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NOTES

OLIPHANT V. SCHLIE: TRIBAL CRIMINAL JURISDICTION OF NON-INDIANS

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> Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal laws, is a *sine qua non* of the sovereignty that the Suquamish originally possessed.[1]

The Ninth Circuit Court of Appeals in *Oliphant v. Schlie*[2] affirmed the denial of a writ of habeas corpus sought by a non-Indian who alleged that the Suquamish Tribe had no criminal jurisdiction over non-Indians. The Ninth Circuit thus became the highest federal court to affirm tribal jurisdiction on the basis of the inherent sovereignty of the tribe. Other recent Supreme Court and lower federal court decisions finding tribal jurisdiction of non-Indians have based their findings on express statutory grants.[3] This note will examine the *Oliphant* decision in light of the tangled history of criminal jurisdiction over Indian country.

I. HISTORICAL INTRODUCTION

An American Indian tribe is a unique political entity.[4] Although many culturally distinct people have come to America, none enjoy the special legal relationship of the Indian tribes with the federal and state governments. This special status derives from their unique position in the historical development of this country: their occupation of North America predating European settlement, the cession of most of that territory to the federal government by treaty, purchase or conquest, and the reservation by the federal government of a fraction of the original Indian holdings for exclusive tribal use and self-government.[5] Since the earliest years of this nation, the federal and state governments have been trying to define this special relationship. The definitions and redefinitions throughout the years have been marked by pendulous changes, fluctuating between

1. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).
2. *Id.*
3. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975); United States v. Finch, 548 F.2d 822 (9th Cir. 1976).
4. *See* Cherokee Nation v. Georgia, 30 U.S.(5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S.(6 Pet.) 515 (1832).
5. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

opposite goals: on the one hand, sovereignty, self-government and self-determination, and on the other, assimilation and termination. Today's complex maze of jurisdictional doctrines is the result.[6]

This note focuses on tribal criminal jurisdiction. Jurisdiction in any given case rests upon analysis of the treaties, statutes, or executive orders applicable to the particular reservation, the general federal statutes applicable to all Indian reservations, and, in some instances, a state constitution and statutes.[7] However, in order to assess the significance of *Oliphant*, this note will survey only the broader doctrines and statutes, and briefly consider the major policy variations.

A. Jurisdiction of Intra-Indian Crimes

Traditionally, crimes committed by one Indian against the person or property of another Indian have been within the jurisdiction of the tribe. Treaties generally recognized this jurisdiction.[9] Congress, as early as 1817,[10] excepted intra-Indian offenses from the general federal jurisdiction exercised over crimes committed in "Indian country".[11]

The first permanent intrusion upon the exclusive jurisdiction of the tribe over intra-Indian crimes came in 1885 after the United States Supreme Court, in *Ex Parte Kan-Gi-Shun-Ca* (also known as *Crow Dog*)[12] held that the federal courts lacked jurisdiction to try Kan-Gi-Shun-Ca, a Brule Sioux, for the murder of a Brule Sioux Chief. In reaction to this decision, Congress passed the Federal Major Crimes Act[13] which remains in effect today.

The next major change in federal statutes governing Indian criminal jurisdiction was the enactment of Public Law 280 in 1953.[14]

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6. Lynaugh, *Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63, 64 (1977).

7. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 952 (1975).

8. It is important to understand that this introductory material is *only* a broad overview, and, as such, tends to oversimplify the many problems in this area.

9. Clinton, *supra* note 7, at 955-56.

10. Indian Trade and Intercourse Act, ch. XCII, §§ 1-2, 3 Stat. 383 (1817) (current version at 18 U.S.C. § 1152 (1970)). *See* p. 342 & note 27 *infra*.

11. "Indian country" is defined in 18 U.S.C. § 1151 (1970).

12. 109 U.S. 556 (1883).

13. The Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified at 18 U.S.C. § 1153 (1970)). The major crimes over which the federal courts have jurisdiction are: murder; slaughter; rape; carnal knowledge of any female, not his wife, who has not attained the age of sixteen years; assault with intent to commit rape; incest; assault with intent to kill; assault with a dangerous weapon; assault resulting in serious bodily injury; arson; burglary; robbery; and larceny.

14. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (current version in scattered sections of titles 18 and 25 of the United States Code (1970) [hereinafter referred to as P.L. 280]. The General Allotment Act was enacted by Congress in the intervening years and contained

Congress' primary concern in enacting P.L. 280 was the "problem of lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement."[15] In P.L. 280, Congress gave consent to States wishing to assume civil or criminal jurisdiction, or both, over Indian reservations.[16] No tribal consent was required,[17] until the amendment of P.L. 280 by the Civil Rights Act of 1968.[18] The Civil Rights Act also provided a method by which States could retrocede any jurisdiction previously assumed under P.L. 280.[19] In addition to amending P.L. 280, those sections of the Act known as the Indian Civil Rights Act extended certain constitutional protections to prosecutions in tribal courts.[20] Although the Act limited punishments which the tribal courts may impose to a maximum of six months imprisonment, a $500 fine, or both,[21] it did not expressly limit the crimes cognizable in tribal court.

In summary, on reservations where the State has not assumed complete criminal jurisdiction under P.L. 280, if the offender and the victim are both Indian, the federal government has exclusive jurisdiction only if the offense is covered by the Federal Major Crimes Act. Otherwise, the tribal courts have exclusive jurisdiction, but are limited in the sentences they may impose.[22]

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provisions affecting criminal jurisdiction; however, this policy was reversed in 1934. Because the continuing effect of this statute is minimal in this area of jurisdiction, it is not discussed in the text at this point.

15. Bryan v. Itasca County, 426 U.S. 373, 379 (1976); Goldberg, *supra* note 5, at 541-42.

16. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 6-7, 67 Stat. 588 (current version at 25 U.S.C. §§ 1321-22 (1970)). Section 2 of the Act granted certain States complete jurisdiction over most or all of the reservations within the State. Most States, however, were simply given the option to assume such jurisdiction. Montana was one such State, and she chose to assume limited jurisdiction over only one reservation, The Confederated Salish and Kootenai Reservation. *See* REVISED CODES OF MONTANA (1947), §§ 83-801 to 807; State *ex rel.* McDonald, 159 Mont. 156 (1972).

17. 25 U.S.C. §§ 1321, 1326 (1970). However, many States required some form of tribal consent. *See, e.g.*, REVISED CODES OF MONTANA (1947), § 83-802.

18. Act of Apr. 11, 1968, Pub. L. No. 90-289, 82 Stat. 77-78 (pertinent provisions codified at 25 U.S.C. §§ 1301-03, 1321-26 (1970)).

19. 25 U.S.C. § 1323 (1970).

20. 25 U.S.C. § 1302 (1970). Generally, the constitutional protections which are extended include those of the fourth, fifth, sixth, and eighth amendments. The Indian Bill of Rights was necessary because previous cases had held that constitutional guarantees were not applicable to tribal proceedings. *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896). *But cf.* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), a case arising out of the Fort Belknap Reservation in Montana.

21. 25 U.S.C. § 1302 (1970).

22. Whether a tribal court can convict a person of an offense which traditionally has been considered a felony, but which is not one of the "Major Crimes", and limit the sentence imposed to 6 months or a $500 fine, has not yet been answered in any court.

B. *Jurisdiction of Crimes By or Against Indians*

With the exception of some pre-1800 treaties,[23] the policies of the federal government regarding jurisdiction of offenses commited by a non-Indian against an Indian, and by an Indian against a non-Indian, remained basically the same until 1953.[24] Congress first set forth this policy in section 4 of the Indian Trade and Intercourse Act of 1802.[25] This section was reenacted in 1817 when exceptions to federal jurisdiction were enumerated.[26] With minor changes, the provisions of the 1817 Act are codified today at 18 U.S.C. § 1152 (1970), which reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishments 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 offenses 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.[27]

This section, known today as the General Crimes Act, recognizes the jurisdiction of the tribe over an offense committed *by* an Indian. The statute extends federal jurisdiction to a non-Indian who commits a crime *against* an Indian in Indian country. The United States Supreme Court has consistently affirmed the exclusive federal jurisdiction of offenses against Indians.[28]

In 1959, in the landmark case of *Williams v. Lee,*[29] the Supreme Court, in dicta, spoke to this area of jurisdiction:

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23. *See, e.g.,* Treaty with the Cherokees, July 2, 1791, art. X, 7 Stat. 40; Treaty with the Creeks, Aug. 7, 1790, art. VIII, 7 Stat. 37. These and other treaties may be found in INDIAN TREATIES, 1778-1883 (C. Kappler ed. 1972).

24. *Ex Parte* Kan-Gi-Shun-Ca (otherwise known as Crow Dog), 109 U.S. 556, 571 (1883); Donnelley v. United States, 228 U.S. 243, 271 (1913). However, the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-58 (1970)), had provided for bringing Indians who received allotments under State jurisdiction. Because the allotment policy was reversed in 1934, the net impact "was not substantial in shifting authority to the states." Clinton, *supra* note 7, at 966-67.

25. Act of Mar. 30, 1802, ch. XIII, 2 Stat. 139.

26. The Indian Trade and Intercourse Act, ch. XCII, §§ 1-2, 3 Stat. 383 (1817) (current version at 18 U.S.C. § 1152 (1970)). This statute has come to be known as the General Crimes Act.

27. The constitutionality of this statute was upheld as a proper exercise of the power vested in Congress by the commerce clause in United States v. Kagama, 118 U.S. 375 (1886).

28. *See, e.g.,* Donnelley v. United States, 228 U.S. 243 (1913); Williams v. United States, 327 U.S. 711 (1946); Williams v. Lee, 358 U.S. 217, 220 (1959).

29. 358 U.S. 217, 220 (1959).

> [I]f the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.[30]

The Court's footnote to this statement is helpful. After referring to the Federal Major Crimes Act as one congressional grant of jurisdiction over reservations to the federal courts, the Court stated: "[N]on-Indians committing crimes against Indians are now generally tried in federal courts."[31] This generalization is substantiated by the fact that there is only one reported case dealing with an attempt by an Indian court to exercise jurisdiction over a non-Indian. In *Ex Parte Kenyon,*[32] a non-Indian sought a writ of habeas corpus from a federal district court. The court found no tribal subject matter jurisdiction because the crime was not committed on the reservation.[33] In dicta, the *Kenyon* decision also said that the General Crimes Act deprived the Indian tribes of jurisdiction over non-Indians.[34] This issue was not directly raised again in any reported case until *Oliphant*.[35]

C. *Jurisdiction of Crimes Between Non-Indians*

Jurisdiction of crimes committed by non-Indians against non-Indians within the boundaries of Indian territory has changed markedly since the adoption of the first federal policies. Many pre-1800 treaties, written in language of international diplomacy, dealt with Indian tribes as sovereign powers, and thus recognized the tribe's jurisdiction over non-Indians who committed crimes within Indian territory.[36] However, some of these early treaties, and most later ones, dealt with criminal jurisdiction on the basis of the offender's citizenship: the federal government assuming jurisdiction over American citizens within Indian territory and the tribes retaining jurisdiction over their own members.[37] This policy of federal jurisdiction over non-Indians committing crimes in Indian territory was formalized, as indicated above, in the series of Indian Trade and Intercourse Acts enacted in the late 18th and early 19th centuries.

In 1831 and 1832, the Supreme Court first addressed the issue of jurisdiction in Indian country in *Cherokee Nation v. Georgia*[38] and

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30. *Id.*
31. *Id.*
32. 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7,720).
33. *Id.* at 355.
34. *Id.*
35. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).
36. *See, e.g.,* Clinton, *supra* note 7, at 953.
37. *Id.* As noted in the Clinton article, this approach was not entirely foreign to international diplomacy. *Cf.* Treaty with China, July 3, 1844, art.XXI, 8 Stat. 596.
38. 30 U.S.(5 Pet.) 1 (1831).

Worcester v. Georgia.[39] The *Worcester* case involved the assertion of state criminal jurisdiction over a non-Indian residing in Indian country. In these landmark cases, Chief Justice Marshall laid two of the cornerstones of Indian law. First, he forcefully asserted the federal government's exclusive jurisdiction over Indian affairs, reasoning that under the Constitution, Congress' power was plenary and the States were without jurisdiction.[40] Secondly, he characterized the Indian tribes as "domestic dependent nations"[41] with powers of self-government which retained those original powers not relinquished by the tribe to the federal government.[42] Subsequent federal legislation has altered the latter characterization by significantly limiting the powers of the tribes.[43] The Supreme Court has sanctioned this unilateral assumption of power[44] and has characterized the powers retained by the tribe as those powers not limited by Congress.[45]

Despite the earlier Marshall opinions and ample federal legislation specifying exclusive federal jurisdiction, in 1881 the Court held, in *United States v. McBratney,*[46] that the State of Colorado had jurisdiction to try a non-Indian for the murder of another non-Indian within the boundaries of the Ute Reservation. This case has come to stand for the rule that state courts have jurisdiction of offenses committed by non-Indians against non-Indians within Indian country.[47] Congress has neither explicitly authorized such jurisdiction,[48] nor explicitly negated it by rejecting the holdings of the *McBratney* line of cases. Although the *McBratney* decision re-

39. 31 U.S.(6 Pet.) 515 (1832).

40. *Id.* at 539-40.

41. Cherokee Nation v. Georgia, 30 U.S.(5 Pet.) 1, 17 (1831).

42. *Id.* at 56.

43. The Federal Major Crimes Act is an example of Congress' unilateral action which infringed upon tribal sovereignty and abrogated prior treaty agreements. *See* Clinton, *supra* note 7, at 972-73, for a rationalization of broken treaties.

44. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

45. United States v. Quiver, 241 U.S. 602, 605-06 (1916). *See* Williams v. Lee, 358 U.S. 217 (1959).

46. 104 U.S. 621 (1881). Draper v. United States, 164 U.S. 240 (1896), completes the rationale of *McBratney* by extending the *McBratney* rule to a State, Montana, which had disclaimed all jurisdiction over Indian reservations within its borders in its state constitution. *Id.* at 247. Unlike Montana, Colorado, the State involved in *McBratney*, had no such disclaimer.

47. Williams v. Lee, 358 U.S. 217, 220 (1959); New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499 (1946).

48. P.L. 280, of course, authorizes States to assume criminal jurisdiction of reservations, but no federal statute specifically authorizes the States to assume jurisdiction of non-Indians only. Under P.L. 280, the state legislatures must affirmatively act in order to assume such jurisdiction. *See* 25 U.S.C. § 1321 (1970). The *McBratney-Draper* line of authority predated P.L. 280 and required no affirmative state action.

mains, in the words of one commentator, "enigmatic",[49] it is valid law today and States do exercise criminal jurisdiction over offenses committed between non-Indians on reservations.

D. Changes in Federal Indian Policy

The unexplained contradiction between *McBratney* and the previous Marshall decisions exemplifies the pendulous and often contradictory fluctuations in federal Indian policy. Congressional policy had changed between the 1830's, when the Marshall opinions were written, and the 1880's when the *McBratney* decision was rendered. In 1834, just two years after the Marshall decisions, Congress reaffirmed those decisions by reenacting section 4 of the Indian Trade and Intercourse Act, which provided for exclusive federal jurisdiction over Indian country. Federal jurisdiction, rather than state jurisdiction, was logical in light of the then prevailing United States policy of relocating Indian tribes to unsettled territory west of the Mississippi River — outside the boundaries of the States. By the 1880's, as a result of westward expansion, most of the States west of the Mississippi were admitted to the Union. Congress could no longer relocate Indian tribes to lands distant from white settlement. The lands reserved for Indian use were necessarily located within state borders, adjacent to lands occupied by non-Indians. The small tracts so reserved did not allow most Indian tribes to continue their traditional way of life with its independent economy. Congress responded in 1887 by passing the General Allotment Act.[50] The goal of this Act was the eventual assimilation of the Indian into the American economic system. The Act specifically provided for the individual Indian to eventually come under state jurisdiction.[51] *McBratney*, in providing for the extension of state jurisdiction over non-Indians within Indian country, was consonant with this policy of termination of reservations and expanded state jurisdiction.

The General Allotment Act of 1887 remained the federal policy until 1934. It authorized the allotment of reservation lands in 80 or 160 acre tracts to individual Indians who ultimately were to take title in fee simple. The excess lands within the exterior boundaries of the reservations, not allotted to tribal members, could be opened to non-members for homesteading.[52] Many non-Indians settled on those reservations either by homesteading or by purchasing land

49. Clinton, *supra* note 7, at 978.
50. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-58 (1970)).
51. 25 U.S.C. § 349(1970).
52. *Id.* § 348.

from individual tribal members.[53] Subsequent assertions of jurisdiction by these tribes over persons or property within their reservations has raised volatile problems.

The Indian Reorganization Act of 1934,[54] reversed the assimilation policy by emphasizing tribal self-government. Tribal constitutions, councils and courts were authorized. Because this Act focused upon improving the welfare of tribal members, most tribal constitutions, adopted pursuant to the Reorganization Act, only address jurisdiction of tribal members.[55]

The federal policy reverted to assimilation in the 1950's with the passage of a series of termination acts. P.L. 280 was enacted during this period.[56] The most recent policy reversal came in the 1960's with the passage of the Indian Civil Rights Act of 1968.[57] Its passage heralded a return to the 1934 goals of improvement of reservation life and tribal government. And, in the 1970's, a new phrase — "self-determination" — entered the lexicon of Indian policy.[58]

These pendulous reversals in federal Indian policy, together with the evolution of the three categories of jurisdictional rules, have resulted in "a complex labyrinth" of jurisdictional statutes, decisions and policies, which many practitioners find virtually impossible to master.[59] It is this legally complex and politically sensitive area that the Ninth Circuit Court of Appeals addressed in *Oliphant v. Schlie.*

II. OLIPHANT V. SCHLIE

The facts of this case are of particular importance because the alleged criminal act was directed against a tribal officer and because it occurred when no other law enforcement officials were available.

At a tribal celebration, known as Chief Seattle Days, a large number of people were camped at the Suquamish tribal campgrounds. In the early morning, a non-Indian, Mark Oliphant, was arrested by tribal police and charged in tribal court with assaulting

53. Not all reservations were opened to homesteading by the Executive during the tenure of the General Allotment Act.

54. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified in scattered sections of title 25 of the United States Code (1970)).

55. *See, e.g.*, CONFEDERATED SALISH AND KOOTENAI OF THE FLATHEAD RESERVATION CONST. art. VI, § 1, cl. 1.

56. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (current version in scattered sections of titles 18 and 25 of the United States Code (1970).

57. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77-78 (pertinent provisions codified at 25 U.S.C. §§ 1301-03, 1321-26 (1970)).

58. *See, e.g.*, Indian Self-Determination Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified in scattered sections of titles 25, 42, and 50 of the United States Code (1970)).

59. Clinton, *supra* note 7, at 991.

an officer and resisting arrest. He was incarcerated in lieu of two hundred dollars bail by order of tribal court, but later was released on his own recognizance. Before trial he petitioned the federal district court for a writ of habeas corpus. The federal court denied the writ and Oliphant appealed. Thus, the Ninth Circuit Court of Appeals faced an issue which had not been raised since *Ex Parte Kenyon*:[60]

> What is the jurisdiction of an Indian tribe over non-Indians who commit crimes while on Indian tribal land within the boundaries of the reservation?[61]

In affirming the district court's denial of the writ of habeas corpus, the Ninth Circuit held that the Suquamish Tribe had criminal jurisdiction of Oliphant for the violation of tribal law. Courts have previously based tribal jurisdiction to regulate the activities of non-Indians on the reservations on federal statutes,[62] but neither the Supreme Court nor any federal circuit court until *Oliphant* had based a finding of tribal criminal jurisdiction of non-Indians primarily upon the inherent sovereignty of a tribe. In 1975 the Supreme Court, in *United States v. Mazurie*,[63] expressly refrained from deciding whether the independent authority of the tribe was alone sufficient to sustain imposition of a tribal ordinance on non-Indians within the Wind River Reservation.[64] In *Mazurie*, the determination was unnecessary because a federal statute authorized the tribe to regulate the sale of liquor on the reservation.[65]

Similarly, the Ninth Circuit in 1976, in *Quechan Tribe of Indians v. Rowe*,[66] noted the tribe's claim of inherent authority to exercise criminal jurisdiction over non-members of the tribe who violated tribal law. However, because the Quechan Constitution limited the tribe's jurisdiction to tribal members, the court found it unnecessary to decide whether any congressional policy prohibits the exercise of such jurisdiction. Thus, the court merely said, "[T]he question remains unanswered."[67]

In *Oliphant* the court of appeals answered this question, at least as it applied to the Suquamish Tribe in the State of Washington. The significance of *Oliphant* lies as much in its rationale as in

60. 14 F. Cas. 353 (W.D. Ark. 1878)(No. 7,720).
61. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).
62. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975); United States v. Finch, 548 F.2d 822 (9th Cir. 1976).
63. 419 U.S. 544 (1975).
64. *Id.* at 557.
65. *Id.*
66. 531 F.2d 408 (9th Cir. 1976).
67. *Id.* at 410 n. 3.

its ultimate conclusion. The majority opinion and the dissent present the two opposing lines of argument regarding Indian jurisdiction. Since neither the Supreme Court nor Congress has resolved the issue, it is important to examine the majority and dissenting opinions.

A. Inherent Sovereignty

In determining whether the Suquamish had jurisdiction over Oliphant, the majority said that the proper approach was to ask "first, what the original sovereign powers of the tribe were, and, then, how far and in what respects these powers have been limited."[68] The phrasing of the issue is determinative, and defines the opposing theoretical positions on the subject. That the choice of approach is critical is illustrated by the fact that neither the majority nor the dissent found any act of Congress which had expressly granted criminal jurisdiction over non-Indians to the tribe. The majority reasoned that since Congress had not acted to limit the inherent power of the tribe, the Suquamish still possessed the jurisdiction. Conversely, the dissent found the tribe to be without such jurisdiction since Congress had not explicitly granted it.

The majority began its analysis with the following statement: "It must always be remembered that the various Indian tribes were once independent and sovereign nations . . . who, though conquered and dependent, retained those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress" (citations omitted).[69] Then the majority took the critical step of stating that the ability to preserve order on the reservation, including the punishing of those who violate tribal laws, is, by definition, part of that original sovereignty.[70] Recognizing that this was a case of first impression,[71] the court supported its statement in two ways—by analogy to the tribal powers to tax and by dicta from *Williams v. Lee*.[72] The court analogized its statement to an early Eighth Circuit decision which upheld the right of the Creek Nation to tax non-Indians:

> [The right to tax] was one of the inherent and essential attributes of its original sovereignty. It was the natural right of that people, indespensible to its autonomy as a distinct tribe or nation, and it

68. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).

69. *Id.*

70. *Id.* for text of quote, *see* p. 339 *supra*.

71. Although the question was previously discussed in *Ex Parte* Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7,720), the court found that the crime alleged in that case, if it occurred at all, took place off the reservation.

72. Williams v. Lee, 358 U.S. 217, 220 (1959).

> must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.[73]

The court then cited dicta in *Williams v. Lee*,[74] in which the Supreme Court recognized that Indian tribes have criminal jurisdiction over crimes by or against Indians.[75]

Although not expressed by the court, the traditional common law axiom that a crime constitutes an act against the sovereign supports the majority's decision that the tribe's original sovereignty, by definition, encompasses the power to prosecute those who violate its criminal laws. This is the governmental interest upon which its power to prosecute criminals is based. Thus, the majority opinion is soundly based not only in the precepts of Indian law, but also in the broader common law.

Starting from an entirely different premise, the dissent agreed with the appellant, Oliphant, that the tribe did not have jurisdiction because Congress had not conferred such authority upon the tribe. The dissent argued that the "notion of tribal sovereignty . . . is merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs."[76] The dissent further contended that to resolve the instant question it was necessary to find a congressional grant of such power to the tribes.[77]

The dissent is implicitly based upon the premise that the tribe no longer possesses whatever inherent powers it may have had as an independent nation, prior to coming within the protective jurisdiction of the United States.[78] Thus, congressional enactments, including treaties, are grants of powers or rights to the tribes. Absent such a statutory grant, the tribes do not possess the power. With this premise, Judge Kennedy then reached the following conclusions about tribal sovereignty: the tribal sovereignty notion grew out of cases dealing with state encroachment and simply are not applicable to the subject of tribal jurisdiction over an individual;[79] the power to prosecute non-members "is not essential to the tribe's identity or its self-governing status"[80] and is not within the residual

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73. Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (cited in Oliphant v. Schlie, 544 F. 2d 1007, 1009-10 (9th Cir. 1976)).

74. 358 U.S. 217, 220 (1959).

75. Oliphant v. Schlie, 544 F.2d 1007, 1010 (9th Cir. 1976). For the text of the *Williams* dicta, see p. 343 *supra*.

76. *Id.* at 1015.

77. *Id.*

78. *Id.* at 1009 n.1. *See also* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600 (1976).

79. Oliphant v. Schlie, 544 F.2d 1007, 1015 (9th Cir. 1976).

80. *Id.*

jurisdiction of the tribal courts.[81]

The dissent's position on tribal sovereignty ignores a well settled rule of Indian law which implicitly recognizes the original sovereignty of tribes, as well as the survival of remnants of that sovereignty. The rule holds that "treaties are not grants of rights to Indians, but a grant of rights from them."[82] Rights not expressly granted are reserved by the tribe. The majority opinion, which is in accord with this rule, recognizes the continued sovereignty of Indian tribes, interpreting congressional enactments not as grants of that original power, but as limits upon it.[83]

B. Congressional Intent to Limit Tribal Sovereignty

With these mutually exclusive premises, both the majority and the dissent analyzed the treaties and statutes applicable to the Suquamish. The majority examined the relevant treaties and acts of Congress "to see if any [had] withdrawn from the Suquamish the power to punish Oliphant for a violation of the tribal law and order code."[84] The dissent, consistent with its premise that tribes have only those remnants of their original sovereignty which Congress expressly grants them, scrutinized the treaties and statutes for any express grant of criminal jurisdiction. To appreciate the impact of these contradictory premises upon the court's statutory interpretation, it is helpful to compare the analyses of the majority and dissent.

Because the treaties between the United States and the Suquamish Tribe were silent on the subject of criminal jurisdiction, the majority reasoned that the treaties could not deprive the Suquamish of such jurisdiction.[85] The dissent argued that "[s]uch silence, if it imparts any information at all, must be understood in light of the then prevailing policies, which do not appear to have permitted jurisdiction by Indian tribes over non-Indians."[86]

The dissent's interpretation of the treaties ignored three basic rules developed by the Supreme Court in construing treaties:

> (1) ambiguous expressions are resolved in favor of the Indian parties; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of Indians.[87]

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81. *Id.* at 1018.
82. United States v. Winans, 198 U.S. 371, 381 (1905).
83. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).
84. *Id.* at 1010.
85. *Id.*
86. *Id.* at 1016.
87. Wilkinson and Volkman, *Judicial Review of Treaty Abrogation: "As Long As Water*

The majority's conclusion that silence could not be construed to deprive the tribe of an original, inherent power is more congruous with these rules. In fact, the majority prefaced its discussion of the treaties by stating that it would be guided by the third rule listed above.[88]

The next step in the majority's analysis was consideration of federal statutes regulating Indian affairs. The first statute addressed was the General Crimes Act.[89] As noted in the introduction, the 1834 reenactment of the Indian Trade and Intercourse Act formed the basis for this statute. The majority reviewed congressional records to interpret this Act:

> Our reading of the Congressional history convinces us that § 1152 was not intended, and should not be read, to prohibit Indian tribes from prosecuting non-Indians for offenses against tribal law committed on the reservation. Section 1152 [The General Crimes Act] can be explained more rationally as an attempt to protect Indian tribes, who had no established legal system and whose authority was frequently challenged by unsympathetic state governments, *see Cherokee Nation v. Georgia, supra,* from depredations by 'unprincipled white men.' H.R. Rep. No. 474, 23 Cong., 1st Sess. 98 (1834).[90]

The court then quoted from the 1834 House Report:

> [I]t is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision of [§ 25 of the Trade and Intercourse Act of 1834] is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their government.[91]

This interpretation of the General Crimes Act is critical to the majority's finding that Congress had not withdrawn criminal jurisdiction from the tribe. The General Crimes Act *does* confer jurisdiction on the federal courts over crimes committed by non-Indians against Indians on the reservations. Had the majority found that the congressional intent was to confer exclusive jurisdiction, the dissent's conclusion would have prevailed, despite the fact that the dissent's premise was diametrically opposed to that of the majority. This interpretation of the General Crimes Act was the second important decision in *Oliphant*. The dissent interpreted this statute as mani-

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Flows, Or Grass Grows Upon The Earth"—How Long A Time Is That?, 63 CALIF. L. REV. 601, 608-11 (1975). *See also* Lynaugh, *supra* note 6, at 68.

88. Oliphant v. Schlie, 544 F.2d 1007, 1010 (9th Cir. 1976).

89. For the text of the General Crimes Act, see p. 342 *supra*.

90. Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976).

91. *Id.*

festing Congress' intent to confer *exclusive* jurisdiction upon federal courts. In finding *concurrent* jurisdiction, the majority broke with over one-hundred years of practice.

Another federal statute briefly examined by both the majority and the dissent was the Indian Civil Rights Act.[92] The majority concluded that contrary to Oliphant's argument, nothing in the Indian Bill of Rights purported to withdraw any criminal jurisdiction from the tribe.[93] The court said that the Indian Bill of Rights "recognizes such [tribal] jurisdiction, but prescribes certain due process type limitations upon its exercise."[94] In contrast, the dissent found that the Indian Civil Rights Act was intended to apply only to "tribal courts in dealings with tribal members."[95] And, therefore, by inference, the Act showed that Congress did not recognize tribal jurisdiction of non-Indians.

The dissent strongly argued that "[t]he current scheme for dealing with offenses on Indian land is consistent with the premise that Indian courts do not have jurisdiction of non-Indians."[96] This argument was persuasively supported by the contention that the Federal Major Crimes Act deprives the tribe only of jurisdiction over Indians who commit the enumerated major crimes. The dissent pointed out that "[i]t seems extremely anomalous that Congress would provide for exclusive jurisdiction in federal courts for major crimes committed by Indians, but permit tribal courts to try non-Indians for those same offenses."[97] On its face, it is indeed unlikely. To resolve this issue raised by the dissent, it is helpful to recall that the Major Crimes Act was a reaction to the Supreme Court holding that the General Crimes Act deprived the federal courts of jurisdiction to try an Indian for the murder of another Indian on the reservation.[98] Congress was addressing a specific problem: an Indian murderer unpunished because of lack of federal jurisdiction. As is usual with *ad hoc* legislation, it failed to provide comprehensive regulation. Additionally, Congress knew that if the murder had been committed by a non-Indian, the federal courts would have had jurisdiction under the General Crimes Act, and, therefore, did not see the need for addressing non-Indians. As suggested by the dissent, the statutory scheme of the Major Crimes Act, supplemented by the jurisdictional limitations imposed upon tribal courts by the Indian

92. 25 U.S.C. §§ 1301-03 (1970).
93. Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976).
94. *Id.*
95. *Id.* at 1016.
96. *Id.* at 1017.
97. *Id.* at 1018.
98. *See* discussion p. 340 *supra*.

Bill of Rights,[99] does support a conclusion that Congress does not intend the tribes to have jurisdiction over non-Indians who commit major crimes upon the reservation.

While the dissent drew strong inferences from the federal statutory scheme,[100] the majority limited its inquiry to the detection of express conflicts between tribal criminal jurisdiction and federal policy. They concluded that not only is there no conflict but, "[t]ribal criminal jurisdiction over non-Indians, as limited by the Indian Bill of Rights, is a small but necessary part of this policy."[101]

C. *Practical Considerations*

The final argument of the court was that this case highlighted the need for tribal jurisdiction over minor offenses, and demonstrated the practicality and wisdom of such jurisdiction. Indeed, this may be the key to the court's break with the one-hundred year tradition of exclusive federal jurisdiction over non-Indian offenders.[102]

After noting the persistence of antagonisms between reservation Indians and the surrounding populations,[103] the court concluded with an extensive and persuasive quote from the appellee's brief. These paragraphs address the practical considerations which are critical to the court's decision:

> Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated. Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already over-crowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps in a suspended sentence. Prosecutors in counties adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process make witnesses difficult to obtain, where the jurisdictional division between federal, state and tribal governments over the offense is not clear, and where the peace and dignity of the government affected is not his own but that of the Indian tribe. Traffic offenses, tres-

99. 25 U.S.C. § 1302 (1970).

100. Oliphant v. Schlie, 544 F. 2d 1007, 1018 (9th Cir. 1976).

101. *Id.* at 1012-13.

102. There were other indicators that the practice of the previous century was about to change. Notable was the withdrawal in 1974 by the Solicitor General's Office of an opinion that the tribes did not have criminal jurisdiction of non-Indians. Solic. Gen. Op. M. -36810 (Aug. 10, 1970), *withdrawn*, Solic. Gen. Memo (Jan. 25, 1974).

103. Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976).

> passes, violations of tribal hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows.[104]

The majority in *Oliphant* pointed to the facts as illustrative of the need for tribal jurisdiction.[105] In planning for the tribal celebration, the Tribe knew thousands of people would congregate in a small area near the tribal campgrounds. Both the local county law enforcement officials and the Bureau of Indian Affairs were asked to provide law enforcement assistance. The county provided only one deputy for one eight-hour shift during the entire weekend. The Bureau told the Tribe to provide their own law enforcement out of tribal funds. Thus, the only law enforcement officials available at the time Oliphant was arrested were tribal police. "Without the exercise of jurisdiction by the Tribe and its courts, there could have been no law enforcement whatsoever on the Reservation during this major gathering which clearly created a potentially dangerous situation with regard to law enforcement."[106]

III. CONCLUSION

After 170 years of federal court jurisdiction over non-Indians who commit crimes against Indians on reservations, the *Oliphant* decision formally recognized that this jurisdiction, granted by the General Crimes Act, is not exclusive. The decision makes good practical sense in terms of the federal judicial system, because it functionally results in a division of criminal jurisdiction over non-Indians on the reservation which matches the current statutory scheme for Indians: minor offenses are tried in tribal courts and major crimes are tried in federal courts. As the *Oliphant* majority noted, neither federal legislation, federal courts nor the federal prosecutorial mechanism is designed to deal with these minor offenses.[107]

The decision raises some questions. One such question, unanswered by the court, concerns the procedural protections available to the non-Indian in tribal court. Will a non-Indian who is tried in tribal court have the right to a jury panel which includes non-Indians? When the provisions of the Indian Bill of Rights differ from the federal constitutional guarantees, which will prevail when ap-

104. *Id.* at 1013-14.
105. *Id.* at 1013.
106. *Id.*
107. The *Oliphant* decision does not address the important interrelationships of tribal jurisdiction with state jurisdiction.

plied to the non-Indian? As demonstrated in *Oliphant,* the habeas corpus proceeding in federal court is available to non-Indians, as well as Indians,[108] who seek judicial protection of their rights. This may allay the fear expressed by Oliphant of not receiving a fair trial in tribal court.[109]

Implicitly, the *Oliphant* decision recognizes the competence of tribal courts to deal with minor offenses. Non-Indians are generally unaware of the structure and procedures of tribal courts, and of the content of tribal constitutions and law and order codes. Also largely unnoticed by non-Indians is the judicial training program established by the National American Indian Court Judges Association.

As a result of the *Oliphant* decision, other tribes will inevitably begin to exercise jurisdiction over non-Indians.[110] In States with significant reservation populations, this will focus increased attention of non-Indians on the Indian courts, and, resultantly, produce a clamor for change.[111] So long as only Indian people were tried in these courts, they were of minimal interest to the majority of non-Indian citizens.

Ultimately the decision as to Indian jurisdiction lies with Congress. Three principal alternatives are available to Congress. First, it could authorize States to exercise jurisdiction over reservations — a return to the policies of the 1950's. Second, it could expand federal law enforcement on the reservations—contrary to the *Oliphant* rationale. And, third, it could continue current policies of strengthening tribal governments, including tribal courts and law enforcement agencies. Of the three options, the third is most consistent with the original treaty commitments and with current policy. The first, state assumption of jurisdiction, does the most violence to those promises of a century ago. This alternative would be an unfortunate relegation of the rights of this political minority, rights guaranteed to them "for as long as water flows or grass grows upon the earth."[112]

Since 1959, the trend in federal court decisions,[113] typified by *Oliphant,* is consistent with the third alternative of strengthening tribal governments. The time thus appears ripe for tribes to negoti-

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108. *See* Colliflower v. Garland, 342 F. 2d 369 (9th Cir. 1965).

109. Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976).

110. Indeed, some tribes have already moved to assert jurisdiction over non-Indians, notably the Salt River and Gila River Pima Maricopa Indian Communities in the State of Arizona, and the Quinault, Colville, and obviously, the Suquamish tribes in the State of Washington. THE AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., MANUAL OF INDIAN LAW D-12 n. 55 (1976).

111. The Billings Gazette, Mar. 6, 1977, at 1A, col. 1, and 1D.

112. Wilkinson and Volkman, *supra* note 87.

113. *Williams v. Lee,* 358 U.S. 217 (1959), marks the beginning of this trend in federal court decisions which generally give increased recognition to the rights of tribal government.

ate with the States to attempt to resolve the plethora of problems which flow from the presence of a semi-sovereign jurisdiction within the borders of a sovereign State. Congressional approval can be sought for negotiated settlements and the federal courts utilized as the final arbiters. Such negotiation will not make the problems easier to solve, but it will increase likelihood that the solutions will maximize functional compatibility between state and tribal sovereignty, with the least possible aggravation to all concerned.