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NOTES

A TALE OF TWO STATUTES: ZEPEDA AND THE NINTH CIRCUIT'S DESCENT INTO JURISDICTIONAL MADNESS

*Luke Emmer Miles**

When Europeans began their invasion of America, they sought to understand, legitimize, and elevate their actions through a mythology in which they juxtaposed themselves as 'civilized' Christians to the 'savage,' heathen natives. In so doing they maximized the differences between themselves and the Indians in moral, biological, and cultural terms. It is not surprising that these myths informed historical as well as first-hand and imaginative representations of Indian-white relations for several centuries; what is surprising is their staying power among contemporary scholars supposedly emancipated from the religious and racial superstitions of the past.

– Neal Salisbury¹

I. Introduction

What makes a person an Indian? Do they need a name like Sitting Bull or is Jim Thorpe enough? Should they wear a headdress with war paint under their eyes? How much Indian blood does it take to be authenticated as a real, live Indian? History is replete with American archetypes for the Indian, from the feather-adorned, high cheek boned logo of the Washington Redskins to Twain's alcohol-guzzling, hate-seething, white-folk-terrorizing "Injun Joe." Perhaps the real Indian is relegated to the past, having died the day the first white foot stepped on North America, his ancestors fated to live forever as a construct of European minds wrestling to grasp that which they could never truly understand. Or maybe he lives in the shadow of the "Hollywood Indian," waiting for the day when his European visage is torn asunder and his true face restored. In the words of one scholar, "In the

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1. Neal Salisbury, *American Indians and American History*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* 46 (Calvin Martin ed., 1987). Dr. Salisbury is a professor of history at Smith College. He specializes in American Indian and Colonial New England history.

centuries since Columbus got lost in 1492, a plethora of European social philosophers have attempted to ‘place’ Indians within the context of a Western intellectual tradition that never expected a Western Hemisphere, much less an inhabited one, to exist.”² Non-Indians have never had a clear conception of who or what an Indian is, evidenced by Columbus’s misnomer (calling the Native peoples of North America Indians because of the mistaken belief that Columbus had found the Indies) that still thrives today, in parlance and statute. It should come as no surprise that federal courts grapple with the question of who is an Indian. But is this inquiry within the province of federal courts to answer?

Perhaps the question of what makes a person an Indian is better understood when broken down into two parts. First, what is an Indian, and second, who is an Indian? Answering the first question of what an Indian is produces parameters for Indian status determination (e.g., an Indian is someone who is a member of a federally recognized tribe). Thus, answering the second question becomes a matter of determining whether a person meets those parameters set by the first question. What we can glean from this structure of inquisition is that if the parameters are faulty, then answering the second question accurately becomes hopelessly arduous, if not impossible. Why is any of this important? The determination of Indian status is at the core of the Ninth Circuit’s recent case, *United States v. Zepeda*,³ and alas, the court missed the mark.

The Ninth Circuit’s use of the “Bruce Test,”⁴ an inadequate rendering of guidelines for determining who is an Indian, produces problematic results (best evidenced by their holding in *Zepeda*) in which the determination of Indian status cannot be accurately achieved. Moreover, the Bruce Test requires a court to answer a question that it seemingly does not have the authority to answer because, under this test, a court determines whether someone is an Indian rather than a tribe. However, it has long been established that “Indian tribes retain their inherent power to determine tribal

2. Michael Dorris, *Indians on the Shelf*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY*, *supra* note 1, at 100. *The American Indian and the Problem of History* is a fascinating collection of essays shedding light on a myriad of problems which arise in identifying the American Indian in a history reflective of European victors.

3. *United States v. Zepeda*, 738 F.3d 201 (9th Cir. 2013), *superseding* 705 F.3d 1052, *reh’g en banc granted*, 742 F. 3d 910 (2014).

4. *See United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) (enunciating that because “Indian” is not statutorily defined, “the generally accepted test for Indian status considers “(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian.””); *see also id.* at 1224 (citing *United States v. Keys*, 103 F.3d 758 (9th Cir. 1996)); *United States v. Broncheau*, 597 F.2d 1260 (9th Cir. 1979).

membership”⁵ This is true even in extreme cases where the distinction is drawn between patrilineal and matrilineal membership.⁶ The first prong of the Bruce Test, which requires a showing of Indian blood,⁷ is an impermissible race classification that changes Indian status from a political distinction⁸ to a racial one. This is contradictory to Supreme Court precedent that clearly establishes that Indian within the context of federal legislation is necessarily political to avoid unconstitutional racial discrimination. Understanding *Zepeda* and its effects in context begins with exploring the case itself. Once the details of *Zepeda* have been sufficiently fleshed out, one must explore the history and construction of the General Crimes Act and Major Crimes Act to understand why the Bruce Test exists. The next step is to delve into the Bruce Test and understand its relationship with the Supreme Court precedent that it seemingly contradicts. Finally, one must examine *Zepeda* in light of the aforementioned forays to unveil why it was wrongly decided and how the court could have avoided the destructive holding that was issued.

II. Tribes and Communities: A Brief History

A cursory overview of the various tribes and communities involved in *Zepeda* is critical in understanding the multidimensional and often confusing nomenclature in federal Indian law. The *Zepeda* opinion itself makes reference to different political and physical communities, namely, the Ak-Chin Indian Reservation, the Gila River Indian Community, and the “Pima,” “Tiho,” “Tohono O’odham,” and “Tohono O’odham Nation of Arizona.”⁹

The Ak-Chin Indian Community is located on the Maricopa (Ak-Chin) Reservation in Arizona, and is home to primarily Tohono O’odham and

5. *Montana v. United States*, 450 U.S. 544, 564 (1981) (citing *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978)); *id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)) (“[T]ribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”).

6. *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 52-56 (1978) (holding that it was within the Santa Clara Pueblo tribe’s sovereign authority to reject membership for children born to a mother who was an enrolled member and a white man even though they would be eligible for enrollment if the father was enrolled and the mother was white).

7. *Bruce*, 394 F.3d 1215.

8. *See generally* *United States v. Antelope*, 430 U.S. 641 (1977) (discussing that “Indian” is a political distinction, rather than racial, which has to do with the relationship of a person to the federal government).

9. *United States v. Zepeda*, 738 F.3d 201, 201, 212 (9th Cir. 2013).

Akimel O'odham Indians.¹⁰ Nearby, the Gila River Indian Community was established on February 28, 1895, and is located approximately forty miles south of Phoenix, Arizona.¹¹ It is home to Akimel O'odham and Pee-Posh (Maricopa) Indians.¹² The Gila River Indian Community government was reorganized under the Indian Reorganization Act (IRA) in 1934.¹³ People considered Akimel O'odham and Maricopa (Pee Posh) have been a part of the Gila River Indian Community since its creation and are federally recognized.¹⁴

Pima is an alternate name for both the Tohono O'odham and Akimel O'odham, given to them by Spanish explorers.¹⁵ However, for many years the Tohono O'odham referred to themselves as Papago,¹⁶ and the Akimel O'odham are generally called Pima.¹⁷ "Tiho" is likely an error on the record, which is supposed to be "T.O." - a colloquial reference for Tohono O'odham.¹⁸

The name Tohono O'odham may refer to many different things. There are Tohono O'odham Indians generally and also the Tohono O'odham Nation (of Arizona).¹⁹ The latter comprises three reservations, the San Xavier Reservation, the Gila Bend Reservation, and the Tohono O'odham Reservation.²⁰ The reservations were created between 1874 and 1917, and

10. OFFICIAL WEBSITE AK-CHIN INDIAN COMMUNITY, <http://www.ak-chin.nsn.us/index.php> (last visited Feb. 16, 2015). Although the court refers to the "Ak-Chin Indian Reservation," this is technically a misnomer because it is more properly the Maricopa (Ak-Chin) Reservation.

11. NATIVE AMERICA IN THE TWENTIETH CENTURY: AN ENCYCLOPEDIA 452 (Mary B. Davis ed., 1996) [hereinafter DAVIS].

12. *Tribal History*, OFFICIAL WEBSITE OF THE GILA RIVER INDIAN COMMUNITY, <http://www.gilariver.org/index.php/about-tribe/profile/history/115-tribal-history> (last visited Sept. 14, 2014).

13. DAVIS, *supra* note 11, at 440.

14. *Tribal History*, OFFICIAL HOMEPAGE OF THE GILA RIVER INDIAN COMMUNITY, <http://www.gilariver.org/index.php/about-tribe/profile/history/115-tribal-history> (last visited Jan. 9, 2014).

15. DAVIS, *supra* note 11, at 452.

16. *Id.* at 637.

17. *Id.* at 452. Both tribes speak the same language, O'odham, and "Pima" is probably more reflective of that than their individual traditions. *Id.*

18. *9th Circuit Reverses Conviction over Indian Status of Defendant*, INDIANZ.COM, <http://www.indianz.com/News/2013/008249.asp> (last visited Jan. 21, 2013). "Tiho" was taken from the testimony of Matthew Zepeda, which likely accounts for the error. *Id.*

19. DAVIS, *supra* note 11, at 637; *see also* United States v. Zepeda, 738 F.3d 201, 212-13 (9th Cir. 2013).

20. *Id.*

the government of the Tohono O'odham Nation was recognized by the United States through the IRA in 1937. The Ak-Chin Indian Community, of the Maricopa (Ak-Chin) Indian Reservation, Arizona,²¹ the Gila River Indian Community, of the Gila River Indian Reservation, Arizona,²² and the Tohono O'odham Nation of Arizona²³ are all federally recognized tribal nations. The ancestry of the O'odham speaking tribes stretches back to prehistoric times, and they have lived in and around the same area for at least the last 400 years.²⁴

As an additional note, holdings of the Ninth Circuit are of special importance in the area of federal Indian law. According to the United States Census Bureau's 2010 results, slightly over thirty-four percent of the population that identifies as either American Indian or Alaskan Native resides in the Ninth Circuit.²⁵ Consequently, the holdings of the Ninth Circuit have a disproportionate effect on Indians, and should be afforded closer review.

III. United States v. Zepeda: *What Happened and Why?*

On October 25, 2008, Damien Zepeda and his brothers, Jeremy and Matthew, drove to the Ak-Chin Indian reservation in Arizona to the house of Dallas Peters.²⁶ Peters was allegedly involved in a relationship with Zepeda's ex-girlfriend, Stephanie Aviles.²⁷ When Damien Zepeda arrived at Peters's house, he confronted and attacked Aviles, who was there with another individual. Peters tried to intervene in the conflict, and Zepeda shot him several times. Peters was seriously injured, but he did not die as a result of the injuries.²⁸

21. Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, No. 19, 79 Fed. Reg. 4748 (Jan. 29, 2014), *available at* <http://www.federalregister.gov> (locate the search box in the top right corner and enter "Indian Entities Recognized," press search, and follow the hyperlink that bears the same name as above).

22. *Id.* at 4750.

23. *Id.* at 4752.

24. DAVIS, *supra* note 11, at 452, 637.

25. U.S. Census Bureau Population Div., *Annual Estimates of the Resident Population by Sex, Race Alone or in Combination, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2012*, U.S. CENSUS BUREAU (June 2013), <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

26. United States v. Zepeda, 738 F.3d 201, 203 (9th Cir. 2013).

27. *Id.* at 203 n.1.

28. *Id.*

Zepeda was charged with assault under the Major Crimes Act,²⁹ which provides for federal jurisdiction over enumerated crimes perpetrated by an Indian against an Indian within “Indian Country.”³⁰ Under the Major Crimes Act, the government must prove the defendant’s Indian status beyond a reasonable doubt.³¹ Further, as interpreted by the Ninth Circuit, the first prong of the Bruce Test requires a showing that “the defendant’s ‘bloodline be derived from a federally recognized tribe.’”³² Federal prosecutors introduced evidence at trial to prove Zepeda was an Indian, including a document entitled “‘Gila River Enrollment/Census Office Certified Degree of Indian Blood’”. The document bore an ‘official seal’ and stated that Zepeda was ‘an enrolled member of the Gila River Indian Community,’ and that the ‘information [wa]s taken from the official records and membership roll of the Gila River Indian Community.’”³³ The document specified that Zepeda had a “Blood Degree” of “1/4 Pima” and “1/4 Tohono O’Odham.”³⁴ The Tribal Enrollment Certificate was published in conjunction with the testimony of Detective Sylvia Soliz, who worked for the Ak-Chin Police Department.³⁵ Soliz testified that the Tribal Enrollment Certificate was confirmation that Zepeda met the blood quantum requirements for the tribe, was an enrolled member, and thus was entitled to receive tribal benefits.³⁶ Other evidence presented as to Zepeda’s Indian status was the testimony of Zepeda’s brother, Matthew, who stated that he and Zepeda, who shared the same parents, were “half ‘Native

29. 18 U.S.C.A. § 1153 (West 2014).

30. Indian Country is defined in 18 U.S.C. § 1151 as

all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state

18 U.S.C. § 1151 (2012). Whether Zepeda’s crime fell under § 1153 was not challenged and is not an issue here.

31. *Zepeda*, 738 F.3d at 210; *see also* Daniel Donovan & John Rhodes, *To Be or Not to Be: Who Is an “Indian Person,”* 73 MONT. L. REV. 61, 63 (2012) (citing *United States v. James*, 980 F.2d 1314, 1317-19 (9th Cir. 1992)); *United States v. Broncheau*, 597 F.2d 1260, 1262 (9th Cir. 1979)).

32. *Zepeda*, 738 F.3d at 210 (citing *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010)).

33. *Id.* at 204.

34. *Id.*

35. *Id.*

36. *Id.* at 205.

American” and half Mexican.³⁷ More specifically, Matthew testified that both he and his brother were “Pima and [T.O.]”³⁸

The jury found that Zepeda’s Indian status had been sufficiently proven, and convicted him on all counts.³⁹ Zepeda challenged the sufficiency of the state’s evidence in proving his Indian status beyond a reasonable doubt. The Ninth Circuit upheld this challenge, and ruled that a “Certificate of Enrollment in an Indian tribe” was not “sufficient evidence for a rational juror to find beyond a reasonable doubt that the defendant is an Indian for the purposes of § 1153 [without] evidence that the defendant’s bloodline is derived from a federally recognized tribe.”⁴⁰

The court discussed whether Zepeda’s bloodline could be traced to a federally recognized tribe. It ultimately concluded that “[t]here [was] no evidence in the record that the ‘Tohono O’odham’ referenced in Zepeda’s Tribal Enrollment Certificate refers to the federally recognized Tohono O’odham Nation of Arizona.”⁴¹ The court further reasoned that they were not at liberty to assume that “Tohono O’odham” and “Tohono O’odham Nation of Arizona” were the same, and that there was no way a jury could conclude this beyond a reasonable doubt.⁴² The court never discussed the “1/4 Pima” blood on Zepeda’s Tribal Enrollment Certificate, even though the Gila River Indian Community, the federally recognized Indian community that issued the certificate, is the home of the Akimel O’odham (Pima) Indians. Because the court ruled that Zepeda’s lineage had not been sufficiently established, the second prong of the Bruce Test was never addressed.⁴³

Damien Zepeda’s curious case leaves us with the following questions: Why do we need the Bruce Test? Is the Bruce Test the appropriate way to determine Indian status? Pending resolution of the two previous questions, did the Ninth Circuit decide the case incorrectly?

37. *Id.*

38. *Id.* The actual record says here that Matthew said “Tiho.” *But see supra* text accompanying note 18.

39. *Zepeda*, 738 F.3d at 204.

40. *Id.* at 213.

41. *Id.* at 212 (validating Zepeda’s argument that the “Tohono O’odham Nation of Arizona” and not simply “Tohono O’odham” appeared on the BIA list of federally recognized tribes).

42. *Id.* at 213.

43. *Id.* at 214.

IV. The Major Crimes Act and General Crimes Act: Two Statutes or One?

The impetus behind the Bruce Test is the ambiguity of two statutes that confer federal jurisdiction in Indian Country. Both the Major Crimes Act (MCA) and General Crimes Act's (GCA) grants of jurisdiction require identification of the defendant as an Indian or non-Indian, but neither statute defines Indian, seemingly leaving it up to the courts to decide.⁴⁴ Although Zepeda was charged under the MCA, that statute tells us only part of a story. The GCA, which preceded the MCA by some sixty-eight years, is the wellspring of the MCA. The GCA was passed in 1817 and provides federal jurisdiction for crimes committed against Indians by non-Indians in Indian Country.⁴⁵ It provides in pertinent part,

[T]he general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.

. . . [except for] offenses committed by one Indian against the person or property of another Indian . . .⁴⁶

The MCA⁴⁷ was passed in 1885⁴⁸ to provide federal jurisdiction for serious crimes committed in Indian Country. The statute provides: "Any Indian who commits against the person or property of another Indian or

44. 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, 283 (2000-2001) (citing 18 U.S.C. § 1153 (1994)).

45. 18 U.S.C. § 1152 (2012).

46. *Id.* The statute reads in full:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

47. 18 U.S.C.A § 1153 (West 2014).

48. Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. GENDER RACE & JUST. 109, 114 (2012).

other person any of the [listed offenses] within the Indian country, shall be . . . within the exclusive jurisdiction of the United States.”⁴⁹

The MCA and GCA are, in essence, intrusions into tribal sovereignty. They are statutory mechanisms by which the federal courts can encroach upon tribal sovereignty and exert federal power. The MCA was passed due to legislative doubt as to tribes’ ability to maintain judicial integrity.⁵⁰ The MCA simply expands the federal jurisdiction provided by the earlier GCA.

As the Eighth Circuit properly recognized in *United States v. Whitehorse*,⁵¹ the statutes, when taken together, cover anyone who commits a crime in Indian Country, because “everyone is either an Indian. . . or not.”⁵² From this perspective, the MCA seems supplementary; it is an effort to provide federal courts with jurisdiction *even* over Indians when certain serious crimes have been committed, a power which previously resided with tribal sovereigns until divested by Congress. Federal courts did not previously have jurisdiction to punish Indians within Indian Country under the GCA’s limited jurisdiction.⁵³ Indeed, the only palpable distinction between the two statutes resides in the determination of Indian status, meaning that the MCA was merely intended to cover those defendants who were not covered by the GCA because they were Indians. The statutes could be combined into one, conferring federal court jurisdiction over certain crimes for both Indians and non-Indians, and the statutes would have the same effect without the confusion that they currently create. The statutes are fundamentally related, yet because they are in fact two separate grants of jurisdiction based upon who is or is not Indian, with no indication of what an Indian is. The courts are forced to make the determination of

49. 18 U.S.C.A § 1153(a). The statute reads in full:

(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, a felony assault under section 113, 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.

50. Langland, *supra* note 48, at 114-15 (discussing that the Major Crimes Act was passed as a direct response to *Ex parte Crowe Dog* in which an Indian received a lenient sentence from the tribal court for murdering another Indian, but the federal courts declined jurisdiction).

51. *United States v. White Horse*, 316 F.3d 769, 772-73 (8th Cir. 2003).

52. *Id.* at 773.

53. 18 U.S.C. § 1152 (2012).

Indian status on their own. For the Ninth Circuit, the remedy is the Bruce Test.

V. The Bruce Test: The Court Plays the Role of the Tribe

In *United States v. Bruce*, the Ninth Circuit enunciated that: “The generally accepted test for Indian status considers ‘(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian.’”⁵⁴ The two prongs of the Bruce Test appear to have evolved from different Supreme Court precedent, which as it turns out, seems to be in direct and irreconcilable conflict. Understanding the origins of the respective prongs enables us to understand why the test seems to produce logically inconsistent results.

“The first prong requires ancestry living in America before the Europeans arrived”⁵⁵ The Ninth Circuit has since clarified that the test requires that the defendant’s “bloodline be derived from a federally recognized tribe.”⁵⁶ The origins of the first prong of the test can be traced back to *United States v. Rogers*.⁵⁷ In *Rogers*, a white man was accused of murder in Indian Country. He claimed that he was not subject to the jurisdiction of the United States because the GCA’s grant of jurisdiction, under which he was prosecuted, did “not extend to crimes committed by one Indian against the person or property of another Indian.”⁵⁸

Rogers claimed that he voluntarily removed himself from the United States to Cherokee country where he was adopted by the tribe, and he “exercised all the rights and privileges of a Cherokee Indian” in the tribe.⁵⁹ Without engaging in any discussion of whether Rogers had the political characteristics of an Indian, or the relevant relationship with the federal government, the court summarily dismissed his plea, noting that “Indian,” in the context of the Trade and Intercourse Act of 1834,⁶⁰ was a racial

54. *United States v. Bruce*, 94 F.3d 1215, 1223 (9th Cir. 2005) (citing *United States v. Keys*, 103 F.3d 758 (9th Cir. 1996)).

55. *Id.*

56. *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010).

57. 45 U.S. 567 (1846). The Bruce Court references *Rogers* in support of the test in both *Bruce* itself as well as *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). Both *Keys* and *Bruce* show that the first prong of the test is derived from the Supreme Court’s holding in *Rogers*. *Rogers*, 45 U.S. 567; *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005).

58. *Rogers*, 45 U.S. at 572.

59. *Id.* at 571.

60. *Id.* at 572-73. This was the statute under which Rogers was indicted. *Id.* The Ninth Circuit identified it as the precursor to the MCA. *Bruce*, 394 F.3d at 1223.

distinction.⁶¹ Rogers was “a white man, of the white race, and therefore not within the exception.”⁶² The Rogers Court did more than simply reject that “Indian” could be something other than a racial distinction; it essentially classified “Indian” exclusively as a racial distinction. Thus, the first prong of the Bruce Test is inherently a question of race—it serves solely as a means to gauge whether the person in question is the proper race for jurisdiction under the GCA. It is worth noting that sometimes the Bruce Test is called the Rogers Test, or at least it is credited as having been first proposed as the proper test in *Rogers*.⁶³ However, *Rogers* summarily dismisses any other kind of test and focuses only on the race of the defendant.⁶⁴

The second prong of the Bruce Test is multifaceted. While the first prong focuses only on the race of the individual, the second prong “probes whether the Native American has a sufficient non-racial link to a formerly sovereign people.”⁶⁵ When analyzing this prong, 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; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.”⁶⁶

The second prong of the test can be traced to *United States v. Antelope*.⁶⁷ *Antelope* is the basis for the proposition that “Indian” is a political distinction rather than a racial one. In *Antelope*, Gabriel Francis Antelope and Leonard Davison were convicted of first-degree murder via felony-

61. *Rogers*, 45 U.S. at 573 (“[A white man adopted into a tribe as an adult] is not an Indian; and the 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 a race generally,—of the family of Indians . . .”).

62. *Id.*

63. See *Bruce*, 394 F.3d at 1225; *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

64. *Rogers*, 45 U.S. at 572-73.

65. *Bruce*, 394 F.3d at 1224 (quoting *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988)).

66. *Id.* (quoting *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995)).

67. *United States v. Antelope*, 430 U.S. 641, 646 (1977). The *Bruce* Court cites to *St. Cloud*, as support for the second prong of the test, and *St. Cloud* in turn, cites to *Antelope*. See *Bruce*, 394 F.3d 1215 at 1224; *St. Cloud*, 702 F. Supp. at 1461.

murder provisions⁶⁸ after robbing and killing an eighty-one-year-old, non-Indian woman on the Coeur d'Alene Indian Reservation in Idaho.⁶⁹ Antelope, who was convicted under the MCA, argued that a non-Indian who committed the same crime would have been tried under Idaho state law, which did not contain a felony-murder provision. This would have required the state to prove additional mens rea elements to convict him of first-degree murder.⁷⁰ Further, Antelope argued that the grant of jurisdiction over "Indian" persons under the MCA was "invidious racial discrimination."⁷¹ The Supreme Court upheld the convictions, stating emphatically that "Indian" in the context of federal legislation is not an impermissible racial classification, but rather a political delineation.⁷²

The Bruce Test boils down to a racial prong and a non-racial prong. As applied in *Zepeda*, a person must meet the first prong before the court will even analyze the second prong, which in application makes "Indian" a wholly racial distinction. The only way that the MCA can apply is if a person is, in racial terms, an "Indian." The utter lack of congruence between the two prongs is dumbfounding. The first prong rests on Supreme Court precedent, which explicitly says that "Indian" is a racial classification, while the second prong rests on precedent from the same court that vehemently denies that "Indian" is a racial classification. Moreover, both *Rogers* and *Antelope* deal with the same family of statutes. Interestingly, *Antelope* makes no mention of *Rogers* whatsoever, rendering the latter good law, even though it is in obvious contradiction to the more modern precedent.

Perhaps questions as to the inconsistencies between the two opinions are better answered by history. In the 136 years between *Rogers* and *Antelope*, the United States abolished slavery (1865), added the Equal Protection Clause (1968), and granted women voting rights (1920).⁷³ In that same time, the United States transitioned from a country that classified African

68. *Antelope*, 430 U.S. at 643. The felony-murder provision of 18 U.S.C. § 1111 was applicable to Antelope because he was being charged under the Major Crimes Act. *Antelope*, 430 U.S. at 643.

69. *Antelope*, 430 U.S. at 642.

70. *Id.* at 643-44.

71. *Id.*

72. *Id.* at 645 (citing *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974)) (comparing the "Indian" preference to jurisdictional requirements for United States Senators or city councilmen); *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (discussing the refusal of benefits for non-Indians to an Indian).

73. These dates are based on when the Thirteenth, Fourteenth, and Nineteenth Amendments were enacted, not proposed.

Americans as property to one in which African Americans can attend the same schools and enjoy the same privileges as other citizens. This is to say that both politics and the law have changed drastically in the United States since 1841. *Rogers* is swaddled in antiquity and inequity, a hallmark of a much darker time in our nation's history when learned men believed that "[w]hen the term Indian is used in our acts of congress, it means that savage and roaming race of red men given to war and the chase for a living, and wholly ignorant of the pursuits of civilized man"⁷⁴ However, it is not enough to simply declare that *Rogers* is wrong. The Bruce Test and its racial prong make no sense in terms of statutory construction.

As discussed *supra*, the statutory grant of jurisdiction under the MCA and GCA leaves open-ended the question of who or what is an Indian. It is precisely this context that provides some guidance as to how that question is best answered. Generally, Indian Country is part of a tribe's sovereign territory (or at least under the tribe's dominion).⁷⁵ Although many tribes have idiosyncratic relations with the federal government, tribes normally have inherent authority over what happens in Indian Country, even so far as exercising power over non-members in limited circumstances.⁷⁶ Congress typically uses its power to regulate activity within Indian Country in order to achieve and maintain a balance between two sovereigns. The relationship between the United States and sovereign tribes is best explained by John Marshall in *Cherokee Nation v. Georgia*:

[Indian tribes] may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants⁷⁷

74. *United States v. Lucero*, 1 N.M. 422, 431 (1869).

75. *See* discussion *supra* note 30.

76. *United States v. Zepeda*, 738 F.3d 201, 205 (9th Cir. 2013) (stating that Indian tribes have exclusive jurisdiction over Indian on Indian crime); *United States v. Lara*, 541 U.S. 193, 199 (2004) (holding that tribal authority to punish nonmember offenders in Indian Country is an inherent power of the tribe as a sovereign rather than a delegated federal power).

77. 30 U.S. (1 Pet.) 1, 1-2 (1831).

Federal oversight of tribal governments serves an obvious purpose - there is a desire by the federal government to have some control over tribal nations within the United States.

The GCA allows federal regulation of crimes committed by non-Indians where it would otherwise have been outside the grasp of federal courts. In essence, it allows the federal government to "reach in" to Indian Country and exercise power over a person who is outside of the jurisdiction of the United States.⁷⁸ The MCA does the same with Indians. "Indian," in this case, does not make sense in any other terms than those of a political identification. The MCA's grant of jurisdiction is not over a select race; it is over lands and people controlled by a different sovereign power: the tribe. The GCA and MCA were not necessarily passed because of a lack of federal jurisdiction over people of a certain ancestry per se. Rather, because Indian Country is under the jurisdiction of quasi-sovereign nations, the power to prosecute criminals is inherent to those nations and recognized under federal law.⁷⁹ "Outside of Indian country, the Indian is the same as everyone else in the eyes of the law."⁸⁰

It is clear that the notion of who is Indian, is, as the Supreme Court has said, an identity vis-à-vis a relationship with the federal government: a question of to whom one is most directly answerable, the tribal government or the United States government.⁸¹ In reference to legislation which pertains directly to Indians, the Court has said that statutory references to Indians are not as "a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [federal government] in a unique fashion."⁸²

78. *United States v. Antelope*, 430 U.S. 641, 646 (1977) (citing *Fisher v. District Court*, 424 U.S. 382, 390 (1976)) ("[W]e reject the argument that denying (the Indian plaintiffs) access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.").

79. *Id.*

80. William C. Canby, Jr., *Tribal Court, Federal Court, State Court: A Jurisdictional Primer*, ARIZ. ATT'Y, July 1993, at 24, 25.

81. *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

82. *Id.*

VI. Native Or Judge: Who Should Have the Power to Say Who Is an Indian?

At the onset of this note, mentioned briefly was the fact that tribes have the power to determine their own membership.⁸³ While this has been reaffirmed time and again by various federal courts, it exists more as a legal optimism than anything else. How can a tribe be said to create its own membership requirements when any number of federal entities still engage in a determination of who is an Indian beyond asking the question of whether or not they are enrolled in a federally recognized tribe? The answer seems to be that the inquiring entities are attempting to determine whether or not an individual claiming to be or not to be an Indian has the requisite relationship with the federal government. “The definition of ‘Indian’ is the measure of eligibility that the government uses for benefits and preferences provided to Indians under a variety of federal programs.”⁸⁴ With few exceptions, membership in a federally recognized tribe is a necessary precursor to being an Indian for the purposes of any federal statute.⁸⁵ The Ninth Circuit, in *Zepeda*, recognized that the best source of identifying “federally acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry” is the Bureau of Indian Affairs’ list of federally recognized tribes published to the Federal Register (BIA list).⁸⁶ After acknowledging that there is a list created and updated regularly by the federal government, which contains the names of every Indian community in the nation with the requisite relationship with the federal government necessary for federal criminal prosecution, how is it that there is some additional factor that the courts consider when determining whether or not federal jurisdiction exists under the GCA and MCA?

Because each tribe on the BIA list is, as a matter of fact, federally recognized, it logically follows that enrolled members of those tribes are federally recognized as Indians. Moreover, there is a safeguard in place such that not just any group of people can get together and call themselves an Indian tribe: any tribe that now seeks federal recognition must petition

83. *Montana v. United States*, 450 U.S. 544, 564 (1981).

84. *Brownell*, *supra* note 44, at 276.

85. *Id.* at 282 (pointing out only two acts, the Indian Health Care Improvement Act of 1976 and the Arts and Crafts Act of 1990 which do not specifically require membership in a federally recognized tribe).

86. *United States v. Zepeda*, 738 F.3d 201, 211 (2013) (citing *Baker v. Carr*, 396 U.S. 186, 215 (1962)).

the BIA.⁸⁷ This process can sometimes take years, and not all tribes that petition are accepted.⁸⁸ It seems logical to assume then that if Indian tribes are allowed to set their own membership requirements, and are also required to petition the federal government for recognition, then at the point that they become recognized, the federal government has in fact approved of their membership requirements. The Bruce Test's requirement that the government must prove a defendant's blood lineage to a federally recognized tribe overrides the tribe's ability to determine its membership and infringes upon tribal sovereignty. It is the equivalent of denying someone status as a federally recognized Indian when the tribe and federal government (outside of the judiciary) have already conferred that status on them. Continuing to use the Bruce Test takes away a tribe's sovereign power to determine its own members in those instances like *Zepeda*, where the court holds that enrollment in a federally recognized tribe is not enough to prove that someone is an Indian.

Additionally, the Bruce Test, by including a strictly racial component, fails to produce accurate parameters for gauging whether someone is "Indian" for the purposes of the GCA and MCA. The Supreme Court, as discussed *supra*, has premised the legitimacy of statutory delineations between Indians and non-Indians, at least in recent history, on the idea that such distinctions are political and not racial.⁸⁹ However, the use of blood quantum to determine who meets the standard, on its face, is wholly racial. It shocks the conscience that federal courts continue the masquerade that "Indian" is something other than a racial distinction when in its application and history, especially pertaining to the GCA and MCA, it is strikingly clear that whether someone is "Indian" is a racial determination. Furthermore, for some tribes and legislators, the trend in recent years has been to move away from blood quantum requirements.⁹⁰ It is disturbing that the one area of law where race is still a major factor is in the criminal arena.

Using the Bruce Test yields untenable and biased results that run contrary to legislative purposes. Assuming that *Antelope* is an accurate rendering of Federal Indian Law, what results from applying the Bruce Test is inconsistent. The thrust of whether someone is an Indian is not based on whether a great grandmother was an Indian. Instead, if that person partakes in a relationship with a tribe to the extent they answer to another sovereign

87. 25 C.F.R. § 83.3 (2014); see also Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 489–90 (2006).

88. Fletcher, *supra* note 87, at 491.

89. *United States v. Antelope*, 430 U.S. 641, 646–47 (1977).

90. Brownell, *supra* note 44, at 281–82.

power beyond the federal government.⁹¹ The latter question is not one of blood, but of self-identification. There are people born with blood derived from federally recognized tribes that do not claim to be Indian and do not have the requisite relationship with the federal government to be classified as an Indian (in relation to the second prong of the Bruce Test). The opposite is also true, especially in light of the fact that some federally recognized tribes do not require a blood quantum.⁹² There is a very real possibility that members of federally recognized tribes who fully meet the requisite relationship with the federal government from a political standpoint would fall outside of the scope of federal jurisdiction solely because they cannot make a showing of blood quantum in a manner that suits the Ninth Circuit.

This is essentially what happened in *Zepeda*. The court reasoned that because “Tohono O’odham Nation of Arizona” and not “Tohono O’odham” appeared in the federal register as a recognized tribe, that *Zepeda* could not be proven to have lineage to a federally recognized tribe.⁹³ The court never mentioned the fact that the Gila River Indian Community, the name that appears on the federal register, is not even the name of an Indian tribe! The Gila River Indian Community is a tribal reservation composed of two separate tribes: the Akimel O’odham (Pima) and the Maricopa (Pee Posh).⁹⁴ This relationship is similar to a more famous (albeit inverse) example - the Iroquois Nation. The Iroquois is not a tribe of Indians, but rather is a confederacy of separate tribal nations, and the name “Iroquois” is not listed on the BIA list.⁹⁵ Although both the Maricopa and Akimel O’odham have been federally recognized tribes for over 100 years, neither of their names appear as such on the BIA list.

Not only is the test that the Ninth Circuit used wholly inadequate to serve the purpose for which it is used, but the Ninth Circuit failed to apply it correctly. In the context of *Zepeda*, the name “Tohono O’odham” was little more than a red herring. It was *Zepeda*’s Pima blood rather than his Tohono O’odham blood that the court should have traced. Whether or not the Ninth Circuit recognized that Pima was an alternate name for the

91. *Antelope*, 430 U.S. at 646.

92. Thomas R. Myers & Jonathan J. Siebers, *The Indian Child Welfare Act*, MICH. B.J., July 2004, at 19, 21 (discussing blood quantum requirements under the Indian Child Welfare Act).

93. *United States v. Zepeda*, 738 F.3d 201, 212 (9th Cir. 2013).

94. DAVIS, *supra* note 11, at 452.

95. Mary Druke Becker, “*We Are an Independent Nation: A History of Iroquois Sovereignty*,” 46 BUFF. L. REV. 981, 983 (1998).

Akimel O'odham is unclear. What is clear is that the court engaged in a narrow and wholly illegitimate interpretation of federal law by merely scanning a list of tribal names without considering the fact that the Indian community, whose document it rendered insufficient to serve as proof of a bloodline from a federally recognized tribe, bore the name of neither of the tribes comprising it.

Additional scrutiny as to a person's Indian status makes sense in areas outside of criminal jurisdiction because of the massive amount of federal funds appropriated based on census findings.⁹⁶ But how is it that the courts ever decided that an inquiry beyond "Is this person a member of a federally recognized tribe?" was necessary to determine whether someone is an Indian under the MCA and GCA? The answer again seems to be found in *Rogers*. By making "Indian" a racial distinction, the court in *Rogers* sought to prevent "white men of every description" from "at pleasure settl[ing] among [Indians], and, by procuring an adoption by one of these tribes, throw[ing] off all responsibility to the laws of the United States."⁹⁷ *Rogers* came before the MCA at a time when federal courts still lacked jurisdiction over Indians in Indian Country. The irony of this history in the context of *Zepeda* is that the same rule created by the courts to protect from people evading federal jurisdiction is now being used to do precisely that, and at great cost to the tribes.

VII. Dodging Race: How Could the Ninth Circuit Decided Zepeda Differently?

Was the holding in *Zepeda* an inevitable result? There are three clear ways in which the court could have avoided such a devastating holding. First, the primary object of this note, is to denounce the Bruce Test. By limiting the inquiry into the defendant's Indian status to whether or not he was an enrolled member of a federally recognized tribe, the court would never need to decide this issue of blood. Second, the court could have followed the dissent, which "disagree[d] with the majority's ultimate determination that the government failed to present sufficient evidence from which a rational jury could infer that Zepeda has a blood connection to a federally recognized tribe."⁹⁸ Third, and perhaps better still, the court could have followed the Eighth Circuit's precedent.

96. Brownell, *supra* note 44, at 276.

97. United States v. Rogers, 45 U.S. 567, 573 (1846).

98. *Zepeda*, 738 F.3d at 214 (Watford, J., dissenting).

The Eighth Circuit case, *United States v. White Horse*,⁹⁹ provides a clear alternative to the Bruce Test, which is particularly applicable to *Zepeda*. In *White Horse*, the defendant, Guy White Horse, was charged with sexual molestation of his six-year-old son under the GCA.¹⁰⁰ He appealed his conviction, arguing that he was in fact an Indian, and the government had failed to meet their evidential burden of proving that he was not.¹⁰¹ The court held there was no plain error:

[B]ecause of the complementary nature of § 1152 and § 1153. There is no contention that the evidence was insufficient to establish that Mr. White Horse committed the physical acts charged in the indictment, and regardless of which statute applied (one of them certainly did) Mr. White Horse was guilty of a federal crime because he, like everyone else, is either an Indian or he is not [W]e believe that the situation here is the same as it would be if we were dealing not with two statutes but with a single one that provided that it applied whether or not the defendant was an Indian.¹⁰²

Mr. White Horse, just like *Zepeda*, committed a crime that falls within both statutes.¹⁰³ Had the Ninth Circuit followed the Eighth Circuit's reasoning, there would have been no need to delve into the sufficiency of the evidence of *Zepeda*'s Indian status since the court still had jurisdiction under the GCA. Essentially, specific to the facts of *Zepeda*, his status as Indian should not have been dispositive as to whether the court had jurisdiction.

It is hard to grasp exactly why the Ninth Circuit chose the route it took. It seems wildly unnecessary to engage in the discussion which is, at times, inconsistent with the court's own precedent. For instance, the court discussed at length the decision in *United States v. Maggi* to support the proposition that a bloodline traceable to a federally recognized tribe was an essential part of the first prong of the Bruce Test.¹⁰⁴ *Maggi* dealt with two

99. 316 F.3d 769 (8th Cir. 2003).

100. *Id.* at 771.

101. *Id.* at 772.

102. *Id.* at 772–73.

103. *United States v. Dodge*, 538 F.2d 770, 775 (8th Cir. 1976) (holding that assault fell within the jurisdictional reach of the General Crimes Act).

104. *United States v. Zepeda*, 738 F.3d 201, 210 (9th Cir. 2013) (citing *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010)).

defendants, Gordon Mann and Shane Maggi.¹⁰⁵ Mann claimed to be a member of the Little Shell Tribe of the Chippewa Cree, a tribe that is not federally recognized,¹⁰⁶ unlike *Zepeda*, where the reference to Tohono O'odham may or may not have been to a federally recognized tribe. More, the court found that the "Blackfeet" blood of Maggi was sufficiently traceable to a federally recognized tribe even though the name on the BIA list is the "Blackfeet Tribe of the Blackfeet Indian Reservation of Montana."¹⁰⁷ The court stretches its precedent so far that it becomes hardly recognizable. The errors in the opinion, such as the mistaken reference to "Tiho" instead of "T.O." or "Ak-Chin Indian Reservation" rather than the "Maricopa (Ak-Chin) Indian Reservation," would be forgivable in many contexts. However, in an opinion where the harbinger of the court's argument is that the defendant's blood certificate said "Tohono O'odham" instead of "Tohono O'odham Nation of Arizona," such mistakes are unacceptable.

VIII. Conclusion

Damien Zepeda was an enrolled member of the Gila River Indian Community.¹⁰⁸ This community of federally recognized Indians, enjoying that status since at least 1934,¹⁰⁹ conferred on him the status of a federally recognized Indian by way of an official document - his "Tribal Enrollment Certificate."¹¹⁰ The Ninth Circuit applied a test, which makes federal jurisdiction under the MCA exclusively applicable to people of a certain race.¹¹¹ Although evidence was presented that (1) Damien Zepeda was an enrolled member of a federally recognized Indian community, and (2) that his blood was "1/4 Pima" and "1/4 Tohono O'odham," the court overturned his conviction based on the idea that no juror could have found beyond a reasonable doubt that his bloodline was derived from a federally recognized tribe.¹¹² Neither the official documents presented, the testimony of tribal officials, nor even the testimony of Zepeda's brother as to his lineage was sufficient evidence. In so holding, the Ninth Circuit established precedent supporting the argument that an official document from a federally

105. *Maggi*, 598 F.3d at 1076.

106. *Id.*

107. *Id.* at 1082.

108. *Zepeda*, 738 F.3d at 204.

109. DAVIS, *supra* note 11, at 440.

110. *Zepeda*, 738 F.3d at 204.

111. *Id.*

112. *Id.* at 204-05, 213.

recognized tribe, which contains a certificate specifying the degree of Indian blood of the enrolled member, is insufficient to prove that a person has a necessary degree of blood from a federally recognized tribe.¹¹³

The *Zepeda* court shows, in striking fashion, why courts should not be deciding who is or is not an Indian. The lack of uniformity of a definition of “Indian” in federal legislation - there are, in fact, over thirty-three different definitions under federal law¹¹⁴ - is evidence of the inability of Indians to fit neatly into a box of western ideology. Though the Supreme Court has recognized the unconstitutionality of premising Indian status on race, the application of the law, particularly in criminal jurisdiction, continues to focus on race.¹¹⁵ Whether or not individual tribes continue to use blood quantum as part of their enrollment requirements is, as a matter of law, their sovereign power.¹¹⁶ As a matter of science, however, strict adherence to blood quantum requirements will eventually lead to the “extinction” of Indian tribes.¹¹⁷ But in any case, blood quantum as a concept is a distinctly non-Indian idea that has more or less been forced on the tribes by federal regulation.¹¹⁸ If the tribes choose to require blood quantum, so be it, but it is a choice that the tribes, not the courts, can make. For federal criminal jurisdiction, the test as to whether someone is an Indian should end after a determination of whether or not they are enrolled members of a federally recognized tribe.

Damien Zepeda is an Indian. He is not an Indian just because he has Pima blood in his veins. His Tohono O’odham blood does not make him an Indian either. The Gila River Indian Community, in its sovereign power, a power inherent to it and recognized by the Bureau of Indian Affairs and the federal government at large, recognizes Damien Zepeda as an Indian. For the purposes of federal Indian law, that makes him an Indian, and it is emphatically not the province of the federal courts to say otherwise.

113. *Id.* at 213.

114. Brownell, *supra* note 44, at 278.

115. *See generally* United States v. Antelope, 430 U.S. 641 (1977).

116. *Montana v. United States*, 450 U.S. 544, 564 (1981); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

117. Ruth Hopkins, *In the Spirit of Our Ancestors*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 31, 2011), <http://indiancountrytodaymedianetwork.com/2011/08/31/spirit-our-ancestors>.

118. *Id.*

