the courts.[227] The court found that it had pendent jurisdiction over the damage claims because they shared "a common nucleus of operative fact"[228] with plaintiffs' other claims. However, the court failed to specify the source of the damage claim, except to note that it did not stem from the Act.

In *Dodge v. Nakai*[229] plaintiffs sought an injunction against enforcement of an allegedly unlawful exclusion order, damages and other relief. Without clearly specifying which of plaintiffs' grievances the Navajo tribal court had power to redress, the court held that plaintiffs' claims were properly before it, despite plaintiffs' failure

218. Loncassion v. Leekity, 334 F. Supp. 370 (D. T.M. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); Dodge v Nakai, 298 F. Supp. 17 (D. Ariz. 1968).
219. 334 F. Supp. 370 (D. N.M. 1971).
220. *Id.* at 375.
221. *Id.* at 372.
222. *Id.* at 375.
223. *Id.* at 373.
224. 301 F. Supp. 85 (D. Mont. 1969).
225. *Id.* at 89.
226. 383 U.S. 715 (1966).
227. Spotted Eagle v Blackfeet Tribe, 301 F. Supp. 85, 91 (D. Mont. 1969).
228. *Id.*
229. 298 F. Supp. 17 (D. Ariz. 1968).

to exhaust tribal remedies.[230] The court justified its holding by noting that the non-Indian defendants would not be proper parties before a tribal court, and that litigating some claims before the tribal court, only to have them again brought before the federal courts, would create a multiplicity of suits. Although varying necessarily with the facts of each case, these factors present the strongest arguments in favor of pendent jurisdiction.

The Supreme Court has delineated the doctrine of pendent jurisdiction in *Hurn v. Oursler*[231] and *United Mine Workers v. Gibbs*.[232] Plaintiff in the latter case, alleging that the Union had maliciously interferred with his employment contract, sought relief under both federal labor law and state common law. After noting that plaintiff's federal claim was of sufficient substance to confer subject matter jurisdiction and that the federal and state claims derived from a common nucleus of operative fact, the Court concluded:

> But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.[233]

Circumstances could be hypothesized where a party, aggrieved by a tribe's violation of the Act, also had a separate cause of action in state or tribal court. Suppose, for example, that in enforcing an exclusion order tribal policemen tortuously batter the party sought to be excluded. Although the availability of state courts to Indian plaintiffs has been settled in the affirmative,[234] the question of whether the tribal court has jurisdiction over a non-Indian remains unanswered.[235] This example assumes the propriety of the non-federal jurisdictional base.

Where the federal claim arising under the Act was dismissed before trial, such as if the tribe had asserted its immunity from suit, the court is bound by *Gibbs* to dismiss the non-federal claim as well.[236] However, where a federal claim has become moot at a later phase of the litigation, the Supreme Court has upheld, as an exercise of discretion, the district court's retention of the state claim

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230. *Id.* at 26.
231. 289 U.S. 238 (1933).
232. 383 U.S. 715 (1966).
233. *Id.* at 725.
234. Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).
235. *E.g.*, 25 C.F.R. § 11.22 (1971) the text of which is, in part, as follows:
> The Courts of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts *by stipulation of both parties. (emphasis added)*

236. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

based on "the extent of the investment of judicial energy and the character of the claim."[237]

Even in situations where the federal claim persists throughout the litigation, ". . . pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."[238] The Supreme Court noted the considerations of ". . . judicial economy, convenience and fairness to litigants . . . ,"[239] while at the same time cautioning:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[240]

Thus, in exercising its discretion, a court must be sensitive to factors unique to claims brought under the Act and to the fact that pendent jurisdiction is *discretionary*.

The analogue to comity as a limitation on pendent jurisdiction is the opportunity to hear the state claim as a vehicle of further effectuating a federal policy. Civil rights cases have been suggested as illustrative.[241] In *Anderson v. Nosser*,[242] an action brought by civil rights demonstrators alleging abuse while they were incarcerated, the court found pendent jurisdiction to hear plaintiffs' state law claims for cruel and unusual punishment, false imprisonment and false arrest. Thus as to state claims arising out of a "common nucleus of operative fact" with a federal claim under the Act, the policy of deference to state courts suggested in *Gibbs* is weakest because the Act creates a civil rights case. Nevertheless, a court's decision to deny pendent jurisdiction in such a civil rights case, where the liability of the party dismissed was well-settled under state law, has been upheld.[243] Even in this favored area, the exercise of pendent jurisdiction remains discretionary.

Although the tribal courts are not a very likely source for a "sure-footed reading of applicable law,"[244] they deserve the deference included under the principle of comity bcause of their unique status as a dispenser of customary law.[245] Arguably, where all litigants are Indian—hence acclimated to the customary, non-adversary

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237. Rosado v. Wyman,, 397 U.S. 397, 403 (1970).
238. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).
239. *Id.*
240. *Id.*
241. Note, *United Mine Workers v. Gibbs and Pendent Jurisdiction,* 81 HARV. L. REV. 657 (1968).
242. 438 F.2d 183 (5th Cir. 1971); *accord,* Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1970) (false imprisonment); Sherrod v. Pink Hat Cafe, 250 F. Supp. 516 (N.D. Miss. 1965) (assault and battery).
243. Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).
244. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).
245. Shepardson, *Problems of the Navajo Tribal Courts in Transition,* 24 HUMAN ORGANIZATIONS 250 (1965).

character of the tribal court—hearing the claim within the full formalies of a federal court furthers neither convenience nor fairness to the litigants.[246] Also, the federal court's award—whether determined by judge or jury—will reflect non-Indian economic values. The defendant is thereby subjected to a twofold disability because both his capacity to pay and his victim's need for compensation are measured by standards which do not take into account the economic realities of the reservation. On the basis of these considerations it is suggested that, as an exercise of their discretion, the federal courts should deny pendent jurisdiction over claims resolvable in the tribal courts.

CONCLUSION

This note has attempted to elucidate ways in which equitable and declaratory relief under the Indian Civil Rights Act can be granted with a minimum of disruption to the tribal system of self-government; it is not concerned with congressional wisdom in passing the Act. The ultimate ramifications of the Act on tribal self-government remain to be seen. Congressional policy toward the Indian tribes has continually vascillated between an attempt to assimilate them into the Anglo-American mainstream, on the one hand, and an attempt to keep them separate, as an autonomous entity, on the other. While the Indian Civil Rights Act was no doubt designed to secure very important and fundamental rights to Indians living under a tribal system of government, its impact on the tribes cannot help but be assimilative to a great extent. Though it cannot yet be known whether decisions from litigation of similar constitutional provisions will be applied part and parcel under the Act, it is doubtful whether the tribal courts will assert any notable degree of independence for fear that any pronounced self-reliance on their part will again result in the devastating assimilationist policy of the 1950's.

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246. Although it was decided before passage of the Act, Littlell v. Nakai, 344 F.2d 486 (9th Cir. 1965), supports deference to the tribal courts as a limitation on pendent jurisdiction. Plaintiff had sought access to the federal court under 28 U.S.C. § 1331(a) to enjoin the tribal council from interfering with his retainer contract. In dismissing the action, the court acknowledged the strong congressional policy of placing responsibility for their own affairs with the tribal governments and stated in conclusion, "the basic principle of diversity jurisdiction requires reference of the suit to the Navajo Tribal Courts." *Id.* at 489.