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The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction

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The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*[1]

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I. INTRODUCTION

The roots of modern federal Indian law were established in a trilogy of United States Supreme Court decisions written by Justice John Marshall during the period of 1823 to 1832. In *Johnson v. McIntosh*,[3] the Supreme Court established the notion of European "discovery" as the basis upon which the United States government obtained control over its land, but held that the land was subject to the Indian's right to occupy it.[4] In *Cherokee Nation v. Georgia*,[5] the Court defined Indian tribes as "domestic dependent nations" and established the trust responsibility that the United States holds in relationship to the tribes. Lastly, in *Worcester v. Georgia*,[6] the Court disallowed state criminal prosecution of a non-Indian, holding that state law had no effect in Indian country. While all of the original holdings of these cases are no longer considered current in

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1. This article is dedicated to our nation's tribal criminal prosecutors. Their hard work and dedication is rarely adequately rewarded or acknowledged, however, their contributions to tribal sovereignty and public safety in Indian country are monumental.

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3. 21 U.S. (8 Wheat.) 543 (1823).

4. It has been suggested that the opinion was designed in this manner as a compromise in order to validate the United States government's dominance over the land without totally eliminating the right of tribes and their members to continue to exist.

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

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

their totality,[7] these cases have historically had a profound effect on tribal government, including tribal criminal jurisdiction.

In the mid-1970's, the United States Supreme Court issued another trilogy of opinions that have also had a profound effect on tribal criminal jurisdiction: *United States v. Mazurie*,[8] *Oliphant v. Suquamish Indian Tribe*,[9] and *United States v. Wheeler*.[10] These opinions, while not of such broad political import as the Marshall trilogy in the previous century, have had a significant impact on day-to-day life in Indian country in that they affect one of the most basic tenets of sovereignty: the ability of a government to exercise criminal jurisdiction within its own territory. Indeed, it could be said that these three cases have dominated tribal criminal jurisdictional principles for the last quarter century. The time is now ripe to review the effect that these cases have had on modern jurisprudence. This article will first review the modern trilogy and address the progeny of these cases in United States Supreme Court jurisprudence. Next, the impact that these cases have had in Indian country will be discussed. Lastly, possible alternatives for improvement will be set forth.[11]

II. THE TRILOGY

A. Mazurie and its Progeny

In *United States v. Mazurie*, the Supreme Court dealt principally with criminal jurisdiction over persons that have traditionally held disparate legal status, particularly Indians, non-Indians, and non-member Indians.[12] But *Mazurie* also focusses on the delegation of federal legislative

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7. For example, contrary to the original holding of *Worcester v. Georgia*, states now have some limited criminal jurisdiction in Indian country, such as where both the suspect and the victim are non-Indian, *United States v. McBratney*, 104 U.S. 621 (1881), *Draper v. United States*, 164 U.S. 240 (1896), or where Congress has transferred jurisdiction over Indian country pursuant to Pub. L. No. 280, 18 U.S.C. § 1162, or some other authority.

8. 419 U.S. 544 (1975).

9. 435 U.S. 191 (1978).

10. 435 U.S. 313 (1978). It should be noted that since 1975, two other Supreme Court decisions have been handed down which also affect tribal criminal jurisdiction: *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) and *Duro v. Reina*, 495 U.S. 76 (1990). However, the impact of the first case is limited to tribes affected by Public Law 280, and the latter case will be discussed as part of the progeny of *Oliphant* and *Wheeler*.

11. During the last twenty-five years, the Supreme Court has issued numerous opinions that affect the territorial reach of laws applicable in Indian country, however, this article will not address these types of cases, but, instead will concentrate on the cases which more directly affect the legal underpinning of tribal criminal jurisdiction as opposed to its territorial reach.

12. Indians are usually defined as members of federally-recognized Indian tribes. *See, e.g.* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 19-27 (1982 ed.)). Qualifications for tribal membership are usually set forth by the respective tribe but are sometimes determined by application of federal statute. *See id.* at 20-27. The phrase "non-member Indian" has come to refer to

authority to the tribes. Prior to 1953, alcohol was illegal in Indian country.[13] In 1953, Congress passed legislation[14] creating a presumption that Indian country would be "dry" unless the tribe authorized alcohol on the reservation.[15] The Shoshone Tribe and the Arapahoe Tribe which jointly govern the Wind River reservation in Wyoming passed an ordinance legalizing alcohol on the reservation. Afterwards, the Blue Bull bar opened on non-Indian owned fee land that lay within the reservation boundaries. The Blue Bull had obtained a state liquor license and was operating in compliance with both tribal and state law. In 1971, the tribes passed Ordinance No. 26 which required liquor outlets on the reservation to have both a tribal liquor license and a state liquor license. In 1972, the owners of the Blue Bull (Martin Mazurie and Margaret Mazurie) applied for a tribal liquor license. After hearing testimony about "singing and shooting at late hours, disturbances of elderly residents of a nearby housing development, and the permitting of Indian minors in the bar,"[16] the tribes denied the liquor license application. After closing the bar for three weeks, the Mazuries decided to re-open it. The Mazuries were then prosecuted in federal court for illegal distribution of alcohol under 18 U.S.C. § 1154 and were convicted.

The Tenth Circuit Court of Appeals reversed the District Court's decision[17] only to have the Supreme Court reinstate the convictions. The Supreme Court stated that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory they are a 'separate people' possessing 'the power of regulating their internal and social relations.'"[18] Relying on *United States v. Curtiss-Wright Export Corp.*,[19] the Supreme Court found that Congressional delegation of alcohol regulation to tribes was valid partially because Indian tribes have "independent authority over matters that affect the inter-

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a member of a federally recognized Indian tribe (an "Indian") who is present on a reservation other than his or her own. (For example, *Duro v. Reina* deals with a member of the Torres-Martinez Band of Cahuilla Mission Indians who was accused of committing a crime against a member of the Gila River Indian Tribe while within the Salt River Pima-Maricopa Indian Community. In this case, both the suspect and the victim would be regarded as "non-member Indians.") The term "non-Indian" is commonly used to refer to a person who is not legally defined as an "Indian."

13. *See* 18 U.S.C. § 1154(a).

14. Codified at 18 U.S.C. § 1161.

15. The statute also requires that the tribal law must be "certified by the Secretary of the Interior, and published in the Federal Register." 18 U.S.C. § 1161. Further, once the tribe has legalized alcohol, activities involving alcohol must also be in conformity with state law. *See id.*

16. *Mazurie*, 419 U.S. at 548.

17. *See United States v. Mazurie*, 487 F.2d 14 (10th Cir. 1973).

18. *Mazurie*, 419 U.S. at 548 (quoting *Worchester v. Georgia*, 6 Pet. 515, 557 (1832); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)) (citations omitted).

19. 299 U.S. 304 (1936) (which interestingly is not an Indian law case).

nal and social relations of tribal life."[20] Further, "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'"[21]

Because the Congressional delegation of liquor control authority to the tribe was valid, the Mazuries were required to comply with the strictures of tribal law. Since the Mazuries were not in compliance with tribal law, they were in violation of federal law and the federal convictions were reinstated by the Supreme Court.[22] Thus when provided for by Congress, tribes may pass laws with criminal implications that are enforceable through criminal prosecution in federal court. While *Mazurie* does not expand tribal criminal jurisdiction via enforcement in the tribe's own court system, it does acknowledge expansion of tribal criminal jurisdiction by making certain federal laws dependent upon tribal legislation. *Mazurie* holds unique implications that will be discussed later in this article.

B. Oliphant and its Progeny

The second case of significant import to tribal criminal jurisdiction is *Oliphant v. Suquamish Indian Tribe*.[23] Like *Mazurie*, the *Oliphant* case deals with the conduct of non-Indians within Indian country. The two defendants were Mark Oliphant, a non-Indian who was accused of assaulting a tribal police officer and resisting arrest, and Daniel Belgarde, a non-Indian who was charged with reckless endangerment and damaging tribal property after allegedly leading tribal police on a high-speed chase which ended when he collided with a tribal police vehicle. The incidents occurred on the Port Madison reservation which is governed by the Suquamish Indian Tribe. Both defendants were charged in tribal court. The defendants responded by filing for federal habeas corpus relief claiming that the tribal court had no criminal jurisdiction over them because they were non-Indians. Both the federal district court and the Ninth Circuit Court of Appeals denied the habeas petitions.[24] The Ninth Circuit noted that the "power to preserve order on the reservation . . . is a *sine qua non* of the sovereignty that the Suquamish originally possessed."[25]

The Supreme Court's *Oliphant* decision gives much detail about the demographics of the reservation. The Court noted that the reservation

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20. *Mazurie*, 419 U.S. at 557.
21. *See id.*
22. *See id.* at 559.
23. 435 U.S. 191 (1978).
24. *See Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976).
25. *Id.* at 1009.

was populated by 2,928 non-Indians and only 50 Suquamish tribal members; and the land was 63% non-Indian owned.[26] The Court noted that under *Talton v. Mayes,*[27] tribal governments are not bound by the Bill of Rights of the United States Constitution, that the protections afforded by the Indian Civil Rights Act are not identical to the rights afforded in federal criminal proceedings, and that non-Indians can not serve on Suquamish tribal court juries.[28] Even though the Supreme Court found no statute nor treaty provision that removed the Suquamish Tribe's criminal jurisdiction over non-Indians, the Court held that by "implication" the Suquamish Tribe's judiciary had no such jurisdiction.[29] At a minimum, the case stands for the principle that a small minority should not be allowed to dictate law over a large majority in a court that has less procedural protection than the majority would otherwise be entitled to. The Court even went so far as to hold that as a whole, "Indian tribes do not have inherent jurisdiction to try and punish non-Indians."[30] Thus, this decision purports to apply not only to reservations with less than 2% tribal member populations, but to all tribes. The devastating implications of the *Oliphant* case to tribal sovereignty is obvious; it's impact will be discussed later in this article.

C. Wheeler and its Progeny

United States v. Wheeler[31] was handed down only sixteen days after *Oliphant*. Anthony Wheeler was an enrolled member of the Navajo Nation. He was arrested by Navajo Nation tribal police and later pled guilty in Navajo Nation tribal court to disorderly conduct and contributing to the delinquency of a minor.[32] He was then charged in federal court with statutory rape[33] for conduct arising from the same incident. The appeal rested on the defendant's contention that the second prosecution was barred by the double jeopardy clause contained in the 5th Amendment of the United States Constitution. The Court noted that:

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26. *See Oliphant*, 435 U.S. at 193 n.1.

27. 163 U.S. 376 (1896).

28. *See Oliphant*, 435 U.S. at 193-194.

29. *See id.*

30. *Id.* at 212.

31. 435 U.S. 313 (1978).

32. Respectively in violation of 17 NAVAJO TRIBAL CODE § 351 (1969) and 17 NAVAJO TRIBAL CODE § 321 (1969). These sections are now codified at 17 NAVAJO NATION CODE § 483 (Equity 1995) and 17 NAVAJO NATION CODE § 313 (Equity 1995).

33. In violation of 18 U.S.C. § 2032 (now codified at 18 U.S.C. § 2243(a)) and 18 U.S.C. § 1153 (commonly known as the Major Crimes Act which gives the federal government jurisdiction over certain enumerated offenses committed in Indian country).

> It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations. Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.[34]

The Court held that tribal criminal jurisdiction is retained unless that aspect of tribal sovereignty is "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status . . . ."[35] Since the Navajo Nation's criminal jurisdiction over its tribal members was never divested, it had retained its criminal jurisdiction. The Court also held that Indian tribes are not federal agencies, but rather derive their sovereignty independently.[36] Since Wheeler's first prosecution was by a sovereign separate from the United States, double jeopardy was not implicated by a subsequent federal prosecution. While this case did not espouse novel legal principles, it did settle the tribal/federal double jeopardy issue.

After the *Wheeler* and *Oliphant* decisions were handed down, one major issue about tribal criminal jurisdiction remained: Did tribal courts have criminal jurisdiction over non-member Indians? The seeds for this question were laid by the Supreme Court in *Wheeler* by limiting its holding to criminal jurisdiction over a tribe's own members when it stated, "The Navajo Tribe's power to punish offenses against tribal law committed by its members is an aspect of retained tribal sovereignty . . . ."[37]

The Supreme Court's answer to this question came in *Duro v. Reina*.[38] In that case, Albert Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians of California, was accused of illegally firing a weapon in the Salt River Pima-Maricopa Indian Community in Arizona. He was charged in tribal court for a violation of tribal law. The defendant then filed a habeas corpus petition in federal court challenging the tribal court's jurisdiction over him since he was not a member of the Pima-Maricopa Tribe. Following *Oliphant*, the Supreme Court found that tribal courts did not have criminal jurisdiction over nonmember Indians. Congress responded by passing legislation[39] over-turning the holding of *Duro v. Reina* by amending the federal definition of tribal "powers of

34. *Wheeler*, 435 U.S. at 323.

35. *Id.*

36. *See id.*

37. *Id.* at 326-327.

38. 495 U.S. 676 (1990).

39. For a history of the "*Duro*-fix" legislation, *see* Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

self-government" in the Indian Civil Rights Act to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*."[40]

Unfortunately, Congress' amendment to the Indian Civil Rights Act did not end the issue. The argument is now being raised that Congress' stated affirmation of tribal inherent criminal jurisdiction over non-member Indians basically amounts to a delegation of federal criminal jurisdiction to the tribes. The implication is that if a non-member Indian is prosecuted in tribal court for a misdemeanor and then is prosecuted later in federal court for a felony due to conduct arising out of the same incident, then the subsequent federal prosecution is barred under double jeopardy principles (despite the holding of Wheeler).[41]

Robert Weaselhead, Jr., a member of the Blackfeet Indian Tribe of Montana, pled guilty in Winnebago Tribal Court in Nebraska to misdemeanor charges of sexual assault, contributing to the delinquency of a minor, criminal trespass, and child abuse. He was later prosecuted in federal court on a federal charge arising from the same incident. Relying largely on *Wheeler*, the federal district court rightly found that double jeopardy did not prevent the federal action.[42] However, the Eighth Circuit Court of Appeals reversed and found that the tribal court had acted under federal authority when it convicted a non-member Indian for a tribal offense and that double jeopardy barred subsequent federal prosecution.[43] Less than three months later, the Eighth Circuit vacated its decision[44] and affirmed the District Court.[45] The Supreme Court has now denied certiorari.[46] *Weaselhead*-type arguments are still being raised in both federal court[47] and tribal court.[48] Should the *Weaselhead* defense ever take hold, a can of jurisdictional worms will be opened, and non-member Indian defendants will be rushing to plead guilty to misdemeanor offenses in tribal court in order to avoid felony charges in federal

40. 25 U.S.C. § 1301(2) (emphasis added).

41. In upholding inherent tribal criminal jurisdiction over a tribe's own members, the Supreme Court specifically stated: "We do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon." *Wheeler*, 435 U.S. at 328 n. 28.

42. *See* United States v. Weaselhead, 36 F.Supp.2d 908 (D. Neb. 1997).

43. *See* United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998).

44. On December 4, 1998.

45. *See* United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999).

46. *See* ___ U.S. ___, 120 S.Ct. 82 (1999).

47. *See, e.g.* Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) (stating that amendments to the Indian Civil Rights Act delegate federal authority to tribes and do not affirm an inherent tribal power).

48. *See, e.g.*, Means v. District Court, SC-CV-61-98 (Navajo Nation Sup. Ct. 1999) (upholding Navajo Nation criminal jurisdiction over a non-member Indian).

court. This dangerous result can be avoided by recognition that Congress has plenary authority over Indian country matters and that by amending the Indian Civil Rights Act, it was affirming the inherent criminal jurisdictional authority that tribes had over all Indians. As noted by the Supreme Court in *Wheeler*, "[w]ere the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated."[49]

III. THE IMPACT OF THE MODERN TRIOLOGY

The modern trilogy of *Mazurie*, *Oliphant*, and *Wheeler* has had a major impact on tribal criminal jurisdiction during the last twenty-five years. *Mazurie* has reinforced the ability of tribes to use tribal law in a federal criminal law setting. After the encouragement of *Wheeler*, development of tribal court systems has moved forward at an exciting pace. On the other hand, the *Oliphant* decision has proven to be a large stumbling block to effective law enforcement and has had an adverse impact on public safety on the reservations for both Indians and non-Indians.

Prior to the time that *Mazurie* upheld Congressional delegation of Indian country liquor control to the tribes, another federal criminal statute also relied on Congressional delegation of legislative authority to Indian tribes. Under the United States Code, it is a federal misdemeanor offense to knowingly hunt, trap or fish on Indian land without lawful authority.[50] Since tribal wildlife regulations usually provide the "lawful authority" regarding permits, seasons, bag limits, etc.,[51] this statute essentially makes it a federal criminal offense to violate tribal wildlife law.[52] Under the federal Lacey Act, it is also a federal crime to do certain acts in furtherance of a violation of tribal wildlife law.[53]

Federal involuntary manslaughter charges arising in Indian country under the Major Crimes Act[54] also rely on tribal law for the definition of the underlying offense. Involuntary manslaughter is defined as "the unlawful killing of a human being without malice . . . in the commission

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49. *Wheeler*, 435 U.S. at 331.

50. *See* 18 U.S.C. § 1165.

51. *See, e.g.*, Christopher B. Chaney, *Wildlife Jurisdiction in Indian Country*, WILDLIFE LAW NEWS QUARTERLY, Summer 1996, at 9.

52. *See, e.g., United States v. Murdock*, 132 F.3d 534 (10th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998), sustaining a federal conviction under 18 U.S.C. § 1165 for taking an elk on the Uintah & Ouray Ute reservation in violation of tribal law.

53. *See* 16 U.S.C. § 3371, *et seq. See, e.g., United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990), sustaining a federal Lacey Act conviction regarding the taking of fish on the Lower Brule Sioux reservation in violation of tribal fishing law.

54. 18 U.S.C. § 1153.

of an unlawful act not amounting to a felony. . . ." [55] If the perpetrator is an Indian, the definition of misdemeanor conduct in Indian country is most often established by the tribal laws. For example, in *United States v. Long Elk*,[56] the Eighth Circuit Court of Appeals sustained a federal manslaughter conviction where the underlying misdemeanor was the Standing Rock Sioux Tribe's reckless driving statute.

Another situation where federal criminal legislative authority has been delegated to tribes is where Congress has allowed tribes to determine whether specific federal sentencing laws should apply in cases arising from their reservations. Under 18 U.S.C. § 3598, the death penalty is not an option in regard to persons convicted of Indian country capital offenses where jurisdiction is based solely on Indian country. However, tribes have the option to authorize the death penalty. This gives tribes the ability to determine whether or not the death penalty should apply within their reservations.[57] Other federal laws with tribal opt-in provisions include a tribal option for the federal "three strikes, you're out" provision[58] and a tribal option to lower the minimum age at which an alleged federal juvenile delinquent can be transferred to adult status (from fifteen years of age to thirteen years of age).[59] Under the holding of *Mazurie*, it is likely that these delegations of federal legislative authority to tribes will withstand challenge. Congress should continue to find ways to make federal criminal laws that apply in Indian country responsive to the needs of the Indian communities that these laws are designed to serve.

At the time that the *Oliphant* and *Wheeler* decisions were handed down in 1978, the Supreme Court found that there were 127 courts operating on Indian reservations.[60] *Wheeler* has encouraged tribes to develop their judicial systems. By 1995, there were 254 courts in Indian country.[61] Many tribal judiciaries now have full-fledged mechanisms for appellate review by way of either an intertribal appellate court[62] or an internal appellate court such as the Supreme Court of the Navajo Nation.[63]

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55. 18 U.S.C. § 1112.

56. 805 F.2d 826 (8th Cir. 1986).

57. *Compare* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 (1831), in which the State of Georgia attempted to outlaw various Cherokee laws apparently including a tribal death penalty, *with* Ex Parte Crow Dog, 109 U.S. 556 (1883) in which the Sioux remedy for murder was apparently a form of restitution.

58. *See* 18 U.S.C. § 3559(c)(6).

59. *See* 18 U.S.C. § 5032, para. 4.

60. *See Oliphant*, 435 U.S. at 196 n.7.

61. *See* Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present and Future*, JUDICATURE, Nov. – Dec. 1995, at 147, 149.

62. Such as the Northern Plains Intertribal Court of Appeals referred to in *A-1 Contractors v. Strate*, 520 U.S. 438, 443 (1997).

63. *See* 7 NAVAJO NATION CODE § 201(B) (1995).

United States Attorney General Janet Reno noted: "While the federal government has a significant responsibility for law enforcement in Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions closest to the people they serve . . . ."[64] Likewise, Supreme Court Justice Sandra Day O'Connor stated: "The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation."[65]

The growth in the number and sophistication of tribal courts[66] has been matched by the development of tribal statutory and case law. Today, some tribal courts offer better protection to criminal defendants than either state or federal courts. The Indian Civil Rights Act (ICRA) provides most of the protections afforded by the Bill of Rights in the United States Constitution including: prohibition of unreasonable searches and seizures, prohibition of double jeopardy, prohibition of excessive bail, prohibition of excessive fines, prohibition of cruel and unusual punishment, prohibition of bills of attainder, prohibition of ex post facto laws, a right against self-incrimination, a right to a speedy and public trial, a right to be informed of the nature and cause of the accusation, a right to compulsory process, a right to trial by jury, a warrant requirement, an equal protection clause, a due process clause, and a confrontation clause.[67] These rights apply to criminal defendants in tribal court. Convictions are subject to review in federal court under habeas corpus.[68]

The most significant difference to criminal defendants between the ICRA and the Bill of Rights is that while ICRA creates a right to assistance of counsel, it is only at the criminal defendant's own expense. Under the Bill of Rights, if the defendant can not afford an attorney, one is required to be appointed; this applies to both federal courts[69] and to state courts.[70] However, it should be noted that the Supreme Court has held that court-appointed counsel in state court is only required if the defendant will actually receive a jail sentence.[71] Additionally, in a federal mis-

64. Janet Reno, *A Federal Commitment To Tribal Justice Systems*, JUDICATURE, Nov.--Dec. 1995, at 113, 114.

65. Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, THE TRIBAL COURT RECORD, Fall 1996, at 12, 14.

66. Even within the *Oliphant* decision (handed down in 1978) the Supreme Court noted that "present-day Indian tribal courts embody dramatic advances over their historical antecedents." *Oliphant*, 435 U.S. at 210.

67. *See* 18 U.S.C. §1302.

68. *See* 25 U.S.C. § 1303. *See also*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

69. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

70. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

71. *See* Scott v. Illinois, 440 U.S. 367 (1979).

demeanor case,[72] a criminal defendant has a right to "retain counsel,"[73] and if the charge is a petty offense,[74] the applicable criminal rule states that court-appointed counsel is not required.[75] On the other hand, many tribal jurisdictions (which are limited to misdemeanor jurisdiction pursuant to 25 U.S.C. § 1302(7)) now either provide indigent criminal defendants with a public defender as a matter of course[76] or as a matter of right. For example, the Navajo Nation Bill of Rights provides for a right to court-appointed counsel for indigent criminal defendants.[77] Under Navajo Nation law, the remedy for noncompliance with this section is dismissal of the charge.[78]

In *Oliphant*, the Supreme Court noted that non-Indians could not serve on Suquamish juries.[79] In the courts of the Navajo Nation, tribal law requires that juries must be comprised of a fair cross-section of the community and non-Indians must be included in tribal court jury pools.[80] The composition of a modern Navajo jury is dissimilar from the composition of a Suquamish jury in 1978. Navajo Nation Rule of Criminal Procedure 13 governs jury demands for misdemeanor trials in tribal court. By contrast, in federal court there is not even a right to a jury in a misdemeanor case (unless it is a "Class A" misdemeanor).[81] It is also interesting to note that while Navajo defendants are entitled to a speedy trial,[82] the federal speedy trial statute is inapplicable to federal misdemeanors (unless it is a "Class A" misdemeanor).[83]

In the areas of right to counsel, jury trial rights, and right to a speedy trial, Navajo Nation courts are more protective of the rights of criminal defendants than federal courts are.[84] Other tribal jurisdictions can also be

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72. *See* 18 U.S.C. § 3571(b)(5); 18 U.S.C. § 3581(b)(6) (maximum punishment one year imprisonment and $100,000.00 fine).

73. FED. R. CRIM. P. 58(b)(2)(B).

74. *See* 18 U.S.C. § 19; 18 U.S.C. § 3571(b)(6)-(7); 18 U.S.C. § 3581(b)(7)-(9) (maximum punishment six months imprisonment and $5,000.00 fine).

75. FED. R. CRIM. P. 58(b)(2)(C).

76. For example, the Jicarilla Apache Tribal Court in Dulce, New Mexico has done this since 1992.

77. 1 NAVAJO NATION CODE § 7 (1995).

78. *See* Navajo Nation v. MacDonald, A-CR-10-90, 19 (Navajo Nation Supreme Court 1992).

79. *See Oliphant*, 435 U.S. at 194.

80. *See* Navajo Nation v. MacDonald, A-CR-09-90, 8-9 (Navajo Nation Supreme Court (1991); George v. Navajo Tribe, 2 Nav. Rptr. 1 (Navajo Nation App. 1979). *See also* 7 NAVAJO NATION CODE § 654 (1995).

81. *See* FED. R. CRIM. P. 58(b)(2)(F).

82. *See* Navajo Nation Bill of Rights, 1 NAVAJO NATION CODE § 7 (1995); 25 U.S.C. § 1302(6); Navajo Nation v.MacDonald, A-CR-10-90 (Navajo Nation Supreme Court 1992); Navajo Nation v. Bedonie, 2 Nav. Rptr. 131 (Navajo Nation App. 1979).

83. *See* 18 U.S.C. § 3172(2).

84. Except for in the case of "Class A" misdemeanors, in which case these rights are virtually

very protective of criminal defendants' rights. If a tribal court is at least as protective towards its criminal defendants as the federal court system is, then a defendant (Indian or non-Indian) would suffer no significant loss of rights by appearing before a tribal court. In fact, it might be more advantageous to appear in the tribal forum. The federal court system may soon be in a position to find an exception to *Oliphant* where a tribe provides criminal defendants with rights that are at least equal to the rights afforded persons facing similar charges in the federal system.

As a corollary to tribal court development and the enhancement of a criminal defendant's rights, reservation law enforcement has also been making great strides. By the mid-1990's, there were 2,070 tribal police officers[85] and 168 tribal criminal investigators providing services in Indian country.[86] These officers serve about 1.4 million Native American people on or near approximately 56 million acres of Indian country in the continental United States.[87]

As demonstrated in the *Oliphant* case, tribal police work can be extremely dangerous. At the Federal Law Enforcement Training Center's Indian Police Academy, in Artesia, New Mexico, there is a monument "[d]edicated to those brave law enforcement officers who made the supreme sacrifice in Indian country"[88] commemorating seventy-five law enforcement officers killed in the line of duty in Indian country (thirty-four of that total were killed since the beginning of 1975). Tribal police are usually among the first law enforcement agencies to respond to reservation crime scenes, to make contact with crime suspects and victims, and to attempt to defuse potentially volatile situations. Tribal police work and the resulting tribal court caseloads have been greatly increasing since *Wheeler*; however, public safety in Indian country has been severely compromised by *Oliphant*.

Although national crime rates in the United States have been declining in recent years, crime rates in Indian country are on the rise. In addition, it is particularly noteworthy that from 1992-1996

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the same.

85. This figure includes federal Bureau of Indian Affairs police officers. UNITED STATES BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 32 (February 1999), citing to UNITED STATES BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES (1996).

86. This figure includes criminal investigators from the federal Bureau of Indian Affairs. REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS - FINAL REPORT TO THE ATTORNEY GENERAL AND THE SECRETARY OF THE INTERIOR, 8 (10-31-97). This report is available at <http://www.usdoj.gov/otj/ucredact.htm>.

87. *See id.* at 6.

88. A picture of the memorial is available at the United States Bureau of Indian Affairs webpage. <http://bialaw.fedworld.gov/memorial.htm>.

> [a]t least 70% of the violent victimizations experienced by American Indians are committed by persons not of the same race - a substantially higher rate of interracial violence than experienced by white or black victims. American Indian victims of rape/sexual assault most often reported that the victimization involved an offender of a different race. About 9 in 10 American Indian victims of rape or sexual assault were estimated to have had assailants who were white or black. [89]

At least 67% of American Indian victims of simple assault, at least 73% of American Indian victims of aggravated assault, and at least 79% of American Indian victims of robbery reported that their assailants were non-Indian.[90] These figures show that a great problem exists in the rate that non-Indian criminals victimize our nation's first people. The fact that, according to *Oliphant*, tribes have no criminal jurisdiction over non-Indians within the tribe's own territory only serves to worsen the situation.[91]

Tribes have tried various methods to overcome the burden that *Oliphant* has placed on reservation public safety. The simplest method has been to cross-commission police officers with Indian country in their jurisdiction with some combination of tribal, federal and state law enforcement authority. While this does not cure jurisdictional problems, it does allow police officers to take action, such as making arrests of suspects, without having to make on-the-spot determinations as to whether a suspect is Indian or non-Indian and whether the victim is Indian or non-Indian.[92] If police officers are not properly commissioned by the law enforcement agency having jurisdiction over a suspect, they may detain[93] the suspect until the proper authorities arrive or until he is transported to the proper authority.[94] For example, if a police officer with only tribal authority witnesses a non-Indian suspect assault another non-Indian, he may be limited to detaining and transporting the suspect until an officer

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89. UNITED STATES BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 7-9 (February 1999). It should be noted that this report does not differentiate between crimes committed in Indian country and those committed off-reservation.

90. *See id.*

91. *See supra* note 30 and accompanying text.

92. This also frees the officer in the field from having to make an on-the-spot determination as to whether a crime scene is within Indian country or not. Land status determinations are sometimes difficult in areas where Indian country is "checkerboarded" with areas that do not have Indian country status or where Indian country boundaries may not be clearly marked or well-known. *See, e.g.*, United States v. Duncan, 857 F. Supp. 852 (D. Utah 1994), finding that a count alleging burglary in Fort Duchesne, Utah was proper because that community was within Indian country while counts alleging offenses in Roosevelt, Utah were subject to dismissal because they were not committed in Indian country.

93. Another possible action for tribal police on some reservations is to remove the person from the reservation. *See infra* note 105 and accompanying text.

94. *See* Duro v. Reina, 495 U.S. 676, 697 (1990).

with state authority receives the suspect into custody.[95] This can be problematic because most Indian country land is in rural areas which can create huge travel commitments. Another problem with cross-commissioning is the reluctance of many agencies to cross-commission officers from outside agencies due to fear that they may be exposing themselves to liability if an officer over which they may have limited control commits a tortious act while acting under the cross-commissioned authority.

Some tribal courts have treated *Oliphant* as creating a set of rights possessed by non-Indian criminal defendants. If the Defendant refuses to waive his *Oliphant* rights and submit to tribal criminal jurisdiction, then he is remanded into federal or state custody as might be appropriate.[96] The problem with this approach is that it is a generally accepted principle that parties can not create jurisdiction where none exists in the first place.[97]

The third method used by tribal courts to assert jurisdiction over non-Indian violators of traditionally criminal prohibitions is to decriminalize certain offenses in order to make *Oliphant* inapplicable to the case. Rather than seeking jail time, tribal prosecutors seek civil assessments, restitution, and forfeiture.[98] For example, the Jicarilla Apache Tribe has re-written its wildlife laws in this manner in order to allow for enforcement against non-Indian poachers on the reservation.[99] Use of this strategy is especially helpful in the wildlife context. In *New Mexico v. Mescalero Apache Tribe*,[100] the Supreme Court found that the state was preempted from exercising wildlife jurisdiction on the Mescalero Apache reservation, and also noted that the state had conceded that the tribe

95. *See also* Ryder v. State, 648 P.2d 774 (N.M. 1982), in which the New Mexico Supreme Court upheld a state traffic citation that was issued after a non-cross-commissioned federal BIA police officer detained a non-Indian on the Mescalero Apache reservation until a BIA officer with state authority arrived and issued the citation.

96. It is recognized that state courts have criminal jurisdiction over non-Indians that commit offenses against other non-Indians. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896). Likewise, state courts probably have criminal jurisdiction over non-Indians that commit "victimless" crimes. *But see* 3 U.S. Op. OLC 111 (1979) (suggesting the possibility of federal jurisdiction if a case involves direct injury to Indian interests). Under 18 U.S.C. § 1152, there is federal jurisdiction over non-Indians who commit crimes against Indians in Indian country.

97. As a practical matter, this problem almost never comes up. If a non-Indian criminal defendant in tribal court waives a potential jurisdictional defense under *Oliphant*, he is probably already committed to the idea that he would rather be subject to tribal authority than state or federal jurisdiction and it is unlikely that he will raise the issue later.

98. The Supreme Court has found that civil forfeiture proceedings are not criminal actions. United States v. Ursery, 518 U.S. 267 (1996). *See also* Christopher B. Chaney, *The Impact of Ursery on Tribal Wildlife Law Enforcement*, WILDLIFE LAW NEWS QUARTERLY, Fall/Winter 1996, at 14.

99. *See* Title 10, JICRARILLA APACHE TRIBAL CODE (1987 as amended 1992).

100. 462 U.S. 324 (1983).

could regulate persons who were not members of the tribe.[101] Other tribes, such as the Navajo Nation, have decriminalized their traffic laws.[102] The problem with this strategy is that states often oppose tribal efforts to decriminalize offenses,[103] and most traditional criminal offenses are best handled in the criminal context.

Another method used by some tribes to exert criminal jurisdiction over non-Indians involves the use of the tribal exclusionary power. Generally, states may not exclude persons from their boundaries;[104] however, the power of Indian tribes to exclude has been well established.[105] Some tribes have taken the position that exercise of criminal jurisdiction over non-Indians is a lesser-included power of the tribal authority to remove persons from tribal lands. In other words, non-Indians who commit offenses on the reservation and then choose not to submit to tribal criminal jurisdiction can be excluded from the tribe's territory. This can be a very powerful tool because many non-Indians live or work in Indian country. Because exclusion is such a drastic remedy, exercise of the tribal exclusionary power is oftentimes strictly regulated by tribal law.[106] While acknowledging this jurisdictional theory, the Supreme Court has yet to rule on the legality of non-Indian acquiescence to tribal criminal jurisdiction in exchange for forbearance of the tribal exclusionary power.[107]

Related to some of the theories set forth above as a basis for the assertion of tribal criminal jurisdiction over non-Indians, is the idea that non-Indians could consent to such jurisdiction.[108] For example, *Navajo Nation v. Hunter*[109] involved the question as to whether a tribal prosecutor was required under Navajo Nation tribal law to prove that a criminal defendant was an Indian in order to sustain a conviction. The Supreme Court of the Navajo Nation found that it was unreasonable to require the prosecution to prove that a defendant was an Indian before a conviction could be sustained. Further, the Court held that *Oliphant* did not create an absolute bar to criminal jurisdiction over non-Indians. The tribal supreme court cited to recent language by the United States Supreme Court[110] which in turn cited to *United States v. Rogers*[111] and *Nofire v.*

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101. *See id.* at 330.

102. *See* 14 NAVAJO NATION CODE § 100 (1995), *et seq.*

103. *See, e.g.*, N.M. Att'y Gen. Op. 92-07 (July 20, 1992).

104. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941).

105. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 252 (1982 ed.). *See also* Merrion v Jicarilla Apache Tribe, 455 U.S. 130, 143-145 (1982).

106. *See, e.g.*, 17 NAVAJO NATION CODE § 1901 (1995), *et seq.*; SOUTHERN UTE INDIAN TRIBAL CODE § 10-1-101 (1989), *et seq.*

107. *See* Duro v. Reina, 495 U.S. 676, 689 (1990).

108. *See Criminal Jurisdiction Over Non-Indians*, Navajo Nation Sol. Op. 92-03 (1992).

109. SC-CR-07-95 (Navajo Nation Sup. Ct. 1996).

110. *See Duro*, 495 U.S. at 694.

United States [112]for the proposition that non-Indians can make themselves amenable to tribal law.[113] The Supreme Court of the Navajo Nation suggested that persons can assume tribal relations and make themselves subject to tribal criminal law "by entry within the Navajo Nation with the consent of the Nation pursuant to Article II of the Treaty of 1868; by marriage or cohabitation with a Navajo; or other consensual acts of affiliation with the Navajo Nation."[114]

The principles enunciated in *Navajo Nation v. Hunter*, have yet to be tested in the federal court system. If an appropriate case eventually makes its way into the federal system for review, the federal court would do well to recognize the broad protections afforded criminal defendants under tribal law, recognize the real-world problems created by *Oliphant*, and then create a workable exception to *Oliphant* in order to support tribal criminal jurisdiction over non-Indians.

IV. CONCLUSION

While not necessarily creating any new jurisprudence, the *Wheeler* decision has helped support development of tribal judicial systems. Tribal courts are flourishing, becoming more accessible, and becoming stronger assets in the American judicial spectrum. The *Mazurie* decision has encouraged the development of tribal law especially in regard to its impact on federal law. This type of development helps to customize the application of federal law in Indian country and makes federal law more responsive to the needs of our nation's tribal communities.

On the other hand, tribes have been forced into a difficult situation by the effects of the *Oliphant* decision. Even though statistics show that Native Americans are being victimized at alarming rates by non-Indian criminal perpetrators, *Oliphant* has prevented tribes from protecting their members from these acts. The *Oliphant* decision has adversely affected public safety in Indian country and has thus adversely affected public safety in America.

It is time for Congress to overturn *Oliphant* through statutory law. This could be done by amending 25 U.S.C. § 1301(2), to indicate that tribes have inherent criminal jurisdiction over all "persons." In the alternative, the Supreme Court should find an exception to *Oliphant* where a tribe provides criminal defendants with rights that are at least equal to the rights of persons facing similar charges in the federal system. At the very

111. 45 U.S. (4 How.) 567 (1846).

112. 164 U.S. 657 (1897).

113. *See* Navajo Nation v. Hunter SC-CR-07-95, 9 (Navajo Nation Sup. Ct. 1996).

114. *See id.* at 10.

least, the Supreme Court could uphold use of one or more of the theories that many tribal judiciaries are espousing to regain jurisdiction over non-Indians. Regardless of the method used, elimination of the harsh effects of *Oliphant* will do nothing but improve public safety in America, especially for our first people.