DO YOU KNOW WHAT YOU ARE? YOU ARE WHAT YOU IS; YOU IS WHAT YOU AM:[1] INDIAN STATUS FOR THE PURPOSE OF FEDERAL CRIMINAL JURISDICTION AND THE CURRENT SPLIT IN THE COURTS OF APPEALS

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INTRODUCTION

Who is an Indian for purposes of criminal prosecution in the United States' federal courts under the Major Crimes Act, 18 U.S.C. § 1153?[2] The statute does not say. While seemingly straightforward, the answer to this question may be complicated and uncertain. Moreover, if one is in the Eighth Circuit or the Ninth Circuit, the answer may differ. Historically, the test from *U.S. v. Rogers*[3] determined Indian status for federal criminal prosecution. However, over time, as political, institutional and demographic conditions changed, so did the test.

Congress' enactment of the Major Crimes Act, which was based on alarmism and devoid of a doctrinal foundation, changed the test for Indian status and how it is applied. In the aftermath of the Court's decision

1. FRANK ZAPPA, YOU ARE WHAT YOU IS (Zappa Records 1981).

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2. 18 U.S.C. § 1153.

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. * * *

Id. The statute does not define "Indian."

3. 45 U.S. 567 (1846).

in *Ex Parte Crow Dog*,[4] United States Indian agents—who were the government's official overseers of Indian country—insisted that something be done to police Indian Country, a place where federal law only had effect against non-Indians.[5] With the enactment of the Major Crimes Act, Congress provided federal courts the jurisdiction they previously lacked—criminal jurisdiction over Indians in Indian Country. What was previously the criterion for exception from federal jurisdiction is now an element of the crime under federal law. Despite its flawed inception, the Major Crimes Act is the federal law applied today in Indian Country to prosecute Indians. The application of the Major Crimes Act depends on the determinative test for Indian status, which is the prerequisite for federal jurisdiction in Indian Country.

Recently, two opinions—the Eighth Circuit's opinion in *United States v. Stymiest*[6] and the Ninth Circuit's opinion in *United States v. Cruz*[7]—have revealed a split in the federal circuits' tests to determine Indian status for federal criminal jurisdiction. This piece describes and analyzes the historical test and its development over time. Then it analyzes the contemporary test and the differences between the Eighth and Ninth Circuits' tests for determining Indian status for federal criminal jurisdiction. Finally, it discusses the reasons why a uniform federal test is necessary, and which test is optimal.

The Eighth Circuit's test, which is the original and more pragmatic of the two, is optimal. The Ninth Circuit's rigid application of only four exhaustive factors with descending weight[8] differs from the Eighth Circuit's general application of as many as five illustrative factors.[9] The Ninth Circuit's *Cruz* opinion moves the standard towards the tribal citizenship rule of *Morton v. Mancari*,[10] which will make establishing federal jurisdiction more difficult. This will discourage federal prosecutions in Indian Country and keep many serious criminals—who are otherwise prosecutable under § 1153—from being prosecuted. Making the test for jurisdiction more difficult will inhibit the federal government from fulfilling its fiduciary duty to keep citizens safe and undermine the rule of law in Indian Country.

The Eighth Circuit's more general test makes jurisdiction easier to prove and does not undermine criminal justice and judicial economy. The Eighth Circuit's test incentivizes § 1153 prosecutions, allows the federal government to better fulfill its duties and strengthens the rule of law in Indian Country. The Eighth Circuit's test should be adopted to aid law enforcement, ameliorate conditions in Indian Country, and promote equal protection for Indians across the country.

4. 109 U.S. 556 (1883).
5. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 1 (1994).
6. 581 F.3d 759 (8th Cir. 2009).
7. 554 F.3d 840 (9th Cir. 2009).
8. *Id.* at 846.
9. *Stymiest*, 581 F.3d at 763.
10. Morton v. Mancari, 417 U.S. 535 (1974).

I. BASED ON THE CONSTITUTION AND THE LEGACY OF FEDERAL JURISPRUDENCE IN THIS AREA, INDIAN STATUS MAY BE CONSIDERED THE ONE CONSTITUTIONALLY-COUNTENANCED RACIAL CLASSIFICATION.

Article I, Section 8, Clause 3 of the United States Constitution ("the Commerce Clause") establishes a special relationship between the federal government and tribes.[11] The Commerce Clause empowers Congress to "regulate Commerce *with* foreign Nations, and among the several States, and *with* the Indian Tribes . . . ."[12] The word "with" is used pertaining to both foreign nations and Indian tribes. The Constitution's use of the word "with" in relation to these subjects, but not States, suggests that Indians have had a special relationship with the federal government since the Nation's founding.[13] This relationship has been one that excludes Indian status from the imposition of absolute equality.[14]

The absolute (or strict) equality principle in contemporary U.S. jurisprudence has evolved from the Equal Protection Clause in Section One of the Fourteenth Amendment.[15] However, the Fourteenth Amendment's Apportionment Clause in Section Two states: "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*."[16] Section One includes an equality principle with which Section Two, which excludes Indians, would seem to be in conflict. It is extremely unlikely that the drafters of the Fourteenth Amendment carelessly drafted such a blatant conflict into the Constitution, no less the same Amendment.[17]

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11. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974).
12. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).
13. *See, e.g.*, Williams v. Gover, 490 F.3d 785 (9th Cir. 2007) (holding that tribes have the right to determine membership subject to the plenary power of Congress, but unless Congress speaks to tribal membership, tribes are not constrained by the constitutional limitations placed on federal or state governments; the BIA cannot define tribal membership).
14. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978).
15. U.S. CONST. amend. XIV § 1.
16. U.S. CONST. amend. XIV § 2 (emphasis added).
17. There are also several federal civil statutes located at Title 25 of the United States Code that acknowledge "Indian" in a manner indicating that it is a special constitutionally-countenanced racial classification. *E.g.*, 25 U.S.C. § 482 (2006) (denying certain loans to persons "of less than one quarter Indian blood"); 25 U.S.C. §§ 261–4 (2006) (limiting non-Indians permitted to trade with Indians, but not limiting Indians trading with other Indians); 25 U.S.C. § 302 (2006) (placing Indian pupils in Reform School); Ute Partition and Termination Act ("UPA"), 25 U.S.C. §§ 677–677aa (2006) (dividing Ute Indians into classes based on blood quantum and providing separate and distinct rights to those classes). Interestingly, the UPA is a 1954 Act that required the Tribe's divisible assets—land, property, monies, and other assets—be distributed between "full-bloods" and "mixed-bloods," with other indivisible assets—such as gas, oil and mineral rights and unadjudicated or unliquidated claims—to be jointly managed. Under the UPA,

> the 'full-blood' group was comprised of those individuals with at least 'one-half degree of Ute Indian blood and a total Indian blood in excess of one-half.' 25 U.S.C. § 677a(b) (2006). The 'mixed-blood' group was comprised of those individuals who either did not possess sufficient Ute Indian blood or other Indian blood to qualify as 'full-bloods' or who became a mixed-blood member by

Instead, the paradox between Sections One and Two of the Fourteenth Amendment illustrates that the absolute equality principle does not apply to those with Indian status, and that Section Two protects a class or status of persons who have a special relationship with the federal government, which is free from the imposition of strict equality.[18] This makes more sense when read in light of Article I. It can be reasonably inferred that the drafters wrote the Amendment and that representatives enacted it with the understanding that it was consistent with what had been written and ratified just eighty years before. Therefore, Indian status as a racial classification violates neither the Equal Protection nor the Due Process Clauses of the Fourteenth Amendment.[19]

The ability to classify Indians as a separate people in the law primarily by their race is a unifying facet of the Constitution, federal statutory law, and federal common law. The Constitution sets up a unique class of persons. Federal statutory language, such as the Major Crimes Act,[20] parses out and addresses Indians on racial grounds. Federal common law—as discussed—historically determined who was an Indian for federal jurisdiction and prosecution based on racial identity. In the event that they were multi-tribal or multi-racial, Indians could be determined to fall under federal jurisdiction through ancestry and the additional recognition by other members of the class. While the test for Indian status has become more nuanced in response to changes in American-Indian society, the fundamental Indian ancestry requirement remains the threshold of the test. One still must have one drop of Indian blood to advance to the second prong in the analysis. The legacy of Indian race for federal jurisdiction endures.

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choice under section 677c after having been initially classified as a full-blood member. 25 U.S.C. §§ 677a(c), 677c.

Hackford v. Babbitt, 14 F.3d 1457, 1462 (10th Cir. 1994). The UPA also terminated federal supervision of the mixed-bloods, who had been disenrolled from the tribe. Under the UPA, the Secretary of the Interior then divided and distributed the Tribe's assets in 1961. Congress' act and the Secretary's actions explicitly distinguish Indians from non-Indians on the basis of race, endorse the tribe's actions, and illustrate the federal government's acceptance of race-based tests for Indian status. This supports the constitutionally-countenanced racial classification argument first articulated by Robert N. Clinton and Carole Goldberg. *See generally* ROBERT N. CLINTON, CAROL E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 94–97 (5th ed. 2007).

18. *See* Carole Goldberg, *Members Only: Designing Citizenship Requirements for Indian Nations*, 50 KANSAS L. REV. 437–71 (2002); *see also* Carole Goldberg, *American Indians and Preferential Treatment*, 49 UCLA L. REV. 943–89 (2002).

19. Indian status as a racial classification would not then violate the Due Process Clause of the Fifth Amendment through the "doctrine of incorporation" or the articles of the Constitution itself. U.S. CONST. amend. V; U.S. CONST. art. VI, cl. 2. The Court's earlier jurisprudence reinforces this argument.

20. 18 U.S.C. § 1153(a) (2006) (stating "[a]ny Indian who commits against the person or property of another Indian *or other person* any of the following offenses . . . within the Indian country, shall be subject to the same law and penalties as all other persons . . . within the exclusive jurisdiction of the United States") (emphasis added).

II. HISTORICALLY, THE TEST FROM *ROGERS*, WHICH RELIED ON RACE, DETERMINED INDIAN STATUS FOR FEDERAL CRIMINAL JURISDICTION.

In *Rogers*, the Supreme Court considered whether a white man who had left the United States to live in the Cherokee Nation could be prosecuted in federal court for acts committed in Indian Country. In 1836, nine years before the case, Rogers had willfully left the United States and incorporated himself into the Cherokee Nation. In the ensuing years, he lived with the tribe, married a Cherokee woman, and fathered several Cherokee children.[21] The Court found that Rogers indeed exercised all "the rights and privileges of a Cherokee Indian in the said tribe."[22]

In 1845, a federal grand jury indicted Rogers in the court for the District of Arkansas for the murder of another white man that occurred in the Cherokee Nation. Rogers argued that the district court lacked jurisdiction. The jurisdictional rule at the time, which was affirmed by the Court in *Rogers*, was that federal courts lacked jurisdiction over Indians in Indian Country. Rogers asserted that by his acts he had become a Cherokee Indian for purposes of proper jurisdiction and that he was excepted from the criminal jurisdiction of the United States.[23] He also asserted that the victim, who had similarly left the United States and long lived among the Cherokees as one of their own, should have been considered an Indian for jurisdictional purposes.[24] Under Rogers' theory of the case, the murder involved two Indians and the federal courts of the United States lacked jurisdiction.[25]

Despite these facts, the Court held that Rogers could not become an Indian by his actions.[26] Instead, because he lacked Indian blood, Rogers—and by implication the victim—remained non-Indian for purposes of United States criminal jurisdiction.[27] In holding that the federal courts properly exercised jurisdiction over the case, the Court stated:

> [W]e think it very clear, that a white man who . . . is adopted in an Indian tribe *does not thereby become an Indian*. . . . He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the [jurisdictional] exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their *race*. It does not speak of members of a tribe, but of the race generally,—of the family of Indians . . . .[28]

Rogers established that one could only be an Indian for purposes of exception from federal jurisdiction by his or her race. While future courts state that the *Rogers* test is a two prong test—(1) that one have some degree of Indian blood, and (2) be recognized as an Indian by a tribe or the

21. *Rogers*, 45 U.S. at 567.
22. *Id.* at 571.
23. *Id.*
24. *Id.* at 568.
25. *Id.*
26. *Id.* at 572–73.
27. *Id.*
28. *Id.* (emphasis added).

federal government[29]—the language of the *Rogers* opinion illustrates that the test was actually only one factor: race as an Indian. The opinion's language illustrates that Indian blood was not just a factor, but was *the factor*[30] in the determination of Indian status for federal jurisdiction.

Although *Rogers* predated *Plessy v. Ferguson*,[31] this was the other side of the "one drop rule" made famous in the landmark case. The "one drop rule" dictated that persons with one drop of African-American blood were subject to laws that required blacks to use separate accommodations from those of whites.[32] Similarly, the Court's rule in *Rogers* excluded those lacking at least one drop of Indian blood from being excepted from federal jurisdiction for acts committed in Indian Country. The federal courts properly exercised jurisdiction over non-Indians, particularly whites, for acts committed in the territory of a tribal sovereign based solely on their race. At this time, the question of Indian status was answered simply by biology. One either was or was not Indian based on race, and federal courts had proper jurisdiction based on this criterion.

A. The Court's Opinion in Ex Parte Crow Dog *Lead to the Enactment of the Major Crimes Act*[33] *and Changed How the Test for Indian Status Was Applied.*

The race-based test derived from *Rogers* remained essentially unchanged for the next 128 years.[34] However, the United States' jurisdiction and how the test was applied did change. The Courts' application of the test changed after the *Ex Parte Crow Dog* case.[35] Public outrage over the case's outcome lead to the test being used to determine who could be charged as an Indian by the federal government under the Major Crimes Act as opposed to who was excepted from federal jurisdiction as it had previously been used.

In *Ex Parte Crow Dog*, the Supreme Court considered whether to issue a writ of habeas corpus for a Brule Sioux Indian, Crow Dog, who had been sentenced to death by the District Court of the Dakota Territory for the murder of another Brule Sioux Indian, Spotted Tail.[36] The murder had occurred within Sioux territory, between two Indians of the same tribe

29. United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996).
30. *Rogers* makes no mention of any additional factors for Indian status, which illustrates that race as an Indian was the necessary and sufficient factor.
31. 163 U.S. 537 (1896).
32. *See id.* at 537–39 (citing 1890 Louisiana statute, chapter 111, which required separation of blacks and whites on railways and discussing Homer Plessy, who was one-eighth "African blood," yet considered black under the law); *see* Christine B. Hickman, *The Devil and the "One Drop" Rule*, *in* MIXED RACE AMERICA AND THE LAW 104, 104–10 (Kevin R. Johnson ed., 2003); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, *in* MIXED RACE AMERICA AND THE LAW 111, 111–15 (Kevin R. Johnson ed., 2003); Kenneth A. Davis, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 HASTINGS CONST. L. Q. 199 (1976).
33. Now codified at 18 U.S.C. § 1153 (2009).
34. The test remained essentially the same until *Morton v. Mancari*, 417 U.S. 535 (1974) and *United States v. Antelope*, 430 U.S. 641 (1977).
35. *See* discussion *infra* Part II.B.
36. Ex Parte Crow Dog, 109 U.S. 556, 557.

and band. Under the traditional rule, the federal courts lacked jurisdiction.

Relying on provisions from the Fort Laramie Treaty of 1868,[37] excepting Indian-on-Indian acts from United States jurisdiction, the Court held that Crow Dog's conviction and sentence for the murder of Spotted Tail were void and issued a writ of habeas corpus.[38] The Court explicitly stated the rule that "in [the] case the offender is one of the Indians . . . the injured person cannot himself be one of the same tribe" if the U.S. is to have jurisdiction. The Court held that acts "by Indians against each other were left to be dealt with by each tribe for itself."[39] This was simply a reiteration of the historical federal jurisdictional rule that had previously been acknowledged in *Rogers*.

Membership was also equated with race. While arcane and pejorative, the language of the opinion illustrates that to the Court, membership in a tribe was synonymous with Indian race; and moreover, that Indian-on-Indian crimes were not within the purview of federal courts.[40] Tribal members or citizens were by definition racially Indian, and all others were just visitors. Tribes had exclusive authority to prosecute crimes committed by Indians in Indian Country and the United States retained jurisdiction over those who lacked Indian blood.

Ex Parte Crow Dog's outcome was the impetus for the Major Crimes Act. United States Indian agents, who were anxious to extend their jurisdiction, saw an opportunity and whipped the American public and the federal government into a fury of hyper-alarmism over the *Ex Parte Crow Dog* decision.[41] The Court's opinion, which (to those who were unfamiliar with the tenets of federal Indian law) seemingly freed a murderer and an Indian no less, sparked public outrage.[42] Indian agents capitalized on this ignorance and indignation. Public calls rang out to fill the apparent jurisdictional void so that justice could be properly served in the future.[43] With the strong urging of the Indian agents who were seeking to impose their authority on members of a previously excepted class of persons, within two years Congress answered its constituents with the Major

37. Treaty of Fort Laramie, U.S.-Sioux Nation, Apr. 29, 1868, 15 Stat. 635.
38. *Crow Dog*, 109 U.S. at 562–63, 572.
39. *Id.* at 568, 571–72.
40. *See id.* at 567–69.
41. Harring, *supra* note 5, at 1. United States Indian agents were the government's official overseers of Indian country. They implemented federal policy in Indian Country and were clearly incentivized to increase their own authority there. The more authority—or legitimated use of violence and coercion—a government official has, the easier it is for that official to implement and carry out government policies. Thus, it is obvious why Indian agents worked to get the Major Crimes Act enacted and extend federal criminal jurisdiction within the bounds of Indian Country.
42. *See* CLINTON, GOLDBERG & TSOSIE, *supra* note 17.
43. *See generally* Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 962–64 (1975); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 526 (1976); *see also* Warren Stapleton, *Indian Country, Federal Justice*, 29 ARIZ. ST. L.J. 337 (1997); Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction,* 14 BYU J. P. L. 173 (2000).

Crimes Act.[44] The lust for authoritarian governmental control and a breach of the tenets of Indian law lead to this change in the law.

The Major Crimes Act was challenged and sustained as constitutional under the plenary power doctrine in *United States v. Kagama*.[45] In *Kagama*, the Court held that Congress' plenary power over Indians flowed from the guardian-ward relationship between the federal government and the tribes. The Court held that this relationship created a trusteeship with federal authority to punish crimes in Indian Country.[46] On the surface, *Kagama*'s outcome was seemingly rooted in the federal government's duty to shield Indian tribes from the states.[47] However, the opinion's outcome was actually the absolutely extra-Constitutional vehicle to thrust federal criminal adjudicatory authority against Indians in Indian Country.[48] From now on, the trusteeship could be used as a "sword" to prosecute Indians instead of the shield it had been used for previously.

Without altering the fundamental test of race, the Major Crimes Act reversed the use of Indian status. With the enactment of the Major Crimes Act, Congress provided the federal courts the jurisdiction they previously lacked. What was previously the criterion for exception from federal jurisdiction was now an element of crimes under federal law. Today, only persons with Indian status can be prosecuted under the Major Crimes Act, and the federal government prosecutes Indians under this law for serious criminal acts committed against others in Indian Country.[49]

After *Rogers*, *Ex Parte Crow Dog*, and *Kagama*, Indian status was still relatively straightforward. It was simply race. In fact, the fundamental rule of race for jurisdiction derived from these cases endures today as the general "some Indian blood" prong of the modern test. Judge Canby of the Ninth Circuit describes the modern test: "[i]n the most general terms, a person must meet two requirements to be an Indian: he or she must (1) have some Indian blood, and (2) be regarded as an Indian by his or her community."[50] Over time, as tribal demographics changed through indi-

44. CLINTON, GOLDBERG & TSOSIE, *supra* note 17, at 95–96 (quoting HARRING, *supra* note 5, at 1).

45. 118 U.S. 375, 376, 384–85 (1886).

46. *Id.* at 384–85.

47. *Id.* at 383–84 ("The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . .").

48. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 138–41 (2009) (discussing *Kagama*'s lack of Constitutional mooring in upholding the Major Crimes Act and the case's serving as the doctrinal footing for the "growth of federal legislation to be deployed on the reservation." *Id.* at 141).

49. 18 U.S.C. § 1153 (2009) (containing the following elements—the person is an Indian, committed one of the enumerated crimes, while within Indian country); CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 87 (Tribal Legal Studies Textbook Series 2004).

50. WILLIAM C. CANDBY, JR, AMERICAN INDIAN LAW 8–9 (4th ed. 2004) (Citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (1942)).

vidual relocation[51] and increased inter-racial marriage[52]—which lead to greater inter-racial and inter-tribal progeny and membership—another general prong (recognition as an Indian by an Indian tribe or the federal government) became embodied in the courts' jurisprudence.[53]

B. An Early Determination of "Who is an Indian" for Federal Criminal Jurisdiction Under Changed Conditions Illustrated the Potential Complexity of this Seemingly Straightforward Question.

The *Ex Parte Pero*[54] case revealed the potentially complicated nature of determining a person's Indian status for federal jurisdiction and foreshadowed future difficulties. In *Pero*, the Court of Appeals for the Seventh Circuit considered whether the petitioners, Pero and Moore, were appropriately issued a writ of habeas corpus after they had been convicted of murder in a Wisconsin State court and sentenced to incarceration in a state prison for actions that had occurred on the Bad River Indian reservation.[55] The men had petitioned a federal district court for a writ of habeas corpus, which it granted "under the three tests: (1) preponderance of blood, (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian."[56]

The federal district court's findings of fact, which the Seventh Circuit reiterated, were that—although not enrolled in a tribe—Moore was the son of an Indian mother who was a full-blooded Indian of the St. Croix Band of Lake Superior Chippewas, and of a half-blood father whose mother was a full-blood of the LaPointe Band of Lake Superior Chippewas, and that Moore himself had lived on the reservation, maintained tribal relations, and was recognized by other Indians to be an Indian.[57] The district court found that Pero was a full-blooded Indian who had been allotted lands within the reservation and received a certificate of competence from the Department of the Interior, which allowed him to lease or alienate his allotted lands without Secretarial approval.[58] Under these facts, the federal district court issued a writ of habeas corpus for Moore and Pero.

In the Court of Appeals for the Seventh Circuit, the court heard the Wisconsin State Prison warden's appeal of the grant of the writ. The warden asserted that because Moore was not an enrolled member of any In-

51. POMMERSHEIM, *supra* note 48, at 156–81 (analyzing historical movements and legal interactions of individual Indians, federal and state citizenship laws regarding these Indians, and the case of *Elk v. Wilkins*, 112 U.S. 94 (1884)).
52. *See* Margo S. Brownell, *Who Is an Indian?: Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275 (2001); Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, AMERICAN SOCIOLOGICAL ASSOCIATION (1995); RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1942 160 (1987); Press Release, U.S. Bureau of the Census, Census Counts on Specific Racial Groups (June 12, 1991).
53. United States v. Antelope, 430 U.S. 641, 646–47 (1977).
54. 99 F.2d 28 (7th Cir. 1938).
55. *Id.* at 29.
56. *Id.* at 31.
57. *Id.*
58. *Id.* at 31–32.

dian tribe, and that because his father was a half-blood and his mother was not an enrolled member of any Indian tribe, Moore was not an Indian for purposes of federal jurisdiction. Moreover, the warden asserted that Pero ceased to be an Indian within the meaning of the federal statute when he received his certificate of competence. The warden argued that this certificate had converted Pero's land into fee simple and made him legally as competent as a non-Indian, which made him similar to others generally residing in Wisconsin and therefore, subject to Wisconsin's criminal jurisdiction.[59] Because one was a mixed-blood (tribally and racially) who was not a member of a tribe, and the other was competent to make decisions regarding his land, the warden asserted that the Wisconsin court had proper jurisdiction to try and convict Moore and Pero for the acts, regardless of the fact that they were committed by persons who were racially Indian in Indian Country.

Despite not being enrolled with a tribe because he descended from Indians and was acknowledged to be an Indian by an Indian community, Moore argued that he was Indian for purposes of federal jurisdiction. The court agreed. Based on evidence that his mother—despite not being enrolled with any tribe—was an Indian, his father—though mixed race—was also an Indian, and that Moore had lived in an Indian community and had been recognized by that community to be an Indian, the court concluded that he was an Indian for purposes federal jurisdiction.[60]

The court reasoned that a person who is racially Indian and recognized by an Indian community to be an Indian occupies Indian status for federal jurisdiction.[61] The court also held that Pero, as a full-blooded Indian, continued to be an Indian for federal jurisdiction purposes after being deemed "competent" by the Secretary of Interior.[62] Being deemed competent by a federal administrative agency does not erase one's Indian race and political status for federal jurisdiction. The court held that the Wisconsin State Court had lacked jurisdiction to try and convict Moore and Pero. The court held that federal courts are the appropriate venue to try persons for acts committed in Indian Country when they are racially Indian and recognized by an Indian community.

In *Pero*, although both men were racially Indian, questions were raised about their status. Because one man—who was three-quarters total Indian blood—descended from different tribes and was not enrolled in a tribe; and the other man—who was a full-blood Indian—was deemed competent to administer his allotted land, arguments were made that they were outside of federal jurisdiction. These arguments were flimsy, but illustrate that even when racial identity is clear, the question of who is an Indian for purposes of federal criminal jurisdiction can still be a problem that involves considerable uncertainty.[63] *Pero*'s outcome illustrated

59. *Id.* at 32–33.
60. *Id.* at 31–32.
61. *Id.* at 31.
62. *Id.* at 34–35.
63. CLINTON, GOLDBERG & TSOSIE, *supra* note 17, at 575–78 (illustrating problems with determining "who constitutes an Indian for purposes of the [federal] criminal jurisdiction statutes").

that adherence to Indian racial identity may well provide an answer, but it also forecasted how much more complicated arriving at an answer might be in the future when conditions in American law and Indian demographics change.

C. In Morton v. Mancari[64] *and* U.S. v. Antelope,[65] *the Court Changed the Test, and Now Indian Status is Generally Regarded to be More Political and Less Racial.*

In *Morton*, the Court held that, because Indians are a distinct political class, Indian preference in employment and advancement does not constitute invidious racial discrimination.[66] However, the Court's ruling was limited "only to members of 'federally recognized' tribes."[67] The Court did not elaborate much beyond enrollment being necessary to be a member of this political class. At first glance, *Morton* might seem to have simplified who is an Indian for purposes of federal law (at least, in the civil context)—enrolled members of federally recognized tribes. However, while *Morton* provided a key to fitting people into Indian status that could be transferred to the criminal side, the case did not clear up the other questions that may arise in an analysis of status for jurisdiction. Nor did its criminal law progeny *Antelope*.

Today, the inquiry is more complicated and uncertain than it was in *Ex Parte Pero*. In *Antelope*, the Supreme Court encountered *Morton*'s issue in the criminal context. Specifically, the Court again considered whether federal law regarding Indians is based on an impermissible racial classification. In *Antelope*, three enrolled members of the Coeur d'Alene Tribe, who had robbed and killed an elderly non-Indian woman within the boundaries of the Coeur d'Alene Indian Reservation, challenged their prosecutions and convictions for burglary, robbery, and murder under 18 U.S.C. § 1153.[68] The defendants contended that had they otherwise been non-Indians, they would have been charged under Idaho State Law,[69] which would have required the prosecution to prove premeditation and deliberation.[70] The federal murder statute, 18 U.S.C. § 1111, which contained a felony-murder provision, did not require the prosecution to prove these same elements. The defendants argued that this difference

64. 417 U.S. 535 (1974).

65. 430 U.S. 641 (1977).

66. *Morton*, 417 U.S. at 554 n.24.

67. *Id.*

68. United States v. Antelope, 430 U.S. 641, 642–43 (1977).

69. *Id.* at 643 n.2 (stating that "[u]nder United States v. McBratney, 104 U.S. 621 (1882), a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law").

70. *Id.* at 644 n.5 ("All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty . . . . shall be murder in the first degree. . . . All other kinds of murder are of the second degree." (quoting Idaho Code § 18-4003 (Supp. 1976))).

was a disadvantage that was based on their racial status as Indians, which constituted invidious racial discrimination.[71]

Unlike the Court of Appeals, which had "concluded that [the] respondents were 'put at a serious racially-based disadvantage;'"[72] the Court held that the defendants were appropriately charged and convicted under 18 U.S.C. § 1153. The Court held that this was not because of their race, but because they were enrolled members of a federally acknowledged Indian tribe.[73] The Court reasoned that "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."[74] The Court also noted the converse of the proposition and iterated that termination of a tribe would cease to make its members subject to federal criminal jurisdiction.[75] The Court did not delve into the nuances of what—beyond enrollment in a federally acknowledged tribe—satisfies the requirements for Indian status for federal criminal jurisdiction. However, the Court did state that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction . . . ."[76] Thus, tribal enrollment is an automatic trigger for federal jurisdiction, but what else beyond that is sufficient is still not concrete.

With *Morton*, the Court changed Indian status in the federal common law from the racial classification it had always been to a political classification.[77] In *Antelope*, the Court applied this rule in the criminal context to make clear that enrollment in a federally acknowledged tribe is sufficient for federal criminal jurisdiction. However, the Court did not go beyond this. *Morton* and *Antelope* created a legal fiction that Indian status is not based on race or ancestry. The Court created the fiction despite the fact that Indian ancestry is universally required for tribal membership, which derivatively incorporates the 'some Indian blood' racial (or ancestral) requirement into federal jurisprudence. Moreover, this implantation of the requirement for membership tracks the first prong of the general test for criminal jurisdiction encapsulated in Judge Canby's statement above.

However, enrollment in a federally acknowledged tribe is not necessary. The Court's language in *Antelope* kept the door open for an undetermined aggregation of other factors to be sufficient for federal jurisdiction. The Court noted that enrollment is not an "absolute requirement for fed-

71. *Id.* at 643–44.

72. *Id.* at 644 (quoting *Antelope*, 523 F.2d at 406).

73. *Id.* at 647.

74. *Id.* at 646 (citing Morton v. Mancari, 417 U.S. 535 (1974) and Fisher v. District Court, 424 U.S. 382 (1976)).

75. *Id.* at 647 n.7.

76. *Id.*

77. *See* Simmons v. Eagle-Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965) ("[I]t seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood . . . . Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race,' Indians can only be defined by their race."), *aff'd* 384 U.S. 209 (1966). *Eagle-Seelatsee*, which was summarily affirmed by the Supreme Court, illustrates that it was the common understanding that Indians were determined primarily by race.

eral jurisdiction,"[78] which allows for individuals to be recognized as Indians through other means. More cleverly, the Court addressed Indians as "a separate people," which is an ambiguous phrase that may allude to racial or political classifications or both. Then, immediately after this, in the same sentence, the Court included the language "their own political institutions" to clarify that the classification is consistent with *Morton*.[79]

Through the language quoted in the preceding paragraph, the Court reconciled the gap between the historical standard and the effect of *Morton*. With this, the Court kept a wide berth for finding Indian status for federal jurisdiction. The Court also made potential future analyses of Indian status to be far more complex than those prior to *Morton* and *Antelope* had been. What exactly constitutes a sufficient degree of Indian blood is uncertain. More importantly for this piece, what exactly constitutes actual recognition by a tribe or the federal government is also uncertain.

Since *Antelope*, the prongs of Indian blood and government recognition—through a combination of factors—have been analyzed thoroughly by the Courts of Appeals for the Eighth and Ninth Circuits. More importantly, these courts have different manners of determining whether the second prong of the test for federal criminal jurisdiction is satisfied.

III. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT APPLIES A TWO-PRONG TEST AND CONSIDERS AS MANY AS FIVE FACTORS IN THE ANALYSIS OF THE SECOND PRONG.

The Eighth Circuit recently illustrated its test for Indian status and its concomitant complexities in *United States v. Stymiest*.[80] The Eighth Circuit considers two prongs: "whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."[81] The court applies several factors, which are illustrative and not exhaustive, to determine satisfaction of the second prong. To the Eighth Circuit, some of the factors appropriate to consider in the analysis are:

> 1. enrollment in a tribe; 2. government recognition formally or informally through providing the defendant assistance reserved

78. United States v. Antelope, 430 U.S. 641, 647 n.7 (1977) (citing Ex Parte Pero, 99 F.2d 28, 30 (7th Cir. 1938)).

79. *Id.* at 646. It is reasonable to infer that the Court squared its rule in *Antelope* with its prior rule from *Morton* for reasons attendant to the doctrine of (horizontal) *stare decisis*—namely, consistency and coherence in its common law rules. The doctrine is designed to precipitate order in the law, allow for intelligible and consistent evolution of the law and foster the actual and perceived integrity of the judicial process. State Oil Co. v. Khan, 522 U.S. 3, 20 (2004) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)); Vasquez v. Hillery, 474 U.S. 254, 265-266 (1986). Moreover, *stare decisis*—as opposed to isolated 'weak precedents'—is necessary for efficiency in common law rules. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply Side Analysis*, 97 NW. U. L. REV. 1551, 1565–81 (2003). Here, the Court's decision seems designed to accomplish all of these.

80. 581 F.3d 759 (8th Cir. 2009).

81. *Id.* at 762 (citing United States v. Rogers, 45 U.S. 567, 572–73 (1846); United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995); United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001) (noting that four circuits and state courts apply this test.)).

> only to Indians; 3. tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction; 4. enjoying benefits of tribal affiliation; and 5. social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.[82]

A combination of "some Indian blood and tribal enrollment are sufficient to establish Indian status,"[83] and while enrollment is the most important factor under the second prong, "it is not essential and its absence is not determinative."[84]

The issue in *Stymiest* was whether Matthew David Stymiest ("Stymiest") was an Indian for purposes of federal criminal prosecution under the Major Crimes Act, 18 U.S.C. § 1153. The court's finding that Stymiest was an Indian for federal jurisdiction was based on the following facts: Stymiest was not an enrolled member of any Indian tribe; he was 3/32 Ojibwe Indian;[85] And he was the grandson of an enrolled member of the Leech Lake Band of Ojibwe in Minnesota—but he and his mother were less than one-quarter Leech Lake Ojibwe and not eligible for enrollment.[86] Thus, Stymiest would not be considered a descendant of the first degree. However, Stymiest had resided with his grandfather for approximately six months in 2003, during which time, his grandfather had "share[d] his heritage" with Stymiest.[87]

Stymiest was employed and resided on the Rosebud Sioux Reservation in the year before the incident that gave rise to the prosecution.[88] He had also socialized with other Indians on the reservation and had said to social acquaintances that he was an Indian.[89] Stymiest had held himself out to be a non-member Indian, which lead to general social recognition as an Indian.

Stymiest had also received emergency medical care several times at the local Indian Heath Services ("IHS") facility. While he was not entitled to receive these benefits, he had held himself out to be an Indian to the authorities. However, Stymiest's representations to IHS authorities may not have mattered because doctors at IHS facilities "must stabilize any patient in an emergency situation, regardless of Indian status . . . ."[90]

More importantly, the Rosebud Sioux tribal authorities had prosecuted Stymiest in tribal court. He had acquiesced to tribal jurisdiction, pleaded guilty, received reduced sentences and had been incarcerated in the tribal jail for the offenses.[91] With this rather complex set of facts, the

82. *Id.* at 763.
83. *Id.* at 764 n.2.
84. *Id.* at 764 (citing St. Cloud v. United States, 702 F.Supp. 1456, 1461 (D.S.D. 1988).
85. *Id.* at 762, 764–65.
86. *Id.* at 765.
87. *Id.* (quoting Stymiest's grandfather's testimony) (internal quotations omitted).
88. *Id.*
89. *Id.* at 765–66.
90. *Id.* at 765.
91. *Id.* ("Although the Rosebud Tribe has no jurisdiction to punish anyone but an Indian, its 'powers of self-government' included the power to prosecute non-member Indians such as Stymiest, if he was a Leech Lake Band Indian" (citing Oliphant v.

Eighth Circuit held that Stymiest was an Indian for purposes of federal jurisdiction under § 1153.[92]

The Eighth Circuit applies five factors with relative equality. Although tribal enrollment is considered slightly more important, it is not necessary for the court to find recognition as an Indian. Moreover, the five factors are an illustrative list of appropriate criteria to consider and not set in stone. The court considers eligibility for benefits reserved only for American Indians and even receipt of assistance one is not actually eligible for as an Indian to be relevant for a finding of Indian status.

The court considers tribal court prosecutions and the defendant's acquiescence to tribal jurisdiction to be relevant in the determination of Indian status. In the Eighth Circuit, a person's representations of Indian heritage made to members of an Indian community may satisfy the social recognition factor and support a finding of Indian status. The court considers socializing with other Indians informally; and does not require adherence to Indian religious practices, engagement in ceremonies, participation in Indian cultural festivals such as dance competitions, or participation in tribal elections to find social recognition as an Indian. The Eighth Circuit considers a person's subjective consideration of himself or herself as an Indian to be relevant. However, the court does not infer this from a person's in-court testimony; rather, the court infers this from a person's behavior—such as self-identification to tribal authorities, federal authorities, and members of an Indian community during casual encounters. Ultimately, by submitting to tribal arrests, being prosecuted in tribal court, holding himself out to be an Indian, and receiving forms of recognition as an Indian, the court held Stymiest to be an Indian for federal criminal jurisdiction.[93]

IV. THE COURT OF APPEALS FOR THE NINTH CIRCUIT APPLIES THE SAME GENERAL TWO-PRONG TEST, BUT CONSIDERS ONLY FOUR FACTORS IN A RIGID, HIERARCHICALLY WEIGHTED MANNER.

The Ninth Circuit recently decided *Cruz*, which is a case that quintessentially illustrates its test for finding Indian status for federal jurisdiction and the complexities of the analysis. The case also clearly illustrates the differences in how the Eighth and Ninth Circuits administer the same

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Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978), and quoting 25 U.S.C. § 1301(2) (2009))).

92. *See id.* at 762 (describing the events that gave rise to the case). Stymiest and a group of people gathered at a home on the Rosebud Sioux Indian Reservation. The party included several Indians and one non-Indian, Juan Hernandez. All consumed alcohol. At some point, Juan choked his pregnant girlfriend and hit her in the abdomen, and left the party. Stymiest followed, leaving and returning once to grab a knife from the kitchen and leaving once again. He returned to the group (knife still clean) and iterated "I just fucked up Juan." *Id.* The homeowner then found Juan outside with "significant head and rib injuries that caused traumatic brain injury, respiratory failure, and fluid overload." *Id.* Stymiest was arrested by tribal police, identified himself as an Indian, and was turned over to federal authorities for having committed a major crime in Indian country.

93. *Id.* at 766.

multi-factor test for determining if one is an Indian for federal jurisdiction.

In several cases prior to *Cruz*, the Ninth Circuit had developed and "distilled a specific test for determining whether an individual can be prosecuted . . ." under the Major Crimes Act.[94] The Ninth Circuit laid out its test in *United States v. Keys*[95] and *United States v. Bruce*.[96] In *Keys*, the court stated "[t]he test, first suggested in *United States v. Rogers*, 45 U.S. 567 (1845), and generally followed by the courts, considers (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian."[97]

The court subsequently expounded on this test in *Bruce*. Regarding the first prong, the court stated that "[b]ecause the general requirement is only of 'some' blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong."[98] Regarding the second prong, the court was more explicit. The court stated that there are four factors to "probe[ ] whether the Native American has a sufficient non-racial link to a formerly sovereign people."[99] The court also stated

> [concerning t]he second prong of the test – tribal or federal government recognition as an Indian, . . . courts have considered, in declining order of importance, evidence of the following: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; 4) social recognition as an Indian through residence on a reservation and participation in Indian social life [when making a determination of Indian status].[100]

94. *Cruz*, 554 F.3d at 842; *see* United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005); United States v. Keys, 103 F.3d 758 (9th Cir. 1996); United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979), *cert denied,* 444 U.S. 859 (1979).
95. 103 F.3d 758 (9th Cir. 1996).
96. 394 F.3d 1215 (9th Cir. 2005).
97. *Keys*, 103 F.3d at 761. In *Keys*, the issue was not whether the perpetrator was an Indian. Rather, the issue was whether the victim—who was a child—was an "Indian" for federal jurisdiction purposes. The court held that the child—despite not being enrolled in an Indian tribe—was an "Indian" for federal jurisdiction purposes because she was eligible for enrollment with a tribe. Moreover, the court held that Keys' prosecution was not based on the race of the victim, but rather the victim's membership in a political group, and therefore did not violate the equal protection clause of the Fourteenth Amendment. *Id.*
98. *Bruce*, 394 F.3d at 1223.
99. *Id.* at 1224 (quoting St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988)).
100. *Id.* (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)) (internal quotations omitted). *See id.* at 1223–27 (holding that a woman who was not enrolled with any tribe was an Indian for purposes of an affirmative defense under 18 U.S.C. §1152 when she was born on an Indian reservation, had been subject to the exercise of tribal criminal jurisdiction, participated in Indian religious ceremonies, and obtained benefits based upon her status as an Indian). The court discusses the differing standard of *Bruce* and *Cruz* at length. *Bruce* involved a § 1152 prosecution and *Cruz* was a § 1153 prosecution. Under § 1153, Indian status is an element of the offense that the government must prove beyond a reasonable doubt. *Bruce*, 394 F.3d at 1229. However, under the General Crimes Act, § 1152, "the question of Indian status is an *affirmative defense*," *Cruz*, 544 F.3d at 850 (quoting *Bruce*, 394 F.3d at 1222–23), which "the defendant must prove . . . by a preponderance of the evidence [absent another statutory standard]." *Cruz,* 1612 (quoting United States v. Beasley,

In *Cruz*, the issue was whether Christopher Patrick Cruz ("Cruz") was an Indian for purposes of federal criminal prosecution under § 1153.[101] Cruz was the son of Roger Cruz (a Hispanic) and Clara Clarice Bird (a Blackfeet and Blood Indian). The Blackfeet Tribe is a federally recognized tribe in Montana; the Blood Indian Tribe is a Canadian tribe.[102] Cruz's mother was 29/64 Blackfeet Indian and 32/64 or one half Blood Indian. Cruz was 29/128 Blackfeet Indian and 32/128 Blood Indian.[103] Cruz was 61/128—or just under one half total Indian blood. He was approximately twenty-two percent Blackfeet Indian, which is less than the one fourth Blackfeet blood quantum that is necessary to be eligible for enrollment in the Blackfeet Tribe. However, he was still considered a "descendant" by the tribe,[104] which entitled him to access Indian Health Services and federal educational grants. His descendant status also guaranteed him on-reservation hunting and fishing privileges.[105] Although entitled, the court found that he never took advantage of these services and benefits.[106]

As a young person, Cruz lived on the Blackfeet Reservation in Browning, Montana for three or four years. At either seven or eight, Cruz moved away from the reservation. He lived outside of the Blackfeet reservation (and other Indian Country) for ten years. In 2005, he moved to Cut Bank, Montana, a border-town just outside of the Blackfeet Reservation.[107] While there, he worked as a Bureau of Indian Affairs fire fighter in Indian Country, but did not participate in Indian religious ceremonies, cultural festivities, or tribal elections.[108] Just before the acts that gave rise to the case were committed,[109] he moved back onto the Blackfeet Reserva-

346 F.3d 930, 935 (9th Cir. 2003)). "Of course, the beyond-a-reasonable-doubt standard 'requires more exacting proof' than the preponderance-of-the-evidence standard." *Cruz*, 544 F.3d at 1612 n.16 (quoting Jones v. United States, 527 U.S. 373, 377 (1999)). Under the beyond a reasonable doubt standard of § 1153, the proponent must get more facts admitted in evidence to establish a claim. *Cruz*, 544 F.3d at 1612 n.16 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986) (citations omitted)).

101. Under § 1153, the defendant's Indian status is an element of any Major Crimes Act offense that the government must prove beyond a reasonable doubt. *Bruce*, 394 F.3d at 1229. This differs from § 1152, under which "the question of Indian status is an *affirmative defense*." *Cruz*, 544 F.3d at 850 (quoting *Bruce*, 394 F.3d at 1222–23).
102. The court did not consider Cruz's Blood Indian ancestry for purposes of federal jurisdiction. For federal jurisdiction, a defendant's tribal affiliation must be with a tribe acknowledged by the United States federal government. *Lapier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993).
103. *Cruz*, 554 F.3d at 843.
104. *Id.* at 846–47.
105. *Id.* at 852.
106. *Id.* at 846, 848.
107. *Id.* at 843
108. *Id.* at 848.
109. *See id.* at 843 (describing the events that gave rise to the case). On December 21, 2006, Cruz was drinking with friends at a motel in Browning, Montana on the Blackfeet Reservation. An altercation over the use of a cell phone took place between Cruz and Eudelma White Grass, who were both heavily intoxicated. Ms. White Grass was seriously injured. Cruz was arrested and charged in both the tribal and federal courts. In federal court, Cruz was charged with "'[a]ssault resulting

tion and rented a motel room on a long-term basis.[110] As a descendant, Cruz was subject to the Blackfeet Tribal Court's criminal jurisdiction and, in fact, had been prosecuted by that court prior to this case.[111] Cruz conceded that he met the first prong because he was twenty-two percent Blackfeet.[112] However, because he did not meet any of the four factors above, the court held that he was not an Indian for purposes of federal criminal jurisdiction under the second prong of the test.[113]

Regarding the Ninth Circuit's first factor, Cruz was not enrolled (or eligible for enrollment) in the Blackfeet Tribe. In fact, because Cruz was not even eligible for enrollment, the government "expressly waived any argument that Cruz satisfies the first *Bruce* factor . . . "[114] Regarding the second—and to the court in this case, the most important—factor, the court held that Cruz had not been recognized as an Indian by federal or tribal authorities. The court found this despite the fact that Cruz occupied "descendant" status under the Blackfeet tribal code[115] and had been prosecuted in tribal court.[116]

Inexplicably, in its argument, the government "[did] not contend that his descendant status, *in and of itself*, [was] a factor [the court should have considered] in performing the *Bruce* analysis."[117] Instead, the government argued that Cruz's descendant status was relevant to the Ninth Circuit's second factor, in that it made him eligible to receive benefits reserved only for American Indians; and that his eligibility satisfied the second factor. The court dismissed this argument on the grounds that mere eligibility for benefits is not sufficient. Rather, only actual receipt of benefits reserved exclusively for American Indians satisfies the Ninth Circuit's second factor under *Bruce*.

The court held that tribal court prosecution does not demonstrate that a person is an Indian for purposes of federal criminal prosecution.[118] The

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in serious bodily injury,' 18 U.S.C. § 113(a)(6), which is a federal offense when committed by an Indian on an Indian reservation, 18 U.S.C. § 1153." *Id.*

110. *Id.* at 843, 846.
111. *Id.* at 846, 850–51.
112. *Id.* at 846.
113. *Id.* at 847.
114. *Id.* at 847.
115. While BLACKFEET ORD. 14, which—in addition to being poorly drafted or not properly edited for several years—governs enrollment states children born after August 30, 1962 must have "one-fourth degree of Blackfeet Indian blood or more" for enrollment and 'descendant status,' *Id.* at § 2(d), the Director of Tribal Enrollment testified that Cruz occupies descendant status and enjoys its benefits, including access to education moneys and tribal hunting and fishing rights. The majority and the dissent agree that Cruz is properly considered by the tribe to occupy 'descendant' status pursuant to its law. For an interesting discussion of the potential deleterious impacts of poor drafting, see Kevin Gover, *For Want of a Comma, a Casino is Lost*, INDIAN COUNTRY TODAY, March 20, 2002.
116. *Cruz*, 554 F.3d at 850.
117. *Id.* at 847.
118. It is important to note that the *Cruz* and *Stymiest* opinions do not affect tribal court prosecutions. *Cruz* and *Stymiest* only considered the relevance of tribal prosecutions to find proper federal criminal jurisdiction over non-member Indians. In the *Cruz* opinion, the Ninth Circuit addressed tribal criminal prosecutions derivatively to say that a tribal court prosecution does not demonstrate that one is an Indian for

majority held that the Blackfeet Tribe's prosecution of Cruz is irrelevant for determining who is an Indian for purposes of federal criminal prosecution, stating: "the fact that charges were brought against Cruz in tribal court does not necessarily mean the tribal court had jurisdiction over him."[119] On this point, the majority concluded that "[i]n this context, a showing that a tribal court on one occasion may have exercised jurisdiction over a defendant is of little *if any* consequence in satisfying the status element in a § 1153 prosecution."[120]

The court also found that Cruz did not satisfy the Ninth Circuit's tribal benefits factor under the same "actual receipt" requirement.[121] The court reasoned that "[g]iven *Bruce*'s clear admonition that 'tribal enrollment,' and therefore *a fortiori* descendant status, 'is not dispositive of Indian of Indian status,' we reject the dissent's argument that mere descendant status with the concomitant eligibility to receive benefits is effectively sufficient to demonstrate 'tribal recognition.'"[122]

Regarding the Ninth Circuit's fourth factor, the social recognition factor, the court held that Cruz had not been recognized socially as an Indian. The court found that Cruz did not adhere to Indian religious practices or engage in ceremonies, never participated "in Indian cultural festivals or dance competitions," and "[did] not carry a tribal identification card" or vote in tribal elections.[123] Because Cruz had only lived on the Blackfeet Reservation for three or four years as a child and a short time prior to the incident, but had not participated in Indian social life, he was not an Indian for federal jurisdiction. The court held, therefore, that Cruz had been improperly charged and convicted as an Indian under § 1153.[124]

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purposes of federal prosecution. *Id.* at 846 n.7, 851. The dissent argued that the tribe's prosecution of Cruz demonstrates that the tribe recognizes him to be an Indian and asserted that under the *Bruce* test, the tribe's recognition of Cruz as an Indian makes him an Indian for purposes of federal prosecution. *Id.* at 852 (Kozinski, J., dissenting). The *Stymiest* court found that tribal courts only have jurisdiction to prosecute and punish Indians. United States v. Stymiest, 581 F.3d 759, 765 (8th Cir. 2009) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978)). The *Stymiest* court also noted that "it is possible for a non-Indian to be prosecuted [in a tribal court] if he does not object." *Id.* These are both conventional findings. Accordingly, *Cruz* and *Stymiest* do not impact tribal court prosecutions of criminals.

119. *Cruz*, 554 F.3d at 847 n.7.
120. *Id.* at 851 (emphasis added).
121. *Id.* at 849.
122. *Id.* at 847 (quoting United States v. Bruce, 394 F.3d 1215, 1224–25 (9th Cir. 2005)) (internal citations omitted).
123. *Id.* at 848.
124. *Id.* at 844 ("We review the district court's decision under the standard applied to sufficiency-of-the-evidence challenges: 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted)); *id.* at 851 (holding that since the evidence viewed under this standard "does not demonstrate that Cruz is an Indian or that he meets *any* of the *Bruce* factors, no rational trier of fact could have found that the government proved the statutory element of § 1153 beyond a reasonable doubt"). *See also* United States v. Vicarra-Martinez, 66 F.3d 1006, 1009–10 (9th Cir. 1995); United States v. Morgan, 238 F.3d 1180, 1185–86 (9th Cir. 2001) (noting applicability of this standard to jurisdictional elements).

The court further explained that the test for the second (government recognition through receipt of assistance) and fourth (social recognition) factors is not only whether tribal authorities recognize one as an Indian, but also the extent to which one considers himself to be an Indian.[125] The court stated hat "the extent to which an individual considers himself an Indian—whether by deciding, for example, to 'reside[ ] on a reservation,' to 'participat[e] in Indian social life,' or to 'recei[ve] assistance reserved only to Indians,'—is most certainly relevant in determining his Indian status."[126] The court did not explicate how this is to be reasonably inferred.

Under the majority's opinion, the Ninth Circuit applies the four factors in declining order of importance. The Ninth Circuit considers only actual receipt—and not mere eligibility—of assistance or benefits reserved only for American Indians sufficient for the second (government recognition through receipt of assistance) and third (tribal benefits) factors. It considers tribal court prosecutions of non-member Indians irrelevant for determining their recognition as an Indian; and the court measures participation in Indian social life and social recognition by one's adherence to Indian religious practices, engagement in ceremonies, participation in Indian cultural festivals or dance competitions, possession of a tribal identification card, and participation in tribal elections for satisfaction of the social recognition factor. Lastly, the Ninth Circuit considers a person's subjective consideration of himself or herself to be an Indian relevant in its determination of Indian status for federal criminal jurisdiction.

A. However, There is a Strong Dissent in Cruz *that is Commensurate with the Eighth Circuit's Test and the Historical Standard.*

To Chief Judge Kozinski, Cruz should have been considered an Indian for purposes of federal jurisdiction. The dissent argued that the Blackfeet Tribe's extension of 'descendant' status to Cruz and its prosecution of Cruz in tribal court demonstrated that the tribe recognized him to be an Indian.[127] Moreover, the dissent asserted that under the *Bruce* test, the tribe's recognition of Cruz as an Indian made him an Indian for purposes of federal prosecution.[128] Further, that Cruz was living on the reservation when the incident occurred and was eligible for benefits reserved only to American Indians (despite not having taken advantage) was further evidence that he was an Indian.[129] To the dissent, the tribe's recognition was most salient and whether Cruz considered himself to be an Indian during the trial was irrelevant.

The dissent then argued that that majority misapplied *Bruce*. According to the dissent, the majority applied *Bruce* as if the four factors were the only things properly considered in the analysis with the outcome being determined by the relative weight of the factors. With the *Cruz* opinion, "[the majority turned] the four factors into a rigid multi-part

125. *Cruz*, 554 F.3d at 849–50.
126. *Id.* at 850 (quoting *Bruce*, 394 F.3d at 1224) (internal citations omitted).
127. *Id.* at 852 (Kozinski, J., dissenting).
128. *Id.*
129. *Id.*

balancing test, with the various prongs reinforcing or offsetting each other, depending on how they are analyzed."[130]

The dissent vitiated the majority's application of the four-factor test with an alternative reading of *Bruce* based on a genealogical analysis of the cases from the Eighth Circuit and District Court of South Dakota, the court from which the Ninth Circuit had originally adopted the test. Citing *United States v. Ramirez*,[131] the last case in which the court applied the *Bruce* test (and omitted any reference to declining order of importance), the dissent stated *Bruce* was describing four factors that are illustrative of what is appropriate to consider when determining Indian status for federal jurisdiction. To support this point, the dissent recalled that "nothing in *Bruce* turned on the relative weight of the factors."[132] The *Bruce* court did not adopt the test as a hierarchy to be strictly applied because it had no cause to.[133]

The dissent then examined the Eighth Circuit case the test was borrowed from, *United States v. Lawrence*.[134] The *Lawrence* court took the four-factor language from an observation made by the District Court of South Dakota in *St. Cloud v. United States*.[135] The dissent found that the *St. Cloud* court stated "[t]hese factors do not establish a precise formula for determining who is an Indian. Rather, they merely guide analysis of whether a person is recognized as an Indian."[136] Accordingly, *Bruce*—like the cases it adopted the four-factors from—was "descriptive rather than prescriptive."[137] Under this conventional reading of *Bruce* in context, the dissent argued that the description of the factors was the equivalent of obiter dicta and that the majority misapplied the multi-factor test when it hierarchically weighed them.[138]

Moreover, the dissent asserted that the majority misread *Bruce* to find that the case held that if tribal enrollment is not dispositive of Indian status, descendant status surely does not prove Indian status.[139] The dissent argued that this is flawed. The *Bruce* court found that a woman who was not enrolled with any tribe was an Indian for federal jurisdiction when she was born on an Indian reservation, had participated in Indian religious ceremonies, and had obtained benefits based upon her status as an Indian.[140]

In fact, *Bruce* does not stand for the proposition that if the defendant is not enrolled, then he cannot be found to be an Indian under another kind of tribal recognition such as 'descendant' status.[141] As the dissent pointed

130. *Id.*
131. 537 F.3d 1075, 1082 (9th Cir. 2008).
132. *Cruz*, 554 F.3d at 852 (Kozinski, J., dissenting).
133. *Id.*
134. 51 F.3d 150, 152 (8th Cir. 1995).
135. 702 F.Supp. 1456, 1461–62 (D.S.D. 1998).
136. *Id.* at 1461.
137. *Cruz*, 554 F.3d at 852 (Kozinski, J., dissenting).
138. *Id.*
139. *Id.* at 853.
140. *Bruce*, 394 F.3d at 1235.
141. *Cruz*, 554 F.3d at 853 (discussing the majority's position and citing *Bruce*, 394 F.3d at 1224–25).

out, *Bruce* held "the converse: that the absence of tribal enrollment does not preclude finding that the defendant is an Indian—which was the question presented here."[142] Therefore, the dissent concluded that the facts of *Cruz* satisfied a combination of the Ninth Circuit's factors and that Cruz should have been recognized to be an Indian. To the dissent, this should have made Cruz subject to federal criminal jurisdiction.[143]

B. The Cruz *Dissent is Commensurate with the Historical Standard for Federal Criminal Jurisdiction.*

Rogers, *Ex Parte Crow Dog*, *Kagama*, and *Pero* all illustrate that the historical standard for Indian status was race-based. Additionally, the people in the *Pero*, *Bruce*, *Ramirez*, *St. Cloud*, *Lawrence*, and *Stymiest* cases all held themselves out to be Indian only by virtue of their race and their social behavior in an Indian community. A contemporary test that is race-based (or gives race a more prominent role in the analysis) is commensurate with the historical standard. Under both the *Cruz* majority and dissent, race as an Indian remains relevant through the "some Indian blood requirement." However, the degree to which race plays a role in the analysis differs. The majority's higher standard for finding recognition under the third and fourth factors, without considering tribal court prosecutions, makes the Indian race component an afterthought and the dissent regards race prominently.

The *Cruz* dissent is a defense of the more general application of the two-prong, multi-factor test and the continuation of a race-based standard. Judge Kozinski's dissent makes the 'some Indian blood' prong the threshold issue. It makes the first prong the primary determinate for Indian status because it is an all or none determination settled by whether one has any Indian blood.

The dissent's analysis also considers race under the Ninth Circuit's second factor through consideration of other means of tribal recognition, such as 'descendant' status. Cruz's 'descendant' status was based on his biological descent from the tribe. Because he was 22% Blackfeet, the tribe recognized him in a manner other than official tribal citizenship, which is political. The dissent took account of this and of the fact that Cruz had been prosecuted in tribal court, which had been done because the tribe regarded Cruz to be racially Indian (even though he was not politically an Indian). The dissent would also have taken a person's being considered an Indian based on casual interactions in an Indian community to be relevant for satisfaction of the social recognition factor and the "recognition as an Indian" prong. This is in some part racial because Indians do not generally regard persons without Indian blood to be Indian. Thus, those without Indian blood cannot appropriately be regarded to be socially Indian. With its consideration of these factors under the "recognition as an Indian" prong, the dissent regards race more prominently than the majority.

142. *Id.*
143. *Id.*

The *Cruz* dissent applies the *Bruce* test in a manner that weighs the factors more equally than the *Cruz* majority, which places its primary emphasis on the first two factors (tribal enrollment and government recognition through receipt of assistance reserved to Indians) because it weighs the factors in descending order of importance. To the *Cruz* majority, enrollment and other official federal or tribal recognition—the more political criteria—are key. The *Cruz* majority opinion puts a heavy emphasis on tribal enrollment for satisfaction of the second prong, which minimizes the consideration of race because race is only derivatively incorporated as a requirement for enrollment in a tribe. Under the majority's reasoning, while enrollment would automatically satisfy the second prong; a lack of enrollment, even with a combination of the other factors, will make it very difficult to prove Indian status. Under the *Cruz* majority opinion, race is an ancillary consideration in light of the weight of enrollment as official recognition by a tribal governmental institution.

A more general application of any number of relevant factors under the second prong makes finding recognition (and satisfaction of the second prong) easier. The dissent's test, which considers all the factors as simply illustrative and equally weighed, is also akin to *Stymiest*'s test and more in line with the historical standard.

The dilution of race in the analysis is exhibited by a simple hypothetical that illustrates how a person's race as an Indian could conceivably cease to be relevant. For instance, if a tribe were to do away with Indian ancestry as a requirement for enrollment, a person could be an Indian by virtue of a tribe's official recognition that he or she is a tribal citizen despite having no Indian blood. This scenario is logically plausible[144] and such a result is possible under the *Cruz* majority's opinion. If the *Morton* standard were adopted and membership in a federally recognized tribe became the bright-line rule for federal criminal jurisdiction and a tribe had no Indian blood requirement, it would eliminate the first prong from the test. This would clearly be anathema to *Rogers* and the line of cases decided until *Morton* and *Antelope*.

However, under the *Cruz* dissent, this would not be possible. Some Indian blood would be necessary and lack of political status would not seriously undermine a case for Indian status. Under the dissent's analysis, race remains the primary standard through being the threshold prong and considered under the factors of the second prong. This would not be anathema to *Rogers*, and for that matter, the cases since. If the *Cruz* majority's opinion were to lead to the *Morton* rule becoming the standard for

144. However unlikely, a tribe could conceivably eliminate the requirement of Indian blood for membership. It has always been the position of the federal government and the courts of the United States that tribes have the exclusive authority to determine their membership. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (providing historical analysis of tribe's right to determine membership and standing for proposition that tribes have absolute authority to define membership criteria); Williams v. Gover, 490 F.3d 785 (9th Cir. 2007) (holding that tribes have absolute and exclusive right to determine membership and that *federal bodies may not define tribal membership*) (emphasis added); Martinez v. Southern Ute Tribe of the Southern Ute Reservation, 249 F.2d 915, 920 (10th Cir. 1957) ("[A] tribe has the complete authority to determine *all* questions of membership") (emphasis added).

federal criminal jurisdiction, race could become far less relevant in the federal jurisdiction analysis. This is not possible under the dissent's position, which is consistent with the historical and Eighth Circuit positions.

C. The Cruz *Majority's Opinion is Inconsistent with its Own Precedents.*

The *Cruz* majority's application of *Bruce* is arguably inconsistent with its typical application of the doctrine of stare decisis. Pursuant to the doctrine of stare decisis, a court will adhere to the rules from prior cases.[145] A court will apply the rule from prior cases in future cases that are factually similar.[146] The Court of Appeals for the Ninth Circuit generally considers the "what" of a case to have primacy over the "why" of a case.[147]

According to its own rule regarding stare decisis, the Ninth Circuit does not apply the reasoning of cases, only the outcomes. *Bruce* was sufficiently dissimilar from *Cruz* that the court's application of *Bruce* to *Cruz* was faulty.[148] *Bruce* concerned a § 1152 prosecution and the question of Indian status was an affirmative defense. On the other hand, *Cruz* concerned a § 1153 prosecution and the question of Indian status was an element of the crime to be proved beyond a reasonable doubt. The posture and outcome (as well as reasoning) of *Bruce* was entirely different from the posture and outcome (as well as reasoning) of *Cruz*. Therefore, the majority's application of *Bruce* in *Cruz* was inconsistent with its usual application of the doctrine of stare decisis.

Additionally, the majority's application of *Bruce* in *Cruz* was inconsistent with how it had applied the test in previous cases similar to *Cruz*, specifically *Broncheau*[149] and *Ramirez*.[150] In those prior cases, the Ninth Circuit applied the test more flexibly without considering the factors in a descending order of importance. As discussed above, the majority applied the factors in *Cruz* rigidly with a strict hierarchy of descending order of importance. As the *Cruz* dissent pointed out "nothing in *Bruce* turned on the relative weight of the factors"[151] and the *Bruce* court did not adopt the test as a hierarchy to be strictly applied because it had no cause to.[152] Thus, the majority's application of the test in *Cruz* was inconsistent with the rule it had developed prior to the case.

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145. 20 Am. Jur. 2d Courts § 129 (2009).
146. Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) ("[L]ike cases should be decided alike") (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)).
147. *See, e.g.*, United States Internal Revenue Serv. v. Osborne, 76 F.3d 306, 309 (9th Cir. 1996) ("[T]he doctrine of *stare decisis* concerns the holdings of previous cases, not the rationales").
148. However, an argument exists for the majority's application of *Bruce*. Because the *Bruce* court held that a person may be found to be an Indian through application of the four factors test, the Ninth Circuit may apply the test and holding in cases with similar questions and facts. Both *Bruce* and *Cruz* concerned whether persons were Indians for purposes of federal law.
149. United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979), *cert. denied* 444 U.S. 859 (1979).
150. United States v. Ramirez, 537 F.3d 1075, 1082 (9th Cir. 2008).
151. United States v. Cruz, 554 F.3d 840, 852 (9th Cir. 2009) (Kozinski, J., dissenting).
152. *Id.*

D. The Cruz *Dissent's Test for Indian Status Under the Second Prong is More Meritorious.*

Judge Kozinski's dissent is commensurate with the historical standard, the Ninth Circuit's application of the test prior to *Cruz*, and how the Eighth Circuit applies the contemporary test for Indian status. It is also commensurate with how the test, which was promulgated and explained by the Eight Circuit, was originally meant to be applied. The original four factors are an illustrative—rather than an exhaustive—list of criteria to be applied without rigid hierarchy of relative value. This is evidenced by how the test was originally promulgated by the District Court of South Dakota, first applied by the Eight Circuit, recently applied in *Stymiest*, and was previously been applied by the Ninth Circuit prior to *Cruz*. The dissent's consistency bodes well for the perceived integrity of the development of common law rules in the law. This promotes efficiency in the common law and avoids the appearance of arbitrariness and caprice in the development of the common law.[153]

V. THERE ARE CLEAR DIFFERENCES IN THE EIGHTH AND NINTH CIRCUITS' APPLICATION OF THE TEST FOR DETERMINING INDIAN STATUS FOR FEDERAL CRIMINAL JURISDICTION UNDER § 1153.

The Eighth Circuit considers: (1) enrollment in a tribe (or "tribal enrollment factor"); (2) government recognition formally or informally through providing the defendant assistance reserved only to Indians (or "government recognition through Indian assistance factor"); (3) tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction (or "tribal court jurisdiction factor"); (4) enjoying benefits of tribal affiliation (or "tribal benefits factor"); and (5) social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian (or "social recognition factor").[154] However, the Ninth Circuit considers: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation (or "tribal benefits factor"); and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life (or "social recognition factor").[155]

The Ninth Circuit's rigid application of only four exhaustive factors with descending weight differs from the Eighth Circuit's general application of five illustrative factors. The Eighth Circuit considers tribal court prosecutions as evidence of tribal recognition as an Indian, while the Ninth Circuit does not. The Eighth and Ninth Circuits also differ regarding what constitutes social recognition as an Indian under the social recognition factor. However, in both circuits, actual receipt of benefits, instead of eligibility for benefits, is sufficient for the government recognition and enjoyment of the benefits of tribal affiliation factors.

153. As discussed above, courts promulgate rules and apply them in subsequent cases pursuant to the doctrine of *stare decisis*. *See supra* note 79.
154. United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009).
155. *Cruz*, 554 F.3d at 846.

The Ninth Circuit's *Cruz* opinion moves the standard towards the tribal citizenship rule of *Morton*, which will disincentivize federal prosecutions in Indian Country. While the *Morton* rule becoming the standard may be easier for federal prosecutors, it would keep many serious criminals—who are otherwise prosecutable under § 1153—from being prosecuted. This will undermine the rule of law in Indian Country. A uniform test that applies the same factors to determine Indian status should be adopted or promulgated for equal protection across the federal circuits of appeals. The Eighth Circuit's test, which is the original, is optimal.

A. The Ninth Circuit's Rigid Application of Only Four Exhaustive Factors with Descending Weight Differs from the Eighth Circuit's General Application of Five Illustrative Factors.

Under the *Cruz* majority opinion, the Ninth Circuit applies its four factors in declining order of importance. The Eighth Circuit does not have a fixed set of factors, but considered five in its most recent case. Moreover, the Eighth Circuit does not hierarchically weigh the factors. In bold contrast to the Ninth Circuit's application of the test that was originated by the Eighth Circuit,[156] the *Stymiest* court stated "the *St. Cloud* factors may prove useful . . . but they should not be considered exhaustive. Nor should they be tied to an order of importance, unless the defendant is an enrolled tribal member, in which case the factor becomes dispositive."[157]

Both circuits regard tribal enrollment as dispositive for finding recognition as an Indian.[158] However, under its hierarchically weighted application of the factors with absolute emphasis on the tribal enrollment factor, the Ninth Circuit considers the other factors beyond the first to be less likely to satisfy the second prong. The Eighth Circuit recognizes the first factor—tribal enrollment—to be an automatic trigger for finding recognition as an Indian; but also recognizes that a lack of enrollment will not preclude recognition and satisfaction of the second prong.[159] In the Eighth Circuit, the first factor's importance is contingent on whether it is true, whereas in the Ninth Circuit, the first factor is preeminent for satisfying or denying Indian status. In the Eighth Circuit, tribal enrollment

156. While the District Court of South Dakota announced the test, the Eighth Circuit was the first federal court of appeals to enumerate the test, which the Ninth Circuit then appropriated.

157. *Stymiest*, 581 F.3d at 764.

158. Tribal enrollment functions legally as a political status determinate. It can potentially be extended without race, but as of today, universally requires Indian ancestry of that tribe. It is important, but as *Cruz* illustrates, not the only official manner of recognition as an Indian. For an interesting study of tribal citizenship, see Vann v. Kempthorne, 467 F. Supp. 2d 56 (D.D.C. 2006); Allen v. Cherokee Nation, No. JAT-04-09 (Cherokee Nation ct. app. Mar. 7, 2006); Cherokee Nation, Citizenship Status of Non-Indians, http://freedmen.cherokee.org/ (last visited Mar. 28, 2010) (discussing Cherokee citizenship).

159. *Stymiest*, 581 F.3d at 764 (citing St. Cloud v. United States, 702 F.Supp. 1456, 1461 (D.S.D. 1988)); *see* U.S. v. A.W.L., 117 F.3d 1423 (8th Cir. 1997) (holding non-enrolled man to be Indian for § 1153 despite not being enrolled with a tribe when he held himself out to be Indian, lived on the reservation, and attended BIA schools).

may only make a case for jurisdiction, but in the Ninth Circuit, tribal enrollment may make *or break* a case for jurisdiction.

The Ninth Circuit's disproportionate reliance on the tribal enrollment factor lessens the likelihood of finding tribal recognition under the second prong. It is logically true that if enrollment does not exist in the Ninth Circuit, the court is far less likely to find Indian status. Moreover, if neither of the first two factors is satisfied, the Ninth Circuit would logically be precluded from finding the second prong satisfied under this systematic descending order or importance application of the test. Even if the tribal benefits and social recognition factors are satisfied, they cannot logically outweigh the unsatisfied factors—tribal enrollment and government recognition through Indian assistance factors.[160] If one is not recognized through enrollment, there may not be another method for a tribe or federal government to recognize a person as an Indian. Moreover, if a person lacks sufficient blood for enrollment, it is unlikely that they would meet the one-quarter-blood quantum requirement for most federal programs such as education funds or IHS benefits for Indians.[161]

As illustrated by *Cruz*, even if a tribe does have an alternative method for recognizing a person as a descendant in the first degree, the Ninth Circuit will not necessarily regard it as valid.[162] In *Cruz*, the court failed to consider a factual element or factor that would have made satisfaction of the second prong more likely. In the *Cruz* case, the government "[did] not contend that his descendant status, *in and of itself*, is a factor [the court should have considered] in performing the *Bruce* analysis."[163] In a footnote, the court states "[t]his concession reflects a sensible understanding of the law. If, for example, a tribal authority declared that *anyone* with an ancestor who was a member of the tribe, no matter how distant, counts as a "descendant," we would be hard pressed to consider such an individual subject to prosecution under § 1153, even though 'tribal authorities [would clearly] recognize [such a person] as an Indian' under our dissenting colleague's formulation."[164] Moreover, the majority avoided consideration of Cruz's 'descendant' status by stating that it could not decide whether Cruz's 'descendant' status is dispositive of tribal recognition and

160. While the *Cruz* court did not expressly say this—it had no need to in its finding that Cruz didn't satisfy any of the four factors—this is true as a matter of logic under the 'descending order of importance' calculus of the hierarchical weighing of the factors. The last two factors, by definition, cannot outweigh the first two factors in the Ninth Circuit's four-factor hierarchy.

161. *See also* The Indian Health Care Improvement Act, 25 U.S.C. § 1603(c) (2009) ("Indian . . . means any person who is a member of an Indian tribe . . . [or] any individual who (1), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, . . . or who is a descendant, in the first or second degree, of any such member, . . . or (3) is considered by the Secretary of the Interior to be an Indian for any purpose, or (4) is determined to be an Indian under regulations promulgated by the Secretary").

162. *Cruz*, 554 F.3d at 847–48.

163. *Id.* at 847.

164. *Id.* at 847 n.9 (emphasis omitted).

Indian status because the court "will not decide questions not raised by the parties before [it]."[165]

Had the government argued that Cruz's descendant status was, in and of itself, acknowledgement by an Indian tribe or that this should have been considered for satisfaction of the Ninth Circuit's second factor, it would have had a better chance of meeting the second prong. While not enrollment, 'descendant' status is an official form of recognition. In the alternative, the tribe could simply not have a 'descendant' status in its law. Then, Cruz would only have been informally regarded to have Blackfeet blood. Instead, the Blackfeet Tribe affirmatively and formally recognizes non-enrolled persons that have Blackfeet Indian blood. The government's case would have been aided if it could have introduced evidence at trial that 'descendant' status is not extended to everyone with Blackfeet blood, but only to those who are descendants in the "first or second degree," or persons who have Blackfeet blood and would be "considered by the Secretary of the Interior to be an Indian for any purpose" or "determined to be an Indian under regulations promulgated by the Secretary."[166] The government's failure to argue this and that Cruz's descendant status should have been considered as a separate factor undermined its case for jurisdiction.

Because he is eligible for IHS benefits, educational grants, and tribal fishing and hunting rights, Cruz clearly would have satisfied the government recognition through Indian assistance and tribal benefits factors under a more general application of the test such as the Eighth Circuit's. Because his mother is enrolled or eligible for enrollment in the Blackfeet Tribe (the opinion does not say), Cruz is a Blackfeet descendant of the first degree. However, the government did not make these arguments and the majority did not consider Cruz's descendant status for satisfaction of the second prong. Accordingly, the *Cruz* majority held that the federal government lacked jurisdiction over Cruz as an Indian under the second prong of the test for § 1153, but may not have done so had the government pursued a different course of action. The Ninth Circuit's rigid application in a hierarchy of descending weight without consideration of tribal court prosecutions makes satisfaction of the second prong more difficult. Moreover, the Ninth Circuit's failure to consider Cruz's descendant sta-

165. *Id.* at 848 (citing *e.g.,* Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996)); *cf.* United States v. Zeigler, 497 F.3d 890, 901 (9th Cir. 2007) (Kozinski, J., dissenting from denial of rehearing en banc) ("We apply [the waiver] rule with some vigor against criminal defendants; we should be no less vigorous in applying it against the government." (internal citations omitted)).

166. This language would track federal language regarding Indian descendants eligible for benefits or assistance reserved only to American Indians. *See* The Indian Health Care Improvement Act, 25 U.S.C. § 1603(c) (2009) (stating that, for purposes of §§ 1612 and 1613 of this Act, "Indian . . . means any person who is a member of an Indian tribe . . . or who is a descendant, in the first or second degree, of any such member . . . or . . . is considered by the Secretary of the Interior to be an Indian for any purpose, or . . . is determined to be an Indian under regulations promulgated by the Secretary"). Tribal recognition, which is short of membership status, but still recognizes persons to have Indian blood of that tribe (such as the Blackfeet Tribe's 'descendant' status) would make it easier for federal prosecutors to establish a person as an Indian under the Eight Circuit's test.

tus—either as another factor or as evidence to satisfy the other factors—made satisfaction of the second prong less likely.

Unlike the Ninth Circuit, the Eighth Circuit considers all of the remaining factors equally and this makes satisfaction of the second prong easier. With this approach, a federal prosecution in the Eighth Circuit can satisfy the second prong with a combination of the remaining factors—following the tribal enrollment factor—being satisfied. Because it does not give descending weight to the factors, the Eighth Circuit is not precluded from finding recognition as an Indian if enrollment and official tribal or federal recognition through other means is not found. The Eighth Circuit considers relevant under the second prong factors such as tribal court prosecutions and 'descendant' status under a tribe's law. This makes satisfaction of the second prong in the Eighth Circuit functionally easier and more likely than in the Ninth Circuit. The Eighth Circuit's more general application of multiple factors, with tribal court prosecutions included as a separate factor, makes satisfaction of the second prong (as long as the defendant has some Indian blood), and thus prosecutions in federal court, easier.

B. As Illustrated by the Stymiest *and* Cruz *Cases, Tribal Court Prosecution as Evidence of Tribal Recognition as an Indian is the Most Important Difference in the Factors Applied in the Eighth and Ninth Circuits' Tests.*

The *Stymiest* court expressly considered tribal court prosecutions as a separate factor in its analysis.[167] The Ninth Circuit did not even consider tribal court prosecutions relevant (much less carve it out as a separate factor) in *Cruz*.[168] The Eighth Circuit's consideration of this factor makes a finding of recognition as an Indian easier and more likely. It provides another metaphorical 'swing at the ball' for a court, which provides a mathematically better chance for satisfying the second prong.

It is also perhaps the most facile way for a tribe to recognize a person as an Indian. A tribal authority simply needs to determine that a person has some Indian blood and then prosecute them in the tribal court for a tribal crime. Because a tribal prosecutor initiates it, it is functionally easier than any other manner of official recognition. The difficulty is found in the investigation of a person's heritage and tribal affiliation, which is relatively easy. This can be very easy if a person has held himself out to be an Indian, and even easier if he self-identifies as an Indian to tribal police. This makes tribal prosecutions the simplest form of tribal recognition.

A tribal court prosecution may not necessarily mean the tribal court has jurisdiction over the person, but certainly makes it more likely that the person is recognized by the tribe to be an Indian.[169] In *Oliphant v.*

167. *See supra* Part III.
168. *See supra* Part IV.
169. *See also*, FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evi-

Suquamish Indian Tribe,[170] the Supreme Court held that, while they lack jurisdiction over non-Indians, tribal courts have jurisdiction over Indians.[171] Then, in *Duro v. Reina*[172] and *United States v. Lara*,[173] the Court wrestled with whether tribes have jurisdiction over non-member Indians.

The Court came to contradictory results in the cases because of intervening congressional legislation. In *Duro*, the Court answered the question in the negative. Congress responded to the Court's holding in *Duro* with the '*Duro* fix' legislation.[174] With this, Congress made clear that tribal courts only have proper jurisdiction over Indians, but that this includes all Indians—members and non-members[175] (though a non-Indian may still be prosecuted in tribal court if he or she consents to tribal court jurisdiction).[176] In *Lara*, the Court sustained the '*Duro* fix' legislation and said that tribes do have jurisdiction over non-member Indians.[177]

The *Stymiest* court discussed tribal courts' understanding of this proposition and incorporation of it into their laws and procedures (as did the *Cruz* dissent).[178] In *Stymiest*, "[t]he Rosebud tribal police chief testified that his officers have jurisdiction only over Indians."[179] The Rosebud tribal court prosecutor testified that "the tribal code prohibits her office from prosecuting non-Indians . . . ."[180] Similarly, both the *Cruz* majority and the dissent acknowledge that the Blackfeet tribal court "'has no jurisdiction to punish anyone but an Indian.'"[181] Moreover, the Blackfeet Tribal Law and Order Code states that "[t]he Blackfeet Tribal Court has jurisdiction over all persons of Indian descent, who are members of the Blackfeet Tribe of Montana and over all other American Indians unless its

dence."); FED. R. EVID. 402 ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.").

170. 435 U.S. 191 (1978).

171. *Id.*

172. 495 U.S. 676 (1990).

173. 541 U.S. 193 (2004).

174. Department of Defense Appropriations Act for 1991, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892–93 (1990) (codified as amended at 25 U.S.C. § 1301(2)–(4) (2010)).

175. *Id.* § 8077(c) ("'Indian means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code if that person were to commit an offense listed in that section in Indian country to which that section applies.") (codified as amended at 25 U.S.C. § 1301(4) (2010)); 25 U.S.C. § 1301(2) (2010) (defining "powers of self-government" to include prosecution of non-member Indians); *see* United States v. Lara, 541 U.S. 193, 199–200 (2004) (construing 25 U.S.C. § 1302(2) (2000)). *See generally* CLINTON, GOLDBERG & TSOSIE, *supra* note 17, at 293 (discussing *Duro* fix legislation and change of the definition of "Indian"); Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992) (analyzing *Duro* fix legislation).

176. United States v. Stymiest, 581 F.3d 759, 765 (8th Cir. 2009).

177. *United States v. Lara*, 541 U.S. at 200–02.

178. *Stymiest*, 581 F.3d at 765; United States v. Cruz, 554 F. 3d 840, 851 (9th Cir. 2009) (Kozinski, J., dissenting).

179. *Stymiest*, 581 F.3d at 765.

180. *Id.*

181. *Cruz*, 554 F.3d at 850 (quoting *Bruce*, 394 F.3d at 1227); *see id.* at 852 (Kozinski, J., dissenting).

authority is restricted by an Order of the Secretary of Interior."[182] As illustrated by the findings of *Stymiest* and *Cruz*, tribal courts are acutely aware of the case history and their proper jurisdiction over all Indians. This is reflected in tribal codes definitions of tribal court jurisdiction. Pursuant to this knowledge, tribal courts do not exercise jurisdiction lightly.

Tribal authorities do not typically pursue prosecutions in tribal court without performance of due diligence duties and an examination of proper jurisdiction. Tribes may conceivably prosecute non-Indians, but not under the guise that they are Indian; rather, it is with the understanding that they are non-Indian and that if they challenge the tribe's jurisdiction with a petition for a writ of habeas corpus in a federal court, the tribe will lose. Tribal courts—like federal and state courts—do not want to waste valuable time and money hearing a prosecution only to have the court's decision invalidated. In the case of major offenses, it would be particularly irresponsible and wasteful for a tribal court to entertain a prosecution only to have it nullified. Furthermore, in tribal communities, this can mean the end of a judge's employment. Tribal courts (and the officials that facilitate them) are no less concerned about how others perceive their integrity than state and federal courts. This is especially true regarding criminal law — an area that has been the subject of considerable controversy and scrutiny by Congress and federal courts.

In *Cruz*, the court dismisses all of this and only notes that it is unknown how far the proceedings against Cruz progressed in tribal court.[183] To the majority, the extent to which proceedings progress in tribal court is what is relevant about tribal court prosecutions of an individual. The court does not seem to have taken the time to determine if Cruz was only prosecuted once or several times in tribal court prior to the case at hand.[184] The court's analysis on this point is relegated to distinguishing between the preponderance of evidence standard applied in *Bruce* and the beyond a reasonable doubt standard applied in *Cruz*.[185] With its one paragraph dismissal of the point, the court exhibited a dismissive attitude toward tribal sovereignty itself.

However, to the Eighth Circuit (and the *Cruz* dissent), the question is not how far the proceedings go, but whether the tribe makes an informed determination that it may prosecute an individual as an Indian in its courts. In the Eight Circuit, if a tribe has done this, it is relevant to the question of whether a person is recognized as an Indian by tribal authori-

182. BLACKFEET CODE § 1.1 (2009) *available at* http://www.blackfeetnation.com/government/14-judiciary.html.

183. *Cruz*, 554 F.3d at 850–51.

184. *Id.*

185. *Id.* Regarding this point, the Eighth Circuit did not delve into relative burden of proof standards or quantitative measurements of how much evidence satisfies tribal recognition. Rather, it simply iterated that tribal court prosecutions may serve as a guidepost among other relevant factors in the determination of whether a person is an Indian for § 1153; it is evidence a jury may consider. *Stymiest*, 581 F.3d at 762–66. Since the test's inception in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), and its adoption by the Eighth Circuit in *United States v. Lawrence*, 51 F.3d 150 (8th Cir. 1995), the requisite burden of proof does not make the use of tribal court prosecutions as a criterion invalid. *Id.*

ties.[186] It may be used as evidence to support satisfaction of the second prong in the Indian status test and an element of § 1153. With its deference to a tribal court's finding of proper jurisdiction, in *Stymiest*, the Eight Circuit (similar to the dissent in *Cruz*[187]) affirmed a key component of tribal sovereignty—the ability to promulgate rules of law and enforce them against Indians.

Tribal court prosecutions of non-member Indians are not irrelevant, but the Ninth Circuit's language in *Cruz* threatens to make them so.[188] Even if a defendant fights tribal court jurisdiction, this does nothing to answer the question of whether the tribe considers that person to be an Indian. Instead, it means the tribe recognizes the defendant as an Indian, but that the defendant wants to avoid prosecution in tribal court (and most likely at all). Lawyers have a duty to further their client's interests and this may take the form of challenging jurisdiction to avoid a pending prosecution. Like any challenge to jurisdiction, a defendant's challenge to jurisdiction in tribal court is designed to avoid prosecution and promote self-preservation. If a tribal court has reasonably investigated and found that a defendant has Indian blood and is regarded to be an Indian and allows the prosecution to be maintained with this understanding, it is relevant to tribal recognition of the person as an Indian. The Eighth Circuit and the *Cruz* dissent recognize this.

C. In Both Circuits, Actual Receipt of Benefits—Instead of Eligibility for Benefits—is Sufficient for the Government Through Indian Assistance and Enjoyment of Tribal Benefits Factors.

The *Cruz* majority was adamant that one must have actually received benefits or assistance reserved only for Native Americans to satisfy the Ninth Circuit's second and third factors.[189] On this issue, the Eighth and Ninth Circuits agree that receipt of benefits or assistance reserved for Native Americans supports satisfaction of the latter factors and the second prong. While Cruz was eligible for benefits, because he did not actually receive them, the Ninth Circuit found that he did not satisfy the government recognition through Indian assistance and social recognition factors.

The Eighth Circuit considers seeking care at a tribal hospital relevant, but not "sufficient to satisfy the political underpinnings of the *Rogers* test."[190] The court considered the fact that Stymiest had received care from Indian Health Services while residing on the reservation and identifying himself as an Indian to support its finding that he was an Indian.[191] Interestingly, while Stymiest was not eligible for benefits, the Eighth Circuit considered his actual receipt of benefits relevant and found that he did satisfy the government recognition through Indian assistance and tribal benefits factors.

186. *Stymiest*, 581 F.3d at 765–66.
187. *Cruz*, 554 F.3d at 852–53 (Kozinski, J., dissenting).
188. *Id.* at 851.
189. *Id. at* 847–48.
190. *Stymiest*, 581 F.3d at 764 (comparing holding of United States v. Cruz, 554 F.3d 840, 848 (9th Cir. 2009), for a separate proposition).
191. *Id.* at 765–66.

The Eighth Circuit found that Stymiest's receipt of IHS services—despite being ineligible—supported its finding that he is an Indian. Would the fact that Stymiest received benefits he was not actually entitled to mean that Stymiest would have satisfied the same factors had he been in the Ninth Circuit? The Ninth Circuit stressed that actual receipt of benefits was necessary, but did not address whether one had to actually be entitled to receive those benefits. Because the Ninth Circuit places the factors in declining order of importance, it will not make a difference unless the Ninth Circuit changes how it weighs the factors. This issue may be clarified in future cases in the Ninth Circuit.

A tribal court prosecution may be considered a benefit of tribal affiliation. A benefit is anything that improves a person's utility or prevents diminishment of person's utility. Stymiest had been prosecuted in tribal court and, notably, the tribal authorities gave him reduced sentences and did not report those crimes to state or local authorities. In *Cruz*, the dissent recognized that

> when [Cruz] was charged with an earlier crime on the reservation, the tribal police took him before the tribal court rather than turning him over to state or federal authorities. How that case was finally resolved is irrelevant; what matters is that the tribal authorities protected him from a state or federal prosecution by treating him as one of their own.[192]

Because tribes typically have lesser penalties and maximum sentences of only one year for a crime under the Indian Civil Rights Act ("ICRA"),[193] this may be considered the receipt of a benefit. Further, a tribe may choose not to inform state and federal authorities of a person's criminal record, which is also an advantage. This is not likely to be true if one is sentenced in state or federal courts: federal and state criminal justice systems typically inform each other of a person's criminal record, which can be factored into sentencing after convictions in the other court.[194] Moreover, in both *Cruz* and *Stymiest*, the tribes could have turned the defendants over to federal or state authorities after their prosecutions,[195] but did not. Tribal court prosecutions were relative benefits to both Stymiest and Cruz, and in Cruz's case, should have been recognized as such.

A more general application of the multi-factor test that considers mere eligibility for benefits and tribal court prosecutions as a benefit would make federal prosecutions easier. They would make satisfaction of the tribal benefits factor more likely, which would in turn improve the likelihood of satisfaction of the second prong for federal jurisdiction. As *Cruz* illustrates, persons who are not enrolled may still be entitled to receive benefits pursuant to their status as descendants. Because they may not be

192. *Cruz*, 554 F.3d at 852 (Kozinski, J., dissenting).
193. 25 U.S.C. § 1302(7) (2009) (limiting Indian tribes' punishments to "one year [imprisonment] and a fine of $5,000, or both").
194. *See* STEVEN W. PERRY, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (2004), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=386.
195. United States v. Wheeler, 435 U.S. 313 (1978).

reported to federal and state authorities, a federal court's consideration of a tribal court prosecution as a benefit would be reasonable. Factoring eligibility for exclusive benefits and tribal court prosecutions into the analysis would aid in satisfaction of the government recognition through Indian assistance and tribal benefits factors in both courts, and the tribal court jurisdiction factor in the Eighth Circuit. This would decrease the difficulty of and incentivize more federal prosecutions in Indian Country.

D. The Eighth and Ninth Circuits Differ Regarding What Constitutes Social Recognition as an Indian Under the Fourth Factor.

The Eighth Circuit finds social recognition as an Indian through self-identification and general social recognition by other Indians. Stymiest identified himself as an Indian to IHS officials, tribal police, and tribal court authorities. He also identified himself as an Indian to Indian friends.[196] This satisfied the Eighth Circuit's social recognition factor. Conversely, the Ninth Circuit sets an artificially high bar for what constitutes "social recognition as an Indian through residence on a reservation and participation in Indian social life."[197] The Ninth Circuit requires that a person hold a tribal identification card, vote in tribal elections, practice "Indian religion," or participate in American Indian cultural festivals or dance competitions.[198]

Beyond making satisfaction of the social recognition factor more difficult, the Ninth Circuit's test seems to be a gauge of "Indian authenticity." The court's analysis suggests that a person who is otherwise biologically Indian, resides on the reservation and engages in common socializing with other Indians in the community is not really an Indian if he or she does not have a piece of paper identifying him or her as an Indian, pray "like an Indian" or dance in powwows. This makes satisfaction of the social recognition factor and chances of a successful federal prosecution more difficult.

At the same time, it is a superficial, qualitative measure of authenticity that harkens back to stereotypical images of Indians in popular culture. The Ninth Circuit's holding strongly implies that a person with Indian blood who resides on a reservation cannot really be an Indian if he or she lacks an official identification paper, does not participate in tribal politics, attends a Christian church, and prefers attending museum events. Not all Indians keep their identification card, participate in politics, or regularly attend what the court would deem actual "spiritual and cultural" events. Persons who have Indian blood and reside on a reservation do regularly socialize with other Indians and gain recognition as an Indian by members of the Indian community without the other accoutrements that the Ninth Circuit values. That a person's spiritual, cultural, and leisure proclivities may override his or her blood, residence, and regular socializing patterns does not reflect the realities of Indian identity on the ground. A more general test for social recognition, such as the Eighth

196. United States v. Stymiest, 581 F.3d 759, 765–66 (8th Cir. 2009).
197. *Cruz*, 554 F.3d at 846 (quoting United States v. Bruce, 394 F.3d 1215, 1224).
198. *Id.* at 848.

Circuit's, is more accurate and makes satisfaction of the social recognition factor more facile.

While the Eighth and Ninth Circuits may consider whether one considers himself to be an Indian relevant, they differ as to what evidence should be considered to make such an inference. The Ninth Circuit stated that it is not just whether a tribe considers a person to be an Indian, but also whether the person subjectively considers himself to be an Indian to be relevant in determining his status.[199]

The Ninth Circuit does not say how it would find this. Based on the Ninth Circuit's rigid application of evidence to the other factors, the court would presumably find this only by a person's self-identification to a tribal authority. This is troubling. While a person may identify himself as an Indian in the initial interactions with tribal police, he may not be inclined to do so under such conditions as a formal tribal arrest or prosecution. Moreover, a person definitely will not do so when faced with a federal prosecution, where being Indian is an element of § 1153. In fact, persons will likely deny Indian identity if they believe it will thwart efforts by a tribe or the federal government to prosecute them.[200] This is just human nature. It is more difficult for a federal prosecutor to obtain evidence that a person has identified himself to a tribal authority (or a federal authority) as opposed to evidence of a person's statements and representations of Indian identity made to those who are around him most often and know him most intimately.

The Eighth Circuit's consideration of a person's representations in casual circumstances and through general social recognition makes satisfaction of the social recognition factor easier. This also makes satisfaction of the second prong easier. Conversely, the Ninth Circuit's antiquated and formal measure makes social recognition as an Indian artificially difficult. The Ninth Circuit makes this more burdensome than it needs to be, which makes satisfaction of the social recognition factor more difficult and chances of a successful prosecution less likely.

E. The Test for Indian Status Adopted by Other Circuit Courts of Appeals or the Supreme Court is Likely to Come from Either the Eighth or the Ninth Circuit.

Because they are exposed to the issue of Indian status for § 1153 more than the other circuit courts of appeals and are the most familiar with the issue, other circuit courts of appeals are most likely to adopt a test for Indian status from either the Eighth or the Ninth Circuit. Poignantly, the majority of federal investigations and prosecutions occur in districts within the Eight and Ninth Circuits of Appeals. Roughly a quarter of all federal investigations and prosecutions occur in the district of South Da-

199. *Id.* at 849–50.

200. *See, e.g.*, Means v. District Court of the Chinle Judicial District, 7 Nav. R. 383 (Nav. Sup. Ct. 1999) (Russell Means, an enrolled Oglala Lakota, argued that the Navajo Nation lacked criminal jurisdiction over him because he was a non-member Indian.); Means v. Navajo Nation, 432 F.3d 924, 937 (9th Cir. 2005) (denying Means' writ of habeas corpus and holding that the Navajo Nation has criminal jurisdiction over non-member Indians).

kota alone, which is in the Eighth Circuit. It is no wonder, then, that the test for Indian status originated in the district of South Dakota and was first announced among the courts of appeals by the Eighth Circuit. The difference in the Circuits' tests is important because the tests are applied in the majority of Major Crimes cases and may lead to systematic differences in outcomes across the circuits. Moreover, the Supreme Court is statistically more likely to adopt one of the tests from the Eighth or the Ninth Circuit as its rule.

A uniform federal test should be adopted by the circuit courts of appeals or promulgated by the Supreme Court. Because of the high rate of serious crimes being committed in Indian country, the test should err on the side of making proving Indian status for § 1153 easier and allow jurisdiction over persons with Indian blood who are generally recognized by other Indians to be an Indian. This will incentivize federal prosecutions of serious crimes and help discourage and abate criminal activity in Indian Country. The Ninth Circuit's test does not and will not do this; the Eighth Circuit's test, however, will.

A uniform test that applies the same factors to determine Indian status must be promulgated for equal protection across the federal circuits. The government may not discriminate against similarly situated persons.[201] American Indians who commit serious crimes in Indian Country are similarly situated persons under § 1153. However, as this piece has illustrated, persons who are biologically and (arguably) socially Indian may be treated differently under the law in the Eighth and Ninth Circuits. It is more difficult to prove an element of § 1153 in the Ninth Circuit. As *Stymiest* and *Cruz* show, Cruz would have likely been considered an Indian in the Eighth Circuit. Moreover, while Stymiest was found to be an Indian in the Eighth Circuit, he may not have been considered an Indian in the Ninth Circuit. Thus, because the test for determining who is an Indian is more strenuous in the Ninth Circuit, it is more advantageous for a non-enrolled Indian person to be prosecuted in the Ninth Circuit where it is more difficult to prove this element. This is a difference in the law across the circuits that may systematically yield different results, which would constitute discrimination among similarly situated Indian persons. Accordingly, a uniform test across the circuits should be adopted or announced.

A uniform test would also precipitate definiteness and efficiency. Definiteness in the law will be good and allow federal prosecutors to decide whether to prosecute according to the facts—not based on probabilities under separate tests. It will also allow for federal prosecutors to plan and pursue prosecutions with greater stability of expectations. It would also be good for defense attorneys for similar reasons. They could better predict, organize and carry out defenses of Indians in federal courts.

Overall, this would be a good thing for judicial economy. This would create greater predictability and stability in the proceedings and likely engender more plea bargains between the parties. This would all lead to less of the courts' time (and the people's money) being expended. A test,

201. U.S. CONST. amend. V.

such as the Eighth Circuit's, that makes Indian status easier to establish will allow the parties to concentrate less on determining a person's status for jurisdiction and more on the substantive questions—whether the person committed the act in question and whether the person has an affirmative defense. Ultimately, these questions are the most fundamental for determining guilt or innocence and administering justice. As the national standard, the Eighth Circuit's test would strengthen criminal justice in Indian country.

VI. THE NINTH CIRCUIT'S *CRUZ* OPINION MOVES THE STANDARD TOWARDS THE TRIBAL CITIZENSHIP RULE OF *MORTON*, WHICH WILL DISINCENTIVIZE FEDERAL PROSECUTIONS FOR SERIOUS CRIMES AND UNDERMINE THE RULE OF LAW IN INDIAN COUNTRY.

A more difficult test to satisfy will disincentivize federal prosecutors from pursuing prosecutions under § 1153, whereas an easier test will incentivize prosecutions. "Incentives are the cornerstone of modern life. . . . An incentive is a bullet, a lever, a key. . .urging people to do more of a good thing and less of a bad thing."[202] An incentive is any factor that motivates a person to pursue a particular course of action or prefer one choice instead of its alternatives.[203] Federal prosecutors, like other people, are generally assumed to be rational, self-interested utility maximizers.[204] They respond to incentives. Federal prosecutors are more likely to refuse prosecutions rather than expend the additional man-hours and tax payer money that can be allocated elsewhere, such as less difficult prosecutions.

Cruz and *Stymiest* illustrate the difference in how the Eighth and Ninth Circuits apply the test. Moreover, they illustrate the disparate outcomes that can be had under the separate tests. The Ninth Circuit's rigid, hierarchical application of the test makes proving Indian status more difficult. This incentivizes federal prosecutors to decline prosecutions to avoid excess difficulties and undue expenditures of time. Conversely, the Eighth Circuit's flexible and general application of the test makes proving Indian status easier and incentivizes federal prosecutions.

Federal prosecutions are needed in Indian reservations, which are high crime areas.[205] Moreover, arrests and prosecutions for serious crimes

202. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 13, 20 (HarperCollins Publishers, Inc. 2005).

203. *See generally* GLENN HUBBARD & ANTHONY P. O'BRIEN, ESSENTIALS OF ECONOMICS (Prentice Hall 2006).

204. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (3d ed. 1986)); *see also* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 21–26 (5th ed., Pearson Education, Inc. 2008).

205. Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 3–4, Plains Commerce Bank v. Long Family Land and Cattle, 128 S. Ct. 2709 (2008) (No. 07-411) (citing LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME (1999)); PERRY, *supra* note 194; CALLI RENNISON, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993-1998 (2001), *available at* http://purl.access.gpo.gov/GPO/LPS19659; Stewart Wakeling et al., *Policing on American Indian Reservations*, NAT'L INST. JUST. J., Jan. 2001, *available at* http://www.ncjrs.gov/pdffiles1/jr000246b.pdf; *see* Sarah Kershaw, *Tribal Underworld: Drug Traffickers Find Haven in*

are lacking in Indian reservations.[206] This makes life in poverty conditions worse.[207] Federal prosecutions would take some strain off tribal authorities, promote justice that may otherwise be denied, and ameliorate conditions in federal Indian reservations.

Indian Country already has a high crime rate that is increasing dramatically.[208] Almost 75% of federal investigations in Indian Country involved violent crimes.[209] Twenty-five percent of all federal investigations for violent offenses occur in Indian Country and violent crimes were the majority of offenses investigated in Indian Country by U.S. attorneys.[210] The violent crime rate in Indian country is "likely to be between double and triple the national average,"[211] and is higher among Indians than for all other races.[212] Violent crime rates in Indian Country are comparable to large urban areas known to be particularly rough such as Baltimore, Maryland, Detroit, Michigan, New York City, and Washington, D.C. The difference between Indian Country and these metropolitan areas is that Indian Country is extremely rural and remote with a very low police-to-citizen ratio.[213] Coupling the violent crime statistics with those of the other § 1153 crimes, and narcotic production, transport, and distribution, paints a disturbing picture.[214]

Yet, with all of this crime, federal prosecutions are lacking in Indian Country. As Matthew Fletcher states, "[f]ederal prosecutors filed only 606 criminal cases in all of Indian Country in 2006 (about one prosecution per tribe), in total."[215] Moreover, "[t]he National Congress of American

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Shadows of Indian Country, N.Y. TIMES, Feb. 19, 2006, *available at* http://www.nytimes.com/2006/02/19/national/19smuggle.html.

206. Letter from James S. Richardson, Sr., President, Federal Bar Association, to Senate Committee on Indian Affairs 2 (July 2, 2008), *available at* http://www.fedbar.org/GR_indian-affairs_070208.pdf (stating finite federal prosecution resources are "stretched too thin to provide the level of support needed in tribal communities to adequately confront [crime]"); *see* N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008; Kershaw, *supra* note 205.
207. *Cf. Capitalism's Last Frontier: Business in the Navajo Nation*, THE ECONOMIST, Apr. 3, 2008, *available at* http://www.economist.com/business-finance/displaystory.cfm?story_id=E1_TDJGGTDJ; *The Last Shall Be First: Indian Tribes and Casinos*, THE ECONOMIST, Apr. 12, 2007, *available at* http://www.economist.com/world/united-states/displaystory.cfm?story_id=E1_JDDGVJT; Brad Knickerbocker, *Gains on the Reservations*, THE CHRISTIAN SCIENCE MONITOR, Feb. 15, 2005, *available at* http://www.csmonitor.com/2005/0215/p01s03-ussc.html.
208. Wakeling et al., *supra* note 205, at 3. *See* PERRY, *supra* note 194.
209. PERRY, *supra* note 194, at vii.
210. *Id.* at 18–19 (analyzing statistics for fiscal year 2000).
211. Wakeling et al., *supra* note 205, at 4 (citing LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 2 (1999)).
212. PERRY, *supra* note 194, at v, 4 (describing the rate of violent victimization per 1,000 persons age 12 or older from 1992-2001).
213. Wakeling et al., *supra* note 205, at 4 (citations omitted). *See also* PERRY, *supra* note 194, at 7 tbl.9 (illustrating that far more violent crimes are perpetrated against American Indians than against other races).
214. The drug trade is closely associated with violence and other serious criminal activity. Duthu, *supra* note 206; Kershaw, *supra* note 205.
215. Matthew L. M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONST. SOC'Y FOR L. & POL'Y, Mar. 2009, at

Indians estimates that federal prosecutors decline to prosecute approximately 85% of felony cases referred by tribal prosecutors."[216] This rate of declinations is "appallingly high."[217] In fact, many of these declinations are due to the fact that federal prosecutors are hamstrung by lack of sufficient evidence to prove the suspect is Indian.[218] The difficulty of proving Indian status for federal criminal jurisdiction is an additional difficulty beyond definitions of federal crimes, concerns over territorial limitations, "distance of the crime from the local United States Attorney's Office, and difficulty in securing witness cooperation."[219] Further, those criminals that are prosecuted by tribes may file habeas petitions[220] or be sentenced to lesser penalties (for no less serious crimes) under tribal codes that are restrained by the Indian Civil Rights Act.[221] All of these difficulties disincentivize federal prosecutors from pursuing Indian Country prosecutions.

The Ninth Circuit's test exacerbates this problem by making proof of the second prong for Indian status more difficult and allowing more criminals to slip through the cracks and avoid prosecution by states or tribes.[222] Criminals who are not prosecuted by the federal government are less likely to be prosecuted at all because of the lack of tribal and state resources coupled with the remoteness of Indian Country. Thus, the federal role in fighting Indian Country crime is preeminent in the real world. Because it is less formal and takes into account eligibility, the Eighth Circuit's test, however, will not make recognition through satisfaction of the second prong more difficult. Because the Eight Circuit's test gives equal

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5–6 (citing Duthu, *supra* note 206, and AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 9 (1991) (noting that when federal or state governments have jurisdiction over sexual assault cases in Indian Country, "in a considerable number of instances the authorities decided not to prosecute")).

216. *Id.* at 6 (internal citations omitted).

217. *Id.* (internal citations omitted).

218. *Id.* (citing *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing before the Indians Affairs Committee of the United States Senate*, 110th Cong. 37–39 (Sept. 18, 2008) (statement of Thomas B. Heffelfinger, former United States Attorney for the District of Minnesota)).

219. *Id.* (citing Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711–12 (2006)).

220. *See* 25 U.S.C. § 1303 (2010) (extending federal habeas writs over tribal convictions and empowering federal courts to review tribal convictions pursuant to federal constitutional standards). For examples of federal courts applying U.S. constitutional standards in their reviews of tribal court convictions, see *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2nd Cir. 1996); and *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

221. 25 U.S.C. § 1302(7) (2010) (limiting tribal court penalties to one year imprisonment, a $5,000 dollar fine, or both). With this, there is now burgeoning doubt that tribes may sentence serious criminals to more than one year total for all crimes, which only exacerbates crime-fighting difficulties and illustrates the need for federal courts to adopt a more general and facile test for federal jurisdiction. *See Miranda v. Nielsen*, 2010 WL 148218 (D. Ariz. Jan. 12, 2010) (holding that Indian tribes do not have authority to sentence convicted criminals to consecutive sentences amounting to more than one year under the Indian Civil Rights Act).

222. Fletcher, *supra* note 215, at 5–7.

weight to the factors (unlike the Ninth Circuit's descending order), federal prosecutors may satisfy the second prong by meeting any combination of the factors. However, under the Ninth Circuit's test, federal prosecutors must meet particular factors—namely the first or second factors to satisfy the jurisdictional element of § 1153. Being able to satisfy the second prong with any combination of factors, rather than only with particular factors, makes the Eight Circuit's test more facile. The Eighth Circuit's test makes it easier for federal prosecutors to establish the jurisdictional element of § 1153, which incentivizes federal prosecutions of non-member Indians (whose status is ambiguous) for crimes committed in Indian Country. Thus, making the Eighth Circuit's test the national standard would promote greater justice in Indian Country.

The Ninth Circuit's test, conversely, makes proving Indian status more difficult and disincentivizes federal prosecutions in Indian Country, which exacerbates the problem of a lack of federal prosecutions. If the federal government does not prosecute otherwise prosecutable cases of serious criminals with an ambiguous status due to the added difficulty of establishing jurisdiction, tribes—which typically have an abject lack of resources to allocate to tribal prosecutors and will very likely be reticent to spend the additional time and money necessary to attempt the successful prosecution of a non-member Indian[223]—and states—which also have limited resources and are unlikely to allocate them to places that are remote and outside the conceptual bounds of their responsibility—will be unlikely to prosecute these serious criminals at all. Thus, making the Ninth Circuit's test the national standard would not promote greater justice in Indian Country.

Using the *Morton* rule as the standard would keep many criminals—who are otherwise prosecutable under § 1153—from being prosecuted. By placing a disproportionate emphasis on tribal enrollment, the Ninth Circuit has moved its test for criminal prosecution under § 1153 toward the rule of *Morton*—tribal citizenship in a federally recognized tribe for Indian status. Because it is a bright-line rule of enrollment, the rule of *Morton* would provide definiteness for federal prosecutors, criminal defenders, and judges. However, it would bar prosecutions of serious criminals who, besides enrollment, may be considered Indians. Moreover, these criminals not being prosecuted by federal authorities will lessen the likelihood that they are prosecuted at all. The same factors that prevent state authorities from prosecuting non-Indians who commit serious crimes in Indian Country—lack of resources and distance—will prevent prosecutions of Indians who commit serious crimes in Indian country.[224] Ultimately, the rule of *Morton* becoming the rule in § 1153

223. The Navajo Nation's drawn out and costly prosecution of Russell Means illustrates this problem. *See* Means v. District Court of the Chinle Judicial District, 7 Nav. R. 383 (Nav. Sup. Ct. 1999); Means v. Navajo Nation, 432 F.3d 924, 937 (9th Cir. 2005).

224. *Means*, 7 Nav. R. at 6–7. With the problems of lack of resources and distance, regarding crimes committed in Indian Country, "the state's jurisdiction is generally limited to those crimes that do not concern Indians or Indian interests." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 178 (West 2004) (1981). It can be difficult to discern what does not concern any Indian interests, and state prosecu-

prosecutions would hinder federal prosecutions and crime-fighting in Indian Country.

Morton created a legal fiction that is entirely inconsistent with American Indian criminal law. In criminal matters, race historically has been *the* standard. The test for Indian status is determined by race. Only after *Morton* was Indian status considered primarily political. Moreover, Indian status for Bureau of Indian Affairs hiring and advancement preferences is radically different from Indian status for § 1153.

Antelope, which was the first case after *Morton*, reflected this difference when it held that tribal enrollment is sufficient, but not necessary for Indian status under § 1153; it specifically allowed for a person who is racially—but not politically (and not within the *Morton* standard)—Indian to be prosecuted under § 1153.[225]

Antelope's progeny in the federal circuit courts of appeals have followed this. The Eighth and Ninth Circuits have followed the tenets of *Antelope* faithfully, for the most part, with the two-prong, multi-factorial test. However, with *Cruz*, the Ninth Circuit severely deviated from this line and turned its trend toward making the *Morton* rule the rule for § 1153 prosecutions.[226] The Ninth Circuit's *Cruz* majority is inconsistent with the historical standard from *Rogers* on and *Antelope.* This divergence also creates different incentives.

The *Cruz* majority's opinion incentivizes prosecutions of persons enrolled or receiving benefits, while *Antelope* and its Eighth Circuit progeny—most recently illustrated by *Stymiest*—incentivizes prosecutions of serious criminals in high crime areas who are biologically Indian and recognized generally by other Indians. This incentive is what, presumably, fueled the *Antelope* decision—keeping the berth wide for finding Indian status to prosecute serious criminals. *Morton*'s motivation—narrowing preference for federal hiring and advancement to those whom had a tribal "self-governance interest"—is entirely different from *Antelope*'s. The Eighth Circuit's test, which is in-line with *Antelope*, maintains the incentive to prosecute more serious Indian criminals in Indian Country, rather than less. The Eighth Circuit's application of the test maintains consistency of the law and keeps those who might very well skip federal prose-

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tors will likely not wade into the complicated legal and factual determinations when they can allocate their efforts to less complicated state criminal matters. Thus, non-member Indians (like non-Indians who commit crimes in Indian Country) are not likely to be prosecuted if the federal authorities decline to prosecute.

225. United States v. Antelope, 430 U.S. 641, 647 n.7 (1977).

226. The Ninth Circuit's test may be brought back in line with its pre-*Cruz* application of the test and the Eighth Circuit's test, which are consistent with *Rogers* and *Antelope*. An appellate court may not by itself in one case declare a rule to be "super-precedent" and ossified by *stare decisis*. *Cf.* Bush v. Gore, 531 U.S. 98 (2000); Roe v. Wade, 410 U.S. 113 (1973); *see* Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 400–01 (2007). An appellate court may appropriately deviate from a rule if a compelling and urgent reason exists, 20 AM. JUR. 2D COURTS § 132 (2009), such as when adhering to precedent will subvert the policy that the rule was intended to further. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985). *Cruz* is only one case that applies the four-factor test differently than in previous cases. As explained in this piece, *Cruz* subverts the policy of § 1153, which is fighting serious crime in Indian Country.

cution under the Ninth Circuit's test from escaping justice. As a rule, the *Morton* test would be a misplaced application of the tribal citizenship standard, which is wholly inconsistent with conventional federal Indian criminal law.

A lack of federal prosecutions for serious crimes undermines the rule of law in Indian Country. The law is constituted by a series of positive commands backed by credible threats of force.[227] Nowhere is this truer in America than in Indian Country, which is predominately rural with a high crime rate and a lack of prosecutions. In Indian Country, federal law is the disincentive that exists to thwart serious crimes. When federal prosecutions of serious crimes in Indian Country are disincentivized and decreased, the credible threat of the law is decreased. The alternatives to federal prosecutions are light sentences under the Indian Civil Rights Act and a lower probability of prosecution by state authorities.[228]

The law is also purposive. Its mission is to order individuals' liberties and allow for greater freedom.[229] When credible threats of force for infringing on others' rights or liberties and violating the law do not exist, the notion of "law" is undermined; people's liberties become less ordered, inefficiencies in the law and market develop, and life generally worsens.[230]

People make potential cost to potential benefit calculations when contemplating whether to engage in serious criminal behavior.[231] In Indian reservations, this calculation is the potential of serious penalty for an act versus the potential to increase one's utility with criminal activity through more money or greater personal satisfaction. Because there is a severe lack of law enforcement and an even lesser possibility of criminal prosecution, the law is the possibility that one will get caught and actually face a penalty commensurate with his or her crime.

Lack of law enforcement and prosecution makes this calculation favorable to engaging in criminal activity. There must be threat of a sufficiently harsh penalty to create a deterrent effect, particular deterrence for

227. *See* JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF THE POSITIVE LAW (4th ed., R. Campbell ed., John Murray, London, 1879); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., Cambridge University Press 1995); *see also* Frederick Schauer, *Positivism Through Thick and Thin, in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 65 (Brian Bix ed., 1988); JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., The Athlone Press 1970).

228. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 526 (1976).

229. *See generally* LON L. FULLER, THE MORALITY OF LAW (Yale University 1969); Lon L. Fuller, *Human Purpose and Natural Law*, 3 NAT. L.F. 68 (1958); Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1945–1946).

230. *See generally* LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER (Kenneth I. Winston ed., Duke University Press 1981); FULLER, THE MORALITY OF LAW, *supra* note 229 (discussing principle that the mission of the law is to order our liberty and allow for greater freedom, but that freedom is severely limited if deficiencies exist and others are free to infringe upon our rights); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957).

231. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169–217 (1968); *see generally* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (University of Chicago Press 1976).

the punished person and general deterrence in the community.[232] Because of the limitations of ICRA, federal prosecution is the only viable threat of serious punishment. Thus, federal prosecution must be a more likely threat to sufficiently deter serious criminals. A test that makes federal jurisdiction more difficult to prove and increases the likelihood of a declination to prosecute decreases deterrence.

With that, the Rule of *Wheeler* allows for rehabilitation and deterrence.[233] An Indian may be prosecuted for a serious crime by the tribe first, and the tribe may employ rehabilitative measures and restorative measures in systems such as the Navajo. Then, the federal government may prosecute the person for the same serious crime to create a sufficient deterrent in the community to committing the same or similar acts in the future. Thus, a more general application of the test makes the law more 'real' to reservation residents and creates a sufficient deterrent to dissuade potential criminals. This promotes the rule of law, makes life more stable and predictable, and improves living conditions by creating the conditions necessary for people to engage in economic activities, which improve community standards of living.

A decrease in federal prosecutions may lead to an increase in *lex talionis*—the law of revenge. When justice is not served by the proper authorities, or with penalties commensurate with the seriousness of a crime, the populace loses faith in the law. With loss of credibility and faith in the law, the populace may turn to *lex talionis*, or the law of revenge. This leads to a spiraling increase in the use of violence in a disproportionate tit-for-tat scenario.[234]

This is especially true in Indian Reservations, which are extremely rural and close nit. Unlike urban areas, there is little anonymity among those residing in reservations. Families and clan groups live together in scattered site clusters or dense communication networks. If a wrong is perpetrated against a person and goes unanswered by the authorities, people know about it. Eventually, if the authorities do not administer justice, a member of the victim's family may take action against the wrongdoer. This may precipitate "pay-back" for that act, which engenders revenge for the act of "pay-back," and so on. One cannot fully allocate their attention to increasing his utility and living a stable life when

232. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–27, 193–209 (2d ed., Oxford University Press 2008).

233. *United States v. Wheeler* stands for the proposition that an Indian who commits a serious crime in Indian Country may first be prosecuted by the tribe and then—because the tribes and the federal governments are separate sovereigns—be prosecuted by the federal government for the same act. United States v. Wheeler, 435 U.S. 313, 329–30 (1978).

234. *See generally* MARGARET ATWOOD, PAYBACK: DEBT AND THE SHADOW SIDE OF WEALTH (O.W. Toad Ltd. 2008); MICHAEL E. MCCULLOUGH, BEYOND REVENGE: THE EVOLUTION OF THE FORGIVENESS INSTINCT (Jossey-ass 2008); WILLIAM IAN MILLER, EYE FOR AN EYE (Cambridge University Press 2006); Posting of Howard Zehr to Restorative Justice Blog, http://emu.edu/blog/restorative-justice/2009/06/11/what-do-restorative-justice-and-revenge-have-in-common/ (June 11, 2009, 7:48 EST) (discussing disproportionate nature of revenge and the cycle of increase in violence it engenders).

he is constantly fighting or is apprehensive about becoming the victim of future crimes. This leads to inefficiencies in reservation societies and severely undermines people's ability to engage in economic activities that improve their standards of living. A stable and credible legal system surety of sufficient punishment will engender perceived integrity and adherence to the law.

Lack of the rule of law also prevents the federal government from fulfilling its fiduciary or trustee (or guardian) duties.[235] A government's most fundamental duty is keeping its citizens safe. Because Indian nations are domestic dependant nations[236] and Indians are United States citizens,[237] the federal government has a duty to keep reservation residents safe. The federal government also has a duty to protect people's property. When law enforcement creates personal and property security, individuals engage in more economic activities that promote development and better standards of living.[238]

When a test is applied that dissuades federal prosecutors from prosecuting serious crimes, law enforcement is undermined. People and property are then necessarily less secure and life is less stable. A test that dissuades federal prosecutors engenders and exacerbates conditions that are inconsistent with those that would exist if the government were fulfilling its law enforcement duty and providing basic security for persons and property. Motivating federal prosecutors to prosecute serious criminals in Indian Country is in line with the federal fiduciary duty to keep Indian Country's residents safe, which is government's primary responsibility.

The federal courts can allow the government to properly enforce the law with a test that makes the jurisdictional issue of § 1153 easier to satisfy. Then, the courts may allocate more time to answer the substantive issues of the law. Courts' application of a test that allows the federal government to fulfill this most basic duty will contribute to the betterment of reservation life.

CONCLUSION

The Major Crimes Act, 18 U.S.C. § 1153, does not explicate who is an Indian for purposes of federal criminal prosecution under the law. While seemingly straightforward, the answer may be complicated and uncertain. It may also differ if one is in the Eighth Circuit or the Ninth Circuit. Historically, the *Rogers* test, which was essentially race-based, determined Indian status.

Over time, as political, institutional, and demographic conditions changed in America, so did the test and how it was applied. Now, the test is two-pronged (some Indian blood and recognition as an Indian),

235. United States v. Kagama, 118 U.S. 375, 381–85 (1886).
236. *Id.*; Worcester v. Georgia, 31 U.S. 515, 517–20 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).
237. Indian Citizenship Act, 68 Pub. L. No. 174, 43 Stat. 253 (1924).
238. Sven R. Larson, *The Economic Case for Limited Government*, PROSPERITAS, Apr. 2007, at 3, 8, *available at* http://www.freedomandprosperity.org/Papers/rahncurve/rahncurve.pdf

with several factors considered in the analysis of the second prong. The test is not applied uniformly, as illustrated in the Ninth Circuit's opinion in *Cruz* and the Eighth Circuit's opinion in *Stymiest*. A uniform federal test is necessary, and the Eighth Circuit's test is optimal.

The Eighth Circuit's application of the test is in line with the historical test, does not violate the rule of *Antelope*, and will make conditions better in Indian Country. The Major Crimes Act was enacted based on United State Indian agents' hyper-alarmism over the *Ex Parte Crow Dog* decision. From then on, the trusteeship could be used as a "sword" to prosecute Indians instead of the shield it had been previously. What was previously the criterion for exception from federal jurisdiction was now an element of the crime under federal law.

The *Pero* case revealed the complications of the test yet to come and relied on the rule of race to find an answer. Then, the Court heard *Morton*, which created the legal fiction of Indian as a "political status." The Court struggled to maintain consistency with *Morton*, yet neither abandon the historical legacy of federal Indian criminal prosecution nor undermine law enforcement efforts in Indian Country in *Antelope*. However, the test changed to include a significant political status element. Now, enrollment in a federally acknowledged tribe is sufficient for federal criminal jurisdiction, but not necessary.

The Eighth Circuit's analysis of the second prong is consistent with this. It makes the importance of tribal enrollment contingent on its presence, but allows for the satisfaction of other factors considered generally to satisfy the second prong. The Ninth Circuit, conversely, considers enrollment preeminent and it can make or break a federal prosecutor's jurisdictional case for § 1153. The first prong is primary under the Eighth Circuit's test, but ancillary under the Ninth Circuit's test.

The Ninth Circuit's rigid application of exhaustive factors with descending weight differs from the Eighth Circuit's general application of illustrative factors. The Eighth Circuit considers tribal court prosecutions as evidence of tribal recognition as an Indian, while the Ninth Circuit does not. The Eighth and Ninth Circuits also differ regarding what constitutes social recognition as an Indian under the fourth factor. However, in both circuits, actual receipt of benefits, instead of eligibility for benefits, is sufficient for government recognition and enjoyment of the benefits of tribal affiliation.

The Ninth Circuit's *Cruz* opinion moves the standard towards the tribal citizenship rule of *Morton*, which will disincentivize federal prosecutions in Indian Country. While the *Morton* rule may be easier for federal prosecutors, it would keep many serious criminals—who are otherwise prosecutable under § 1153—from being prosecuted. This will undermine the rule of law in Indian Country and will inhibit the federal government from fulfilling its fiduciary or trustee duty to keep citizens safe. Thus, the Eighth Circuit's test is optimal and should be adopted to aid law enforcement, ameliorate conditions in Indian Country, and promote equal protection for Indians across the country.