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Indian Law-Criminal Jurisdiction-Tribal Courts Have Criminal Jurisdiction over Non-Indian - Oliphant v. Schlie

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Indian Law—CRIMINAL JURISDICTION—TRIBAL COURTS HAVE CRIMINAL JURISDICTION OVER NON-INDIANS—*Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *cert. granted sub nom. Oliphant v. Suquamish Indian Tribe*, 97 S. Ct. 2919 (1977).

Mark David Oliphant, a non-Indian, was arrested on August 19, 1973, by Suquamish tribal police on the Port Madison Indian Reservation in the State of Washington.[1] He was charged with assaulting an officer and resisting arrest,[2] and then incarcerated.[3] Before trial, Oliphant filed a petition for writ of habeas corpus in the United States District Court, Western District of Washington, claiming that Indian tribal courts have no criminal jurisdiction over non-Indians.[4] The district court denied the petition,[5] and Oliphant appealed. The United States Court of Appeals for

1. The criminal acts with which Oliphant was charged were committed on lands located within Indian country but leased by the Suquamish Tribe to a Washington State corporation. The concept of Indian country was discussed by the district court and will not be treated in this case note. Oliphant v. Schlie, No. 511-73C2 (W.D. Wash. Apr. 5, 1974), *aff'd*, 544 F.2d 1007 (9th Cir. 1976), *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977). For a general discussion of what constitutes Indian country, see F. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 5-8 (1971).

2. The tribe claimed that the authority to try Oliphant before the tribal court was derived from its Law and Order Code. The code provides:

> The Tribal Court of the Port Madison Reservation shall have original jurisdiction over . . . [a]ll crimes committed within the territorial jurisdiction of the Port Madison Reservation and all other Tribally owned lands, . . . except the major crimes as defined by the Act of March 3, 1885 (23 Stat. 362) as amended which are within the jurisdiction of the Federal Government.

Suquamish Indian Tribe Law & Order Code, ch. 1, art. III, § 3 (1973). The Suquamish Law and Order Code allows for a trial de novo to a tribal court of appeals except as to those issues decided by a jury at the tribal court level. *Id.* art. II, § 2.

On the other hand, Oliphant could have been charged in federal court for assaulting the tribal police officer under "one or several of the following federal statutes:" 18 U.S.C. § § 111, 113, 1114, 1152 (1970). Oliphant v. Schlie, 544 F.2d 1007, 1014 n.2 (9th Cir. 1976) (Kennedy, J., dissenting); *see* Stone v. United States, 506 F.2d 561 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975).

3. Pursuant to a previously existing agreement with the Bureau of Indian Affairs, the city of Bremerton provided jail facilities for holding tribal prisoners. Oliphant v. Schlie, No. 511-73C2, slip op. at 2 (W.D. Wash. Apr. 5, 1974).

4. Oliphant v. Schlie, No. 511-73C2 (W.D. Wash. Apr. 5, 1974). The fact that Oliphant lived within the Indian reservation, Brief for Petitioner at 10, Oliphant v. Schlie, No. 76-5729 (U.S. Nov. 22, 1976), might have been deemed as giving implied consent for submission to the jurisdiction of the tribal court. *See* Article, *The Allocation of Criminal Jurisdiction in Indian Country—Federal, State and Tribal Relationships*, 8 U. CAL. D.L. REV. 431, 448-50 (1975); 18 ST. LOUIS U.L.J. 461, 461-63 (1974) (supporting territorial jurisdiction of Indian courts). The Ninth Circuit, however, did not consider this issue in the instant case.

5. Oliphant v. Schlie, No. 511-73C2 (W.D. Wash. Apr. 5, 1974).

the Ninth Circuit affirmed, holding that non-Indians are subject to Indian tribal court jurisdiction since Congress has never expressly taken this jurisdiction away from Indians.[6] The United States Supreme Court has since granted Oliphant's petition for certiorari.[7]

I. BACKGROUND

Indian law is a complex potpourri of federal, state, and tribal law. In criminal matters, the applicable law can be determined only after identifying the person who committed the act, the nature of the criminal act, and the location of the crime. Continual changes in congressional policies and federal and tribal laws further complicate the criminal jurisdiction issue.

To lay the foundation for an analysis of the instant case, this section will examine the doctrine of original tribal sovereignty and explore its meaning and scope, discuss the disputed matter of statutory jurisdiction over non-Indians committing crimes upon Indians within Indian country, and present a brief overview of the concept of Indian self-government as modified by congressional policy from the early 1800's to the present.

A. *Tribal Self-Government Under the Doctrine of Residual Sovereignty*[8]

Prior to the colonization of America, Indian tribes possessed full sovereignty over their land and members. Following conquest, Indians became subject to congressional regulation as provided by the Constitution,[9] and the tribes' external powers of sovereignty ceased. The tribes' internal powers of sovereignty, however, remained.[10] Subsequent treaties,[11] statutes,[12] and federal

6. 544 F.2d 1007 (9th Cir. 1976).

7. Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977).

8. The term "residual sovereignty" is used to convey the concept of original Indian sovereignty that has been limited through subsequent action by the United States. *See* note 14 and accompanying text *infra*.

9. Although the President of the United States is authorized to make treaties, U.S. CONST. art. 2, § 2, treatymaking with Indians has now ceased. Notes 11, 51 and accompanying text *infra*. Responsibility for governing Indians is vested in the Congress of the United States by constitutional provision: "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. 1, § 8.

10. For an explanation of the terms "external" and "internal" powers, see F. COHEN, *supra* note 1, at 122-26, 273-77.

11. For a discussion of the history and legal force of Indian treaties, see OFFICE OF THE SOLICITOR, UNITED STATES DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 138-214 (1958) [hereinafter cited as FEDERAL INDIAN LAW].

administrative regulations[13] further diminished Indian sovereignty by limiting the internal powers of the Indian tribes. Presently, Indian tribes are considered wards of the federal government and retain only residual sovereignty.[14]

The concept of tribal residual sovereignty is derived from two nineteenth century Supreme Court cases. In *Cherokee Nation v. Georgia,*[15] Chief Justice Marshall clarified the special position given Indian tribes in the United States. Quoting the Constitution, Marshall asserted that Indian tribes are distinct from both "foreign Nations" and the individual states: "They may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[16] In *Worcester v. Georgia,*[17] Marshall refined his earlier pronouncement on the status of Indian tribes, likening them to conquered nations: "The Indian nations had always been considered as distinct, independent political communities . . . . [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger [nation] . . . ."[18]

These passages and cases have generally been accepted to stand for the proposition that Indian tribes, within the limits imposed by the federal government, have the right to govern

12. The authority of Congress to pass legislation affecting Indians is inferred from Congress' constitutional charge to regulate the commerce of the Indian tribes. *See* note 9 and accompanying text *supra.* Titles 18 and 25 of the United States Code embody the majority of the statutes affecting Indians and Indian tribes. For a general discussion of this topic, see F. COHEN, *supra* note 1, at 89-100.

13. The Commissioner of Indian Affairs is empowered to promulgate regulations bearing on Indian affairs. 25 U.S.C. § 2 (1970). For a general discussion of administrative powers over Indian affairs, see F. COHEN, *supra* note 1, at 100-15.

14. FEDERAL INDIAN LAW, *supra* note 11, at 398 (footnote omitted):

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.

15. 30 U.S. (5 Pet.) 1 (1831).

16. *Id.* at 17.

17. 31 U.S. (6 Pet.) 515 (1832).

18. *Id.* at 559-61.

themselves free from encroachment on internal tribal powers by state governments.[19] Thus, Indian tribes may form their own governments,[20] pass and enforce their own ordinances,[21] exlude nonmembers of the tribe[22] and trespassers[23] from their reservations, regulate business transacted on the reservation,[24] create tribal courts,[25] and exercise civil and criminal jurisdiction over their members.[26]

More recently, however, the Supreme Court has limited the application of the doctrine of residual sovereignty. In *McClanahan v. Arizona State Tax Commission,*[27] the Court observed that "modern cases . . . tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable

19. *E.g.,* United States v. Mazurie, 419 U.S. 544 (1975); Talton v. Mayes, 163 U.S. 376, 383-84 (1896); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906); FEDERAL INDIAN LAW, *supra* note 11, at 396-98.

20. *See Ex parte* Crow Dog, 109 U.S. 556 (1883); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). *See generally* Powers of Indian Tribes, 55 Interior Dec. 14 (1934); F. COHEN, *supra* note 1, at 122-37; FEDERAL INDIAN LAW, *supra* note 11 , at 395-423.

21. Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965).

22. Quechan Tribe v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976).

23. *Id.*; Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).

24. United States v. Mazurie, 419 U.S. 544, 556-58 (1975); Buster v. Wright, 135 F. 947 (8th Cir. 1905).

25. Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965). Tribal courts operate on some Indian reservations under the authority of the Indian tribe. Powers held by the tribal courts are derived from the sovereignty of the tribe itself. The Eighth Circuit aptly explained this derivation of authority from the tribe in Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 91 (8th Cir. 1956):

> The plaintiffs would argue that there is found no provision in the Federal Constitution for Indian courts. None is necessary . . . . [T]he Constitution, by authorizing Congress to regulate commerce with the Indian tribes and by authorizing the making of treaties with them, while not in and of itself *establishing* the sovereignty of the tribes, nevertheless does *recognize* their sovereignty. As interpreted by the United States Supreme Court, that sovereignty is absolute excepting only as to such rights as are taken away by the paramount government, the United States. Under this view, not even a Congressional Act would be necessary to establish the legality of the Oglala Sioux Tribal Courts. However, regulatory powers over these judicial establishments have been exercised to promote uniformity, gradual assimilation and other ends.

In contrast, other Indian reservations have Courts of Indian Offenses, created by the authority given the Secretary of the Department of Interior by Congress. M. PRICE, LAW AND THE AMERICAN INDIAN 129 (1973). The Commissioner of Indian Affairs is specifically authorized to promulgate regulations with regard to Courts of Indian Offenses. 25 U.S.C. § 2 (1970). The Suquamish court that exercised jurisdiction over Oliphant was an Indian tribal court. 544 F.2d at 1009.

26. 25 U.S.C. § 1302 (1970); 25 C.F.R. § § 11.1-.87NH (1976); *see* Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975); Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965).

27. 411 U.S. 164 (1973).

treaties and statutes."[28] Thus, while the doctrine of residual sovereignty has been invoked to justify many powers of self-government, jurisdiction over non-Indians who commit criminal offenses upon Indians has been permitted heretofore only when specifically authorized by treaty.

B. Federal Jurisdiction over Non-Indians Committing Crimes on Reservations

Under a number of early treaties between the federal government and Indian tribes, the tribes were allowed jurisdiction over non-Indians committing crimes within Indian country.[29] Treaties with the Suquamish Tribe, however, are silent on this subject.[30]

In addition to treaties, federal statutes affect the criminal jurisdiction of tribal courts. One of the earliest of these statutes, the Trade and Intercourse Act of 1790,[31] designated the method of handling non-Indians who committed crimes against Indians within Indian country.[32] The act provided that such crimes and offenses were to be tried in the federal courts.[33] Subsequent revisions of the act[34] retained the provision for federal criminal jurisdiction over non-Indians. On the other hand, the revisions did not provide for jurisdiction over Indians who committed crimes against other Indians within Indian country.[35] Thus, for such

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28. *Id.* at 172. In *McClanahan*, the Court, citing an 1868 treaty with the Navajo tribe, invoked the doctrine of residual sovereignty to prevent the State of Arizona from levying an income tax on Indians earning income on the reservation.

The *McClanahan* standard was met in the recent case of United States v. Mazurie, 419 U.S. 544 (1975). There, the Court referred to 18 U.S.C. § 1161 (1970) for authority that Indian tribes are permitted to regulate the sale of liquor on the reservation, even if sold by non-Indians doing business on lands held by non-Indians within the limits of the reservation.

29. F. COHEN, *supra* note 1, at 6 & n.48.

30. 544 F.2d at 1010.

31. Ch. 33, 1 Stat. 137 (1790).

32. *Id.* § 5:

> [I]f any citizen or inhabitant of the United States . . . shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian . . . [the offender] shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or [territorial] district to which he . . . may belong, against a citizen or white inhabitant thereof.

33. *Id.* § 6.

34. For a brief history of subsequent revisions of the 1790 Trade and Intercourse Act, see FEDERAL INDIAN LAW, *supra* note 11, at 323-24.

35. The Trade and Intercourse Act of 1817, the second permanent Trade and Intercourse Act, contained this provision:

crimes Indian tribes were allowed exclusive jurisdiction over their members.[36]

This unqualified tribal jurisdiction was limited by the Appropriations Act of 1885.[37] This act granted federal courts exclusive jurisdiction over Indians who committed any of seven major offenses against other Indians.[38] The current version of this provision extends federal jurisdiction to fourteen major crimes.[39]

The current relevant versions of the 1790 Act[40] and the 1885 Act,[41] however, do not expressly grant federal courts *exclusive* jurisdiction over non-Indians committing crimes against Indians within Indian country.[42] Nevertheless, federal and state courts,

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> [S]uperior courts . .. . and circuit courts and other courts of the United States, of similar jurisdiction in criminal causes . . . shall have . . . full power and authority to hear, try, and punish, all crimes . . . against this act . . . : *Provided,* That nothing in this act shall be so construed . . . to extend to any offence committed by one Indian against another, within any Indian boundary.

Ch. 42, § 2, 3 Stat. 383 (1817).

36. This pronouncement of jurisdiction over crimes by Indians against Indians was seen by Cohen as recognition of tribal "self government." F. COHEN, *supra* note 1, at 362.

37. Ch. 341, § 9, 23 Stat. 385 (1885). This act was passed in response to the Supreme Court decision in *Ex parte* Crow Dog, 109 U.S. 556 (1883), which held that the courts of the United States were without criminal jurisdiction over a Sioux Indian who had murdered another Indian on an Indian reservation. The Court stated that such jurisdiction had not been conferred upon the lower federal courts by Congress. *Id.* at 572.

38. Ch. 341, § 9, 23 Stat. 385 (1885). The seven offenses were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

39. 18 U.S.C.A. § 1153 (Cum. Supp. 1977) (in part):

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

40. 18 U.S.C. § 1152 (1970):

> 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.

41. Note 39 *supra.*

42. This fact was emphasized by the majority in the instant case. 544 F.2d at 1010-11; note 61 and accompanying text *infra.*

Though unmentioned in the statutes, crimes committed against non-Indians on reservations, whether by Indians or non-Indians, have historically been punishable in federal

with the exception of the district court and the Ninth Circuit in the instant case, have consistently read such a grant into the statutes.[43] In *Ex parte Kenyon,*[44] the court directly addressed the question of whether a federal court or an Indian tribal court was empowered to exercise jurisdiction over a non-Indian who had allegedly committed larceny within Indian country.[45] Citing earlier versions of the current statutes for authority,[46] the court stated that for an Indian court to have jurisdiction, the "offender must be an Indian, and the one against whom the offence is committed must also be an Indian."[47] Similarly, in *Donnelly v. United States,*[48] the Supreme Court declared that a non-Indian who had shot an Indian on the reservation was subject to federal rather than state jurisdiction. Other courts have reached the same conclusions as the *Kenyon* and *Donnelly* courts.[49]

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and state courts respectively. *See* Apapas v. United States, 233 U.S. 587 (1914) (Indian against non-Indian); Draper v. United States, 164 U.S. 240 (1896) (non-Indian against non-Indian); Alberty v. United States, 162 U.S. 499 (1896) (non-Indian tribal member against non-Indian); United States v. McBratney, 104 U.S. 621 (1881) (non-Indian against non-Indian). *See also* FEDERAL INDIAN LAW, *supra* note 11, at 320-22, 324-25.

Several tribal codes, including the Suquamish Law and Order Code, *supra* note 2, claim tribal jurisdiction over non-Indians committing crimes within Indian country. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., MANUAL OF INDIAN LAW D-4 n.43 (1976).

43. Notes 44-49 and accompanying text *infra*. The Assimilative Crimes Act, 18 U.S.C. § 13 (1970), incorporates "the criminal laws of the several States into the laws of the United States so that violations will be prosecuted as Federal offenses." FEDERAL INDIAN LAW, *supra* note 11, at 308. Therefore, even actions which are criminal under state law and not under federal statute are tried by federal courts. The sole exception to this is where the state has assumed complete jurisdiction over all civil and criminal Indian cases as authorized by the United States. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. The State of Washington does not retain this power. 544 F.2d at 1012.

44. 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7,720).

45. The court in *Kenyon* questioned whether a crime was indeed committed and, if so, whether it was within Indian country. The court left unresolved the first question but concluded that whatever questionable act did take place was transacted "beyond the place over which the Indian court had jurisdiction." *Id.* at 355. This indicates that not only are the *person* and *act* important factors in determining whether Indian courts have jurisdiction, but also that location must be considered. *See* F. COHEN, *supra* note 1, at 358.

46. 14 F. Cas. at 355.

47. *Id.*

48. 228 U.S. 243 (1913).

49. *See, e.g.,* Williams v. Lee, 358 U.S. 217, 220 n.5 (1959); Williams v. United States, 327 U.S. 711, 714 (1946); United States v. Chavez, 290 U.S. 357, 363-65 (1933); United States v. Ramsey, 271 U.S. 468 (1926); United States v. Pelican, 232 U.S. 442, 451-52 (1914); *In re* Wilson, 140 U.S. 575, 577-79 (1891); *Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954).

Recently, however, and prior to the instant case, the Ninth Circuit had described the issue of tribal criminal jurisdiction over non-Indians as "an unanswered question." Quechan Tribe v. Rowe, 531 F.2d 408, 411 n.4 (9th Cir. 1976).

C. *Government Policy and Indian Self-Government*

The concept of tribal self-government has generally been accepted.[50] Actions taken by Congress, however, have only sporadically supported this notion; during the past two centuries, congressional policies have ranged from termination of Indian tribal units to preservation of the same.[51] More recently, Congress has sought to assimilate Indians while on the reservation and to preserve the concept of self-government.[52] This policy of assimilation has been followed to the present with few exceptions.[53]

The Indian Civil Rights Act of 1968[54] illustrates the congres-

50. *See generally* FEDERAL INDIAN LAW, *supra* note 11, at 395-454.

51. Government dealings with the Indians under the line of 19th century congressional policies included removal and placement on reservations, implementation of programs for educating and civilizing the Indians, withdrawal from the tribes of the right to make treaties, and the allotment of tribal lands to individual Indians with a view to terminating the tribal units and preparing the Indians for citizenship. For an historical look at these governmental actions, see S. TYLER, A HISTORY OF INDIAN POLICY 5-6, 54-91 (1973); BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN POLICIES FROM THE COLONIAL PERIOD THROUGH THE EARLY 1970's 6-7 (1974); Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW 600 (1976).

Specifically, the permitting of treatymaking by the tribes ended with passage of the Indian Appropriation Act of 1871. The act provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Ch. 120, § 1, 16 Stat. 566 (1871) (current version at 25 U.S.C. § 71 (1970)).

52. *See* FEDERAL INDIAN LAW, *supra* note 11, at 10-13; Martone, *supra* note 51, at 607-18. *See also* Indian Reorganization Act of 1834, 25 U.S.C. § § 461-478 (1970). This statute halted the allotment process and provided for the stabilization of the "tribal organization by vesting such tribal organization with real, though limited, authority" for self-government. S. REP. No. 1080, 73d Cong., 2d Sess. 1 (1934).

53. *See generally* S. TYLER, *supra* note 51, at 151-234. The salient exception to this policy appeared in H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953), which called for termination of the guardian/ward relationship between the federal government and the Indians. This trend was short-lived, however, and gave way to "New Directions in the 1960's." *See generally* BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN POLICIES FROM THE COLONIAL PERIOD THROUGH THE EARLY 1970's 10-12 (1974).

54. 25 U.S.C. § 1302 (1970):

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

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

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

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

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

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

(6) deny to any person in a criminal proceeding the right to a speedy and public

sional intent to assimilate the Indians. That act incorporated into federal Indian law a modified version of the safeguards furnished in the United States Bill of Rights[55] which had been held by the Supreme Court to be inapplicable to Indian tribal governments.[56] Thus, the Indian Civil Rights Act provides an important set of tools for adopting Indians into American culture without terminating their tribal organization.

Resolution of the jurisdictional issue in the instant case requires consideration not only of federal Indian policy but also of the doctrine of residual sovereignty and the historical exclusivity of federal jurisdiction in non-Indian cases. These considerations will be examined in the analysis in an attempt to settle the criminal jurisdiction question in the instant case.

II. INSTANT CASE

In affirming the denial of Oliphant's petition for a writ of habeas corpus, the United States Court of Appeals for the Ninth Circuit rejected the argument that Indian tribunals lack criminal jurisdiction over non-Indians. Oliphant claimed that the current relevant portion of the 1790 Act, 18 U.S.C. section 1152,[57] effectively strips Indian courts of jurisdiction over all except Indians.[58] The court acknowledged that section 1152 extends federal criminal jurisdiction to Indian country, but indicated that the provision does not extinguish tribal jurisdiction nor declare federal

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trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

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

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

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

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

For a comparison of the United States Bill of Rights with the rights provided in this act, see note 93 *infra*.

55. *See* note 93 *infra*.

56. Talton v. Mayes, 163 U.S. 376, 384 (1896); *accord,* Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976); Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343, 1344 & n.6 (1969).

57. 18 U.S.C. § 1152 (1970).

58. 544 F.2d at 1010.

jurisdiction to be exclusive.[59]

Moreover, rather than limiting tribal jurisdiction, the court asserted that the history of section 1152 evinces an intention to prevent Indians from being subject to the double jeopardy of both tribal discipline and federal court rule.[60] The court reasoned that, according to the principle of residual sovereignty, Indian tribes continued to hold unimpaired their right to exercise jurisdiction over offenders entering their boundaries because Congress had not expressly declared federal jurisdiction to be exclusive.[61]

The majority asserted that "practical considerations," based on historical animosity existing between Indians and nearby state residents, supported granting jurisdiction to Indian tribes because crimes committed on reservations by non-Indians might well go other wise unredressed.[62] The court also stated that the policies of the United States would not be frustrated by such a holding.[63] Since the federal government has encouraged Indian tribes to adopt law and order codes, set up tribal courts, and exercise authority over reservation lands, allowing the tribal court jurisdiction over non-Indian offenders for criminal actions as limited by the Indian Bill of Rights is a "small but necessary part of this policy."[64]

Oliphant's second argument, that a fair trial before the tribal court would be impossible since non-Indians would be excluded from the jury venire, was summarily dismissed by the court as premature.[65]

In his dissenting opinion, Judge Kennedy contended that the congressional intent never was to give Indian courts criminal jurisdiction over non-Indians.[66] Disagreeing with the majority's reading of concurrent jurisdiction into section 1152, the dissent stated that "[i]t seems extremely anomalous that Congress would provide for exclusive jurisdiction in the federal courts for major offenses committed by Indians, but permit tribal courts to try non-Indians for these same major offenses."[67] The more rea-

59. *Id.* at 1010-11.

60. *Id.* at 1010-11 & 1010 n.3.

61. *Id.* at 1009 & n.1.

62. *Id.* at 1013.

63. *Id.* at 1012-13.

64. *Id.* at 1013.

65. *Id.* at 1011-12.

66. To substantiate this conclusion, the dissent relied on the history of 18 U.S.C. §§ 1152-1153 (1970) and administrative declarations of a lack of tribal jurisdiction over non-Indians. *Id.* at 1014-19 (Kennedy, J., dissenting).

67. *Id.* at 1018 (Kennedy, J., dissenting).

sonable inference, the dissent argued, is that Congress intended tribal court jurisdiction to extend no further than to Indian offenders.[68]

Moreover, the doctrine of residual sovereignty should be inapplicable to the question of criminal jurisdiction, the dissent stated, since such a notion has been relied upon only in cases of state encroachment into areas of tribal self-government.[69] Similarly, because even as to Indians the tribal courts have jurisdiction only over minor offenses, Judge Kennedy found the exercise of tribal criminal jurisdicion over nonmembers to be nonessential "to the tribe's identity or its self-governing status."[70]

III. Analysis

The Ninth Circuit resolved the jurisdictional issue of the instant case by invoking the doctrine of residual sovereignty and relying on a reading of section 1152 as providing for concurrent federal and tribal court jurisdiction.[71] This analysis will examine the merit of the court's rationale and then focus on underlying policy considerations that support the conclusion reached but do so on grounds other than those principally relied upon by the Ninth Circuit.

A. Inapplicability of the Residual Sovereignty Concept

The majority's residual sovereignty argument rests on congressional silence. Since no express statutory limitation on the criminal jurisdiction of Indian courts over non-Indians exists, the Ninth Circuit found that there had been no curtailment of the original criminal jurisdiction enjoyed by Indian nations.[72]

The doctrine of original sovereignty was first introduced as a check on state encroachment of tribal government, and application of the concept has previously been limited to cases involving state infringement on tribal rights and to cases justifying Indian governments' regulation of business on reservations.[73] According to the limited application standard announced by the Supreme Court in *McClanahan*,[74] residual sovereignty should be viewed as

68. *Id.*
69. *Id.* at 1015 (Kennedy, J., dissenting).
70. *Id.*
71. Notes 58-62 and accompanying text *supra.*
72. Note 61 and accompanying text *supra.*
73. Notes 15-19 and accompanying text *supra.*
74. Notes 27-28 and accompanying text *supra.*

merely a backdrop against which pertinent treaties and federal statutes should be examined when determining issues of state infringement. Since neither state encroachment nor regulation of business on the reservation is at issue here, the applicability of the doctrine of residual sovereignty is questionable.

The concept of residual sovereignty has never been extended to include criminal jurisdiction over non-Indians.[75] Federal cases since *Ex parte Kenyon* have uniformly held that federal courts have exclusive jurisdiction over non-Indians committing crimes against Indians. Since 1834, administrative agencies empowered with responsibility over Indians and Indian affairs have also followed a pattern consistent with the disallowance of tribal criminal jurisdiction.[76] Moreover, Congress has not acted to change this interpretation of federal law.[77] In addition, the current Law and Order Code promulgated by the Department of Interior for the regulation of courts of Indian offenses[78] provides that these courts have jurisdiction over only Indians for criminal matters and over non-Indians only with their consent for civil matters.[79] Until recently,[80] some tribal judges themselves have stated that

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75. Text accompanying note 28 *supra*.

76. It appears that the earliest pronouncement of the lack of tribal jurisdiction over non-Indians committing crimes within Indian country was in an opinion by the Attorney General:

> [T]he 25th section of the act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another: thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

Jurisdiction of the Choctaw Courts, 2 Op. Att'y Gen. 693, 695 (1834). *See also* Powers of Indian Tribes, 55 Interior Dec. 14, 56-64 (1934); Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att'y Gen. 174, 179 (1855).

77. 544 F.2d at 1016 n.7 (Kennedy, J., dissenting). For a brief explanation of the potential exception to exclusive federal jurisdiction, see note 43 *supra*.

78. For a discussion of these courts, see note 25 *supra*.

79. Relevant portions of the Law and Order Code provide:

> A Court of Indian Offenses shall have jurisdiction over all [criminal offenses enumerated in the Law and Order Code], when committed by any Indian, within the reservation or reservations for which the court is established . . . .
>
> . . . .
>
> The Courts of Indian Offenses shall have jurisdiction of all [civil] suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other [civil] suits between members and nonmembers which are brought before the courts by stipulation of both parties.

25 C.F.R. §§ 11.2-.22 (1976).

80. Note 42 *supra* (discussing the current trend of Indian tribal codes to include

tribal courts have had no jurisdiction over non-Indians.[81] Finally, even commentators favoring the grant of jurisdiction over non-Indians to tribal courts have unanimously recognized that those courts presently lack such jurisdiction.[82]

It appears, therefore, that to extend residual sovereignty to include criminal jurisdiction over non-Indians would be, as the dissent claims, a "novel and unusual" application of the doctrine and inconsistent with prior practice.[83] In the face of statements by administrative agencies, decisions of federal courts, and commentaries by leading scholars all affirming exclusive federal jurisdiction, congressional silence on the subject most likely evidences approval of the accepted interpretation.

B. Statutory and Constitutional Considerations

1. Reevaluation of federal statutes

The court in the instant case claimed that the purpose of section 1152 was not to prohibit Indian tribes from prosecuting non-Indians but rather was to protect Indians from double jeopardy.[84] The court maintained that the failure of section 1152 to "protect non-Indians against double jeopardy does not indicate that only Indians were susceptible to federal and tribal discipline."[85] The court stated that the statutory protection of only Indians from double jeopardy might be explained by the fact that the only person to have suffered double punishment before the enactment of the provision was an Indian.[86] More likely, however, the reason that express protection for non-Indians from double jeopardy was not drafted into section 1152 was because the double jeopardy threat was not applicable to non-Indians since they were not subject to tribal jurisdiction in the first place.

The court also maintained that the extension of federal criminal laws to Indian country by section 1152 was not a declaration of exclusive federal jurisdiction.[87] The cessation of granting crimi-

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claims of criminal jurisdiction over non-Indians upon the reservation).

81. *See, e.g., Constitutional Rights of the American Indian, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 1st & 2d Sess. 385, 679 (1961-1962) (testimony of Shirley Nelson, Hualapai tribal judge, and Cato W. Valandra, President, Rosebud Sioux Tribal Council).

82. *See, e.g.,* M. PRICE, *supra* note 25, at 174; Davis, *Criminal Jurisdiction over Indian Country in Arizona,* 1 ARIZ. L. REV. 62, 92-94 (1959).

83. 544 F.2d at 1014 (Kennedy, J., dissenting).

84. *Id.* at 1011.

85. *Id.* at 1010 n.3.

86. *Id.*

87. *Id.* at 1010.

nal jurisdiction over non-Indians by treaty,[88] the numerous pronouncements by federal courts and administrative agencies,[89] and the provisions of the Law and Order Code,[90] however, all indicate that federal jurisdiction is exclusive.

The Ninth Circuit's reading of section 1152 as not granting exclusive federal jurisdiction falters on yet another ground. Section 1152 declares federal jurisdiction over crimes committed in Indian country against Indians except when committed by other Indians. The following section, the current relevant portion of the 1885 Act, however, empowers federal courts exclusively to try even those cases which involve only Indians when the offense committed is one of the specified major crimes. Section 1153, it is important to note, makes no mention of federal jurisdiction over non-Indians committing these major crimes. Thus, if jurisdiction over non-Indians is not vested exclusively in federal courts, as the majority contends, then Indian tribal courts could arguably assume jurisdiction over even major crimes committed by non-Indians against Indians within Indian country. Such a result is manifestly untenable and inconsistent with the apparent intent and purpose of sections 1152 and 1153.[91]

2. *Examination of constitutional considerations*

In dismissing as premature Oliphant's argument that a fair trial would be impossible,[92] the Ninth Circuit skirted a constitutional issue of major import. Since numerous basic rights afforded defendants in federal and state courts are not required in tribal courts,[93] it may be violative of the Constitution to subject non-Indian United States citizens to the criminal jurisdiction of tribal

88. Note 29 and accompanying text *supra*. Cohen reports only two treaties made after July 22, 1790, that allowed Indian tribes to subject non-Indians within Indian territory to the laws of the Indians. F. COHEN, *supra* note 1, at 6 n.48.

89. Notes 44-49, 76 and accompanying text *supra*.

90. Notes 78-79 and accompanying text *supra*.

91. Notes 31-43 and accompanying text *supra*.

92. 544 F.2d at 1011-12.

93. Among the rights not expressly mentioned in the Indian Civil Rights Act, 25 U.S.C. § 1302 (1970), are the following: (1) the right of the people to keep and bear arms; (2) the right to be free from having to quarter soldiers in one's house without consent; (3) the provision that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury; (4) the right to an impartial jury and to have the trial in the area wherein the crime was committed; (5) the right to a jury trial for civil matters at common law involving $20 or more, and the right to be free from having a fact, previously tried by a jury, reexamined by any court of the United States except as provided by common law; (6) the right to counsel; and (7) the rights enumerated in the Ninth and Tenth Amendments.

courts. When viewed in this light, the past refusal of federal courts to relinquish jurisdiction over non-Indians may be partially due to a feeling that non-Indian citizens should not be subject to courts that are fundamentally distinguishable in composition and orientation from federal and state courts.

Among the rights not guaranteed Oliphant in the tribal court was the right to an impartial jury. Since the Suquamish constitution provides no opportunity for non-Indians to participate in any form of tribal government[94] even though non-Indians far outnumber Indians on reservation lands,[95] Oliphant may be subjected to an unfair trial.[96] Other basic rights subject to modification in tribal courts include those guaranteed by the equal protection and due process clauses of the Constitution. Several federal courts have held that the corresponding clauses in the Indian Civil Rights Act are not to be given the same meaning as the clauses in the Constitution.[97]

Additional legal and cultural distinctions accentuate the differences between tribal courts and state or federal courts. Tribal judges are not required to be attorneys nor to have studied law.[98] Some tribes allow defendants appearing before tribal courts to be represented only by "non-attorney representatives as counsel."[99] Due to cultural differences between Indians and non-Indians, the common law often is inapplicable to interpret Indian tribal ordinances or laws to which non-Indians may be subject.[100] Finally,

94. Brief for Appellant at 20, Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).

95. Petitioner's Brief for Certiorari at 17, Oliphant v. Suquamish Indian Tribe, No. 76-5729 (U.S. Nov. 22, 1976).

96. Recent Supreme Court decisions have held that the "concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (appeal challenged a state jury selection system that excluded most women from service); Peters v. Kiff, 407 U.S. 493 (1972) (non-Negro's successful challenge of practice of excluding Blacks from grand and petit jury service). Under the *Peters* holding, not only could Oliphant have challenged the Suquamish policy of excluding non-Indians from jury service, but defendant members of the Suquamish Tribe could likely also challenge the procedure.

97. *E.g.*, Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Janis v. Wilson, 385 F. Supp. 1143 (D.S.D. 1974); Curdy v. Steele, 353 F. Supp. 629 (D. Utah 1973).

98. 25 C.F.R. § 11.3(d) (1976); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1357 (1969); Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1832-33 (1968). Efforts to improve the quality of Indian courts, however, are being made. *See generally* A. GEIS & C. RICHARDS, INDIAN JUSTICE A GUIDE TO PLANNING.

99. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1357 (1969). This rule, however, has been rejected by at least one federal district court. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969). *See also* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., *supra* note 42, at B-5, B-6.

100. *E.g.*, *Ex parte* Tiger, 47 S.W. 304, 305 (Indian Terr. Ct. App. 1898).

the maximum sentence that can be imposed by an Indian tribal court is limited to a fine and six months in jail.[101]

When the differences in rights afforded Oliphant in federal and tribal court are considered, strong reason appears why the appellant in the instant case should not be subjected to the criminal jurisdiction of the tribal court. It would be incongruous to cause a citizen of a "conquering" nation[102] to be subject to courts of the "conquered" nation, especially when the conquered nation's guarantees of fairness are limited when compared with those of the conquering nation.

Although they are not required to provide every constitutional safeguard, some Indian courts may in fact provide or be capable of providing these rights to all parties before them. If this is the case, there remains little reason to deny these courts some degree of criminal jurisdiction over non-Indians. The assessment of constitutional quality of tribal courts, however, is more consistent with the activities of Congress than with those of the federal judiciary. Perhaps the time has come for Congress, charged with the duty of regulating Indian affairs,[103] to conduct such an evaluation of individual Indian courts and to expressly grant criminal jurisdiction to qualifying tribunals. Until this occurs, however, the federal courts may be required to make the assessment.

C. Policy Considerations

The criminal jurisdiction of Indian tribes has been continually reduced since their conquest.[104] Granting jurisdiction over non-Indians is inconsistent with this trend. Countervailing policies and pressures of modern society, however, cast doubt on the propriety of continually reducing tribal powers.

The strongest policy argument for reversing this trend and allowing Indian courts to exercise criminal jurisdiction over non-Indians is that such jurisdiction is a sine qua non of Indian self-

101. 25 U.S.C. § 1302(7) (1970). In this regard the Indian tribal courts resemble justice of the peace courts. Unlike a justice of the peace court, however, a tribal court must provide a jury upon request if imprisonment is a possible sentence. *Id.* § 1302(10). *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1356 (1969). Thus, the Supreme Court's decision that a defendant does not have a right to a jury trial for "petty offenses" which carry sentences of less than six months imprisonment, Codispoti v. Pennsylvania, 418 U.S. 506 (1974), does not apply to Indian courts because of the provision in 25 U.S.C. § 1302 (1970) requiring juries upon request.

102. *See generally* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

103. Note 9 and accompanying text *supra*.

104. Notes 31-43 and accompanying text *supra*.

government. Indians on reservations suffer unjustly because non-Indians committing criminal offenses on reservations go unpunished in large measure since federal and state authorities have demonstrated a disinterest in actively prosecuting these cases.[105] This hiatus in the legal process must be eliminated, and allowing Indians to prosecute matters occurring within their country seems to partially answer this need.

Even if criminal jurisdiction over non-Indians were not an elementary part of self-government, such a jurisdictional grant would be consistent with the present policy of assimilation.[106] Such a grant would strengthen the self-regulating power of tribes and acknowledge the progress made by Indian nations in assimilating the American culture into reservation life.

Nevertheless, a grant of criminal jurisdiction over non-Indians may jeoparize some tribal independence by eliminating some cultural and legal dissimilarities. Presently, interpretation of the equal protection and due process clauses of the Indian Bill of Rights in the Indian Civil Rights Act takes into account the basic interests of the tribe and its cultural autonomy.[107] Similarly, Indian ordinances may be interpreted other than by common law definitions.[108] If constitutional safeguards are to be guaranteed to non-Indians brought before tribal courts, uniformity of legal systems must be achieved, requiring the abandonment of these individualistic interpretations. Once uniformity is achieved, much of the necessity and justification for retaining two identical systems of justice would dissolve. The possibility would then arise that at least some tribal courts would be eliminated.

The grant of criminal jurisdiction over non-Indians, however, likely will not unduly hasten the complete assimilation of Indian tribes.[109] Yet, it must be recognized that a grant to Indian tribes of criminal jurisdiction over non-Indians in an attempt to pro-

105. *See, e.g.*, 544 F.2d at 1013-14; *Constitutional Rights of the American Indian, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 383-90 (1961) (testimony of Shirley Nelson, Haulapai tribal judge, and Cipriano J. Manuel, Papago chief tribal judge).

106. Notes 50-53 and accompanying text *supra*.

107. Note 97 and accompanying text *supra*.

108. Note 100 and accompanying text *supra*.

109. Indeed, it has been suggested that federal policy is beginning to reflect a sensitivity to the unique concerns of Indians and "is slowly moving away from the approach of implementing programs based upon what the non-Indian considered to be in the best interests of the Indian." Article, *The Allocation of Criminal Jurisdiction in Indian Country—Federal, State and Tribal Relationships*, 8 U. CAL. D.L. REV. 431, 451 (1975). Any such shift in policy would result in modification of the present policy of assimilation.

mote Indian self-government is also a step toward what appears to be an inevitable, and to some an undesirable, continuance of assimilation of Indian peoples into American culture.

IV. Conclusion

The Ninth Circuit declared the existence of tribal jurisdiction over non-Indians by invoking a "novel and unusual" application of the doctrine of residual sovereignty and a reading of concurrent federal/Indian jurisdiction in federal statutes. Historically, tribes have lacked such jurisdiction and courts and administrative agencies have uniformly supported this view. Given this historical precedent, the holding of the instant case cannot be reasonably justified by either the doctrine of residual sovereignty or the statute.

A departure from the past trend of restricting tribal jurisdiction should not be made without substantial justification. In light of the consistent indifference of federal and state authorities to prosecuting non-Indian committed crimes, however, an extension of limited authority to tribal courts to try non-Indians may be defensible. A grant of such jurisdiction would assist tribes to preserve order upon the reservations.

Congress should bear the responsibility to statutorily remedy this jurisdictional issue after evaluating the constitutional safeguards currently obtaining in Indian tribal court procedures and after appraising the impact that expanding tribal jurisdiction would have on broad national policies. Pending such congressional action, courts should exercise restraint before overturning the two-century pattern of denying Indians criminal jurisdiction over non-Indians.