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Indian Law—Indian Sovereignty and Tribal Jurisdiction over Non-Indian Offenders—Oliphant v. Schlie, 544 F. 2d 1007 (9th Cir. 1976)

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INDIAN LAW—INDIAN SOVEREIGNTY AND TRIBAL JURISDICTION OVER NON-INDIAN OFFENDERS—*Oliphant v. Schlie*, 544 F. 2d 1007 (9th Cir. 1976).

The question of tribal jurisdiction over non-Indians inside the territorial limits of the reservation has remained unanswered since it first arose in a frontier case in 1878.[1] Because no federal statute expressly confers such jurisdiction upon the tribes, the ability to exercise such jurisdiction depends upon the extent of the tribes' inherent sovereignty. A fundamental split in theory has arisen between those courts which believe that the tribes possess all powers of internal sovereignty not expressly limited by Congress[2] and others which contend that the tribes possess only those powers conferred upon them by the federal government.[3] In 1975 the United States Supreme Court stated that the inherent sovereignty of the tribes implies a "certain degree of independent authority over matters that affect the internal and social relations of tribal life,"[4] but the Court did not explore the extent of that authority. Recently, in *Oliphant v. Schlie*,[5] the Court of Appeals for the Ninth Circuit upheld a tribal court's jurisdiction over a non-Indian defendant for an offense committed on Indian land.[6]

1. *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720) (tribe had no jurisdiction over non-Indian offender). *See* notes 58–64 and accompanying text *infra*.

2. *E.g.*, Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) (tribe's inherent sovereignty supports jurisdiction of tribal police officer to investigate on-reservation violations of state and federal law); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956) (refusing to enjoin tribal enforcement of sentence imposed on tribal members for the offense of adultery); United States v. LaPlant, 156 F. Supp. 660, 662 (D. Mont. 1957) (forbidding federal prosecution of tribal member who had already been convicted and fined by tribal court for the offense).

3. *E.g.*, Oliphant v. Schlie, 544 F.2d 1007, 1014–15 (9th Cir. 1976) (Kennedy, J., dissenting), *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977). United States v. Blackfeet Indian Reservation, 364 F. Supp. 192, 194 (D. Mont. 1973) (term "sovereign" as applied to Indian tribes means no more than "within the will of Congress"). *See also* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAWYER 600 (1976).

4. United States v. Mazurie, 419 U.S. 544, 557 (1975) (upholding congressional delegation of law enforcement authority to an Indian tribe).

5. 544 F.2d 1007 (9th Cir. 1976). Mark David Oliphant was arrested by Suquamish tribal police on the Port Madison Indian reservation and was charged in tribal court with assaulting an officer and resisting arrest. He was incarcerated by order of the tribal court and later released on his own recognizance. Before trial he petitioned the United States district court for a writ of habeas corpus, claiming that a tribal court cannot exercise jurisdiction over a non-Indian. The district court denied the writ, and Oliphant appealed.

6. The federal courts recently have begun to recognize a requirement of ex-

Oliphant, the first attempt in recent case law to deal directly with the issue of tribal criminal jurisdiction over non-Indians, represents an acceptance of the theory that tribal sovereignty is diminished only to the extent that it is expressly limited by the federal government. The Court of Appeals for the Ninth Circuit held that, in the absence of any express limitations on tribal power, the original criminal jurisdiction of the tribe remains undiminished. After establishing this foundational principle, the court proceeded to analyze the alleged limitations on tribal jurisdiction. First, the court found no treaty purporting to limit the tribe's criminal jurisdiction.[7] Second, the federal jurisdictional statute was found to contain no claim of exclusivity.[8] Third, the court construed the 1968 Indian Civil Rights Act[9] as limiting but not extinguishing tribal criminal jurisdiction over non-Indians. Fourth, state jurisdiction under Public Law 280[10] was found to have been effectively retroceded.[11] Finally, the court found that tribal criminal jurisdiction

haustion of tribal remedies before intervention by a federal court. *See, e.g.,* United States *ex rel.* Cobell v. Cobell, 503 F.2d 790, 793 (9th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973); Dodge v. Nakai, 298 F. Supp. 17, 26 (D. Ariz. 1968). The requirement is not an inflexible one. The applicability of the exhaustion requirement is to be determined by "weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights." O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973). Although the exhaustion requirement was developed in cases involving federal review of tribal actions under the Indian Bill of Rights, 25 U.S.C. §§ 1301–1303 (1970), the reasoning in those cases is equally applicable to the *Oliphant* situation. Because the defendant was no longer in custody, tribal interests outweighed the deprivation of the defendant's individual rights, and federal intervention could have been postponed pending resolution of the case in tribal court.

7. The treaties involved in the case were the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, and the Act of Mar. 3, 1905, 33 Stat. 1078.

8. 18 U.S.C. § 1152 (1970). *See* note 39 *infra.*

9. 25 U.S.C. §§ 1301–1341 (1970). *See* notes 30 & 31 and accompanying text *infra.*

10. 18 U.S.C. § 1162 (1970), 25 U.S.C. §§ 1321–1326 (1970). *See* notes 46 & 47 and accompanying text *infra.*

11. In the 1968 Civil Rights Act, the United States was given authority to retake jurisdiction which had been assumed by the states under Public Law 280 and then retroceded. 25 U.S.C. § 1323 (1970). The Governor of Washington proclaimed retrocession of jurisdiction over the Suquamish on August 26, 1971. The Secretary of the Interior effectively accepted the retrocession on April 14, 1972 (37 Fed. Reg. 1353 (1972).

Oliphant claimed that the retrocession was ineffective because invalid under Washington law due to lack of legislative authority for the Governor's proclamation. The court found the issue to be a question of federal law, and that the acceptance of retrocession by the Secretary of the Interior made it effective regardless of the validity of the Governor's action under Washington law. 544 F.2d at 1012.

over non-Indians conformed with the federal policy of encouraging Indian self-government.

The *Oliphant* decision stands in marked opposition to a commonly expressed view that tribal courts cannot validly assert criminal jurisdiction over non-Indians.[12] The court's conclusion that the federal statute is non-exclusive establishes a system of concurrent federal-tribal jurisdiction which may have a profound effect upon the law enforcement situation on Indian land. This note analyzes these issues in light of the history and nature of tribal sovereignty and concludes that, because tribal sovereignty is the foundation upon which an ambiguous state or federal jurisdictional statute must be examined, the result in *Oliphant* is correct and in accord with current policies encouraging tribal self-determination.

I. SOURCES OF AUTHORITY IN INDIAN COUNTRY

Criminal jurisdiction in Indian country[13] is presently allocated among the federal government, the states, and the Indian tribes on the bases of the race of the offender and victim, the nature of the offense, and the locus of the offense.[14]

A. Tribal Sovereignty

Before the arrival of Europeans on this continent, the various Indian tribes were sovereign entities in the sense that they exercised full

12. *E.g.*, Memorandum, Solicitor for the Department of the Interior, 77 Interior Dec. 113 (Aug. 10, 1970) (withdrawn Jan. 25, 1974); D. Klein, Criminal Jurisdiction in Indian Country: The Policeman's Dilemma 17, 22 (paper of the National Indian Justice Planning Ass'n, Inc., 1973); *accord*, W. BROPHY & S. ABERLE, THE INDIAN—AMERICA'S UNFINISHED BUSINESS 50 (1966); Newman, *Jurisdiction over Indians and Indian Lands in Washington* in 1 STUDIES IN AMERICAN INDIAN LAW 232, 239 (R. Johnson ed. 1970). *See also* Comment, *The "Right of Tribal Self-Government" and Jurisdiction of Indian Affairs*, 1970 UTAH L. REV. 291, 298.

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

> Except as otherwise provided in sections 1155 and 1156 of this title, the term "Indian country" as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

14. For analyses of each possible combination of these factors, see F. COHEN,

powers of self-government.[15] Although it is generally recognized that the process of conquest destroyed the external sovereignty of the tribes,[16] there is disagreement with respect to the effect of conquest upon the extent of the tribes' internal sovereignty.[17] Nevertheless, the concept of inherent tribal sovereignty has been fundamental since its explicit recognition by Chief Justice Marshall in *Worcester v. Georgia*.[18] Speaking for the Court, the Chief Justice stated that treaties between Indian tribes and the federal government recognize "the

HANDBOOK OF FEDERAL INDIAN LAW 358–65 (1942); Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 ARIZ. L. REV. 62 (1959); Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387 (1974).

15. The concept of sovereignty initially may have been foreign to Indian "stateless" societies in which the structure of command issued from the community as a whole, but Indian tribes have been forced to adopt the "sovereign" label in order to preserve their political integrity. McGimpsey, *Indian Tribal Sovereignty*, in 2 STUDIES IN AMERICAN INDIAN LAW 1, 4–5 (R. Johnson ed. 1971).

16. In the Act of Mar. 3, 1871, ch. 120, § 1, 25 U.S.C. § 71 (1970), Congress proclaimed: "Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." One international tribunal has affirmed this view. In the Cayuga Indian Claims case (Great Britain v. United States), Nielsen Rep. 203, 307 (1926), a claim could not be maintained by the Cayuga Nation because it was not a legal unit of international law. *See* 20 AM. J. INT'L. L. 574, 577 (1926).

17. Cohen states that conquest did not alter the tribe's internal sovereignty in the absence of legislative action: "Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its power of self-government." F. COHEN, *supra* note 14, at 123.

18. 31 U.S. (6 Pet.) 515 (1832) (Georgia had no jurisdiction to regulate who could live in Indian country). The foremost commentator on Indian law has called tribal sovereignty "the most basic principle of all Indian law . . . . [T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." F. COHEN, *supra* note 14, at 22.

In the early days of the treaty-making period, the government recognized tribal sovereignty, providing specific recognition of the tribes' rights to make war (Treaty of Dancing Rabbit Creek with the Choctaw Nation, Sept. 27, 1830, 7 Stat. 333), to punish white settlers on their lands (Treaty with the Wiandot, Delaware, Chippewa, and Ottawa Nations, Jan. 21, 1785, 7 Stat. 16), and, in one case, to send a deputy to Congress (Treaty with the Cherokee Nation, Nov. 28, 1785, art. xii, 7 Stat. 18).

Chief Justice Marshall laid the foundation for examination of the scope of tribal power in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The Cherokee tribe sought to restrain the state from enforcing its law inside the boundaries of Cherokee land. Because the tribe was not a foreign state, the Court had no jurisdiction under article III of the Constitution. In dismissing the bill, Marshall examined the relationship between the Indian tribes and the federal government. The Court held that the Indian tribes were not foreign states, but that "they may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian." 30 U.S. (5 Pet.) at 17.

several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive."[19] Thus, the treaty at issue in the case did not create any Indian right, but only recognized a pre-existing one.[20]

Since Marshall first articulated the doctrine, courts have repeatedly reaffirmed the inherent sovereignty of the Indian tribes. They have held that the tribal right to self-government includes the right to choose a form of government,[21] to define conditions of tribal membership,[22] to regulate domestic relations,[23] to prescribe rules of inheritance,[24] to levy taxes,[25] to exclude non-members,[26] and to administer justice.[27] In civil cases, the tribe may assert jurisdiction even though a non-Indian is a party to the transaction.[28] Indeed, a growing recogni-

19. 31 U.S. (6 Pet.) at 557.

20. "The very fact of repeated treaties with them recognizes [the Indian tribes' title to self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection." 31 U.S. (6 Pet.) at 560–61.

21. Williams v. Lee, 358 U.S. 217, 220 (1959) (holding that the test for validity of state jurisdiction in a civil suit is whether the exercise of state jurisdiction infringed on the tribe's right to make its own laws and be governed by them).

22. Cheyenne River Sioux Tribe v. Kleppe, 424 F. Supp. 448 (D.S.D. 1977) (election, called to amend constitution and bylaws of the tribe to require that any enrolled member be of at least one-fourth Cheyenne River Sioux Indian blood, was not subject to the 26th amendment, which gives 18-year-olds the right to vote).

23. United States v. Quiver, 241 U.S. 602 (1916) (tribe retained jurisdiction over offense of adultery committed by Indians on the reservation); Duckhead v. Anderson, 87 Wn. 2d 649, 555 P.2d 1334 (1976) (tribe has exclusive jurisdiction to determine if mother, enrolled tribal member, was to retain custody of her child). *See also* State *ex rel.* Adams v. Superior Court, 57 Wn. 2d 181, 356 P.2d 985 (1960); *In re* Colwash, 57 Wn. 2d 196, 356 P.2d 994 (1960).

24. Jones v. Meehan, 175 U.S. 1 (1899) (right of inheritance was determined by tribal law and custom).

25. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956) (power to tax a tribal member for the privilege of grazing stock is an inherent attribute of tribal sovereignty); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) (tribe's right to tax a non-Indian on the reservation is "one of the inherent and essential attributes of its original sovereignty").

26. Morris v. Hitchcock, 194 U.S. 384, 389 (1904) (right of tribe to control the presence of intruders had been sanctioned by a federal act); Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976) (in the absence of treaty provisions or congressional pronouncements to the contrary, tribe has inherent power to exclude nonmembers from the reservation).

27. Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975). In that case a tribal police officer was held to have jurisdiction to investigate violations by a non-Indian of state and federal law on the reservation: "Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system." *Id.* at 1179.

28. Williams v. Lee, 358 U.S. 217 (1959) (state had no jurisdiction over a suit by a non-Indian, who owned a store on the reservation, to recover goods sold on credit to Indians, because the exercise of state jurisdiction would undermine the authority of tribal courts over reservation affairs).

tion of the Indian right to self-determination and the expanding ability of the tribes to enforce law and order on the reservations has given rise to a noticeable judicial trend toward reinforcement of the sovereignty concept.[29] The Indian Civil Rights Act of 1968,[30] the necessity for which was generated in part by a recognition that at least some of the limits in the Bill of Rights do not apply to tribal courts,[31] manifests a congressional reaffirmation of tribal sovereignty.[32]

The *Oliphant* court's analysis of the problem of tribal jurisdiction over non-Indians is illustrative of the trend toward recognition of tribal sovereignty. The court noted that the tribe had complete jurisdiction before it was conquered, as does any independent nation. Thus, the relevant question is not whether Congress has conferred tribal criminal jurisdiction over non-Indians, but whether a treaty or congressional act has expressly removed such jurisdiction from the

29. *See, e.g.*, Long v. Quinault Tribe, No. C 75-677 (W.D. Wash. Sept. 2, 1975). (non-Indian must exhaust his tribal remedies before a federal court will interfere); Belgarde v. Morton, No. C 74-683 (W.D. Wash. Aug. 22, 1975) *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977) (tribal court has jurisdiction over non-Indian committing an offense on a state highway on an Indian reservation); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 677 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (tribe may, under certain circumstances, regulate members' treaty-based right to fish outside the reservation boundaries); Duckhead v. Anderson, 87 Wn. 2d 649, 555 P.2d 1334 (1976) (a tribal court retains jurisdiction to determine custody of an Indian child placed in a foster home outside the reservation).

30. 25 U.S.C. §§ 1301-1341 (1970).

31. Before the 1968 legislation, the Supreme Court had held that some guarantees in the Bill of Rights did not apply to tribal governments. *See* Talton v. Mayes, 163 U.S. 376 (1896) (fifth amendment did not apply to local legislation by the Cherokee nation); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). The Indian Civil Rights Act resolved the problem by extending some, but not all of the restrictions in the Bill of Rights to tribal courts. The Act contains modified versions of the first, fourth, fifth, sixth, seventh, and eighth amendments and limits penalties to six months imprisonment and/or a $500 fine for any single offense. 25 U.S.C. § 1302 (1970). The scope of the rights afforded by the Act may not be coextensive with the established legal meaning of the Bill of Rights; the scope is to be determined by balancing the individual right against the tribe's legitimate interest in maintaining its traditional values and cultural integrity. Janis v. Wilson, 385 F. Supp. 1143 (D.S.D. 1974) (termination of tribal government employees for engaging in political demonstrations during working hours was not a violation of the Indian Civil Rights Act); *cf.* Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976) (when tribal ordinance was challenged on equal protection grounds, the court used a balancing approach but applied a strict standard of review by requiring that the tribe's interest be "compelling").

32. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 677 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (tribe could regulate the treaty fishing rights of its members without state regulation if tribe complied with certain conditions). "There was a period during which Congress enacted legislation limiting the exercise of tribal autonomy in various particulars. However, in the last decade, Congressional legislation has definitely been in the contrary direction, notably in the so-called Indian Civil Rights Act." *Id.* at 340.

tribe.[33] The court declared that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."[34]

B. Federal and State Power

Federal power over Indian affairs is based primarily on the commerce clause,[35] although it has also been sustained on the grounds of federal land ownership[36] and the government's "guardian-ward" relationship with the Indian tribes.[37] Whatever the source, federal power over Indian affairs has proved to be so extensive that it may properly be characterized as "plenary."[38]

The federal government has not chosen to exercise the full extent of its power by enacting a comprehensive criminal code for Indian country. Statutory authority for federal prosecution of crimes on Indian land has been established by 18 U.S.C. § 1152,[39] which incorpo-

33. 544 F.2d at 1009 n.1.

34. *Id.*

35. "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. Congress has exercised broad powers over Indian tribes under the commerce clause, beginning in 1790 with a series of Indian Trade and Intercourse Acts which were the forerunners of the modern federal criminal jurisdiction statute, 18 U.S.C. § 1152 (1970). *See* Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of July 22, 1790, ch. 33, 1 Stat. 137.

The Supreme Court has held that the commerce clause provides constitutional authority for federal criminal jurisdiction. United States v. Holliday, 70 U.S. (2 Wall.) 407 (1866) (commerce clause sufficient to sustain criminal jurisdiction in case involving a commercial transaction); United States v. Rogers, 45 U.S. 567 (1846) (commerce clause a valid basis for jurisdiction over crime of murder on Indian land). The Court, however, later suggested that only a "very strained construction" of the commerce clause supports the assertion of criminal jurisdiction. United States v. Kagama, 118 U.S. 375, 378 (1886).

36. Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 240 (1823) (title to Indian land is in the United States, the tribes have only an exclusive right of occupancy, and a land patent granted by the Cherokee Nation was therefore invalid).

37. United States v. Thomas, 151 U.S. 577 (1894); United States v. Kagama, 118 U.S. 375 (1886).

38. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (Secretary of Interior had authority to lease Indian oil lands); F. COHEN, *supra* note 14, at 90.

39. 18 U.S.C. § 1152 (1970) states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any

rates both federal enclave law[40] and the Assimilative Crimes Act[41] into the body of generally applicable federal law.[42] Section 1152 creates an exception to federal jurisdiction for crimes committed by an Indian against another Indian;[43] however, the Major Crimes Act of 1885[44] gives federal courts jurisdiction over cases involving only In-

offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

40. Federal enclave law consists of "those laws passed by the federal government in the exercise of its police powers over federal property and now defined in the United States Criminal Code in terms of 'special maritime and territorial jurisdiction of the United States,' 18 U.S.C. § 7." United States v. White, 508 F.2d 453, 454–55 (8th Cir. 1974).

41. 18 U.S.C. §§ 7, 13 (1970). Section 13 provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The Assimilative Crimes Act has been held applicable to Indian country. *See* Williams v. United States, 327 U.S. 711 (1945); United States v. Sosseur, 181 F.2d 173 (7th Cir. 1950).

42. Federal law makes some acts federal crimes regardless of where committed. *See, e.g.*, 18 U.S.C. § 1201 (1970) (federal kidnaping act).

43. 18 U.S.C. § 1152 (1970).

44. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385, *as amended by* Act of May 29, 1976, Pub. L. No. 94–297, § 2, 90 Stat. 585 (codified at 18 U.S.C.A. § 1153 (West Supp. 1977)). The Act provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

The statute was enacted in 1885 as a result of adverse reaction to the Supreme Court's decision in *Ex parte* Crow Dog, 109 U.S. 556 (1883), in which the Court interpreted § 1152 as leaving undisturbed the tribes' exclusive jurisdiction over offenses involving Indians only. In that case, the Court held that a federal court has no jurisdiction over the crime of murder committed by one Indian against another in Indian country, in the absence of express legislation.

The legislative history reveals the indignation generated by the decision:

dians if the offense is one of fourteen enumerated felonies. All other crimes involving only Indians, however, remain subject to exclusive tribal jurisdiction.[45]

Congress again exercised its plenary power in 1953 with the passage of Public Law 280,[46] which gave five states criminal jurisdiction over Indian country within their borders[47] and allowed other states to assume criminal and civil jurisdiction without tribal consent.[48] Enactment of the Indian Civil Rights Act of 1968[49] again altered jurisdiction. It amended Public Law 280 by making future assumptions of jurisdiction by the states conditional upon the consent of the affected tribe, providing procedures for retrocession of jurisdiction,[50] and extending certain due process requirements to tribal courts.[51]

These federal statutes establish both the limits of the federal government's exercise of its plenary power and the extent to which the tribes remain sovereign powers. It was established early that, in the absence of federal provision for state jurisdiction, state laws have no

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It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment.

16 CONG. REC. (pt. II) 934 (1885) (remarks of Rep. Cutcheon).

45. 18 U.S.C. § 1152 (1970). *See* note 44 *supra*. Crimes under general federal law remain, of course, under federal jurisdiction. *See* note 42 *supra*.

46. Act of Aug. 15, 1953, Pub. L. No. 83–280, ch. 505, § 7, 67 Stat. 588 (current version at 18 U.S.C.§ 1162 (1970) and 25 U.S.C. §§ 1321–1326 (1970)).

47. The five states given authority to assume jurisdiction are California, Minnesota, Nebraska, Oregon and Wisconsin. 18 U.S.C. § 1162 (1970). Alaska was added later. Act of Aug. 8, 1958, Pub. L. No. 85–615, 72 Stat. 545.

It is not clear whether state jurisdiction under Public Law 280 is exclusive. That issue will be decided in a companion case to *Oliphant*. *See* Belgarde v. Morton, No. C 74–683 (W.D. Wash. Aug. 22, 1975) *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977) (Suquamish tribe had jurisdiction over the offense of reckless driving committed on a state highway within the reservation). *But see* 63–64 OP. WASH. ATT'Y GEN. No. 68 (Nov. 8, 1963) (concluding that state jurisdiction under Public Law 280 is exclusive).

48. Under the provisions of Public Law 280, the State of Washington passed a statute assuming full jurisdiction over concenting tribes. As to unconsenting tribes, the state assumed full jurisdiction with respect to fee land, but jurisdiction on non-free lands only with regard to eight subject matter categories: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles on public thoroughfares. WASH. REV. CODE § 37.12.010 (1976). The Court of Appeals for the Ninth Circuit held this partial assumption of jurisdiction based on land title classification unconstitutional under the equal protection clause of the 14th amendment. Confederated Bands of the Yakima Nation v. Washington, 555 F.2d 1332 (9th Cir. 1977).

49. 25 U.S.C. §§ 1301–1341 (1970).

50. The United States was given authority to retake jurisdiction which was assumed by the states under Public Law 280. 25 U.S.C. § 1323 (1970).

51. *See* note 31 *supra*.

effect in Indian territory.[52] The language of the *Oliphant* court demonstrates that this basic policy has endured: "[I]f the crime is by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."[53] When a non-Indian is the offender or victim, a limited exercise of state jurisdiction has been allowed.[54]

Thus, the basic principles of the jurisdictional scheme are: (1) Indian tribes originally possessed all powers of sovereignty; (2) conquest destroyed the tribes' powers of external sovereignty and rendered them subject to the legislative power of the United States; (3) the tribes retain full powers of internal sovereignty except as qualified by treaties or express federal legislation.

II. TRIBAL JURISDICTION: PERSONAL OR TERRITORIAL?

A. The Nature of Tribal Jurisdiction

Tribal criminal jurisdiction has often been viewed as "personal," extending only to Indians. In 1970 the Solicitor of the Department of the Interior issued an opinion[55] on the question of tribal jurisdiction over non-Indians which concluded that "Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or federal governments."[56] This report, recently replaced by an opinion favoring tribal jurisdiction,[57] was illustrative of a policy that has consistently limited the exercise of tribal sovereignty in the past.

There is a dearth of authority supporting such a limitation on tribal jurisdiction. The only clear case law on the subject is found in *Ex parte Kenyon*,[58] an 1878 circuit court decision. Although commission of the particular crime outside the territorial boundaries of the reser-

52. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).
53. Oliphant v. Schlie, 544 F.2d 1007, 1010 (1976) *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977) (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
54. *See* Part II–*B infra*.
55. 77 Interior Dec. 113 (1970).
56. *Id.* at 115.
57. Memorandum to Deputy Solicitor from Morris Thompson, Commissioner of Indian Affairs (Sept. 3, 1976), *reprinted in* 3 INDIAN LAW REP. i-8–i-10 (1976).
58. 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720) (tribe had no jurisdiction over the crime of larceny committed by a non-Indian outside the boundaries of the reservation).

vation was the deciding factor in the case,[59] the court stated in dicta that tribal jursidiction is limited to offenses in which both the offender and victim are Indian.[60] The court, however, relied on an earlier version of 18 U.S.C. § 1152,[61] which did not expressly declare the exclusivity of federal jurisdiction over Indian country.[62] Moreover, the court's position in *Kenyon*—that tribal jurisdiction extends only to intra-Indian crimes—is discredited by section 1152's implicit authorzation of concurrent federal-tribal jurisdiction over offenses by an Indian against a non-Indian on the reservation.[63] The *Oliphant* court, expressly disapproving the dicta in *Kenyon,* found that the extension of federal jurisdiction in section 1152 was best explained as a protection for the tribes from unsympathetic state governments, not as an attempt to establish exclusive federal jurisdiction.[64]

59. The court in *Kenyon* said of the fact that the crime had occurred off the reservation, "This alone would be conclusive of the case." *Id.* at 355. The personal limitation on tribal jurisdiction could be considered as an alternate holding; the Supreme Court, however, construed it as dictum in Elk v. Wilkins, 112 U.S. 94, 108 (1884), and stated that the extra-territorial nature of the crime was the conclusive factor in *Kenyon.*

60. The court concluded:

> [I]f there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction, because, to give this court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian.

14 F. Cas. at 355. The dictum in *Kenyon* was accepted and republished by Felix Cohen, the foremost commentator on Indian law. *See* F. COHEN, *supra* note 14, at 360. As the *Oliphant* court noted, Cohen's statement is no more authoritative than its source, although the stature of his treatise has given the dictum substantial force. 544 F.2d 1007, 1011 n.5 (9th Cir. 1976). His view that tribal criminal jurisdiction is personal in nature is inconsistent with his own formula for determining the content of tribal sovereignty: "What is not expressly limited remains within the domain of tribal sovereignty." F. COHEN, *supra* note 14, at 122.

61. *Ex parte* Kenyon, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (No. 7720) The court relied on the language of the Act of Dec. 1, 1873, ch. 4, 28 Rev. Stat. § 2146, 18 Stat. 376 (1873) (codified at 18 U.S.C. § 1152 (1970)).

62. One commentator has suggested that the widespread belief that tribal jurisdiction is limited to Indians may be attributable to a confusion between tribal courts and Indian Courts of Claims, which derive their authority from the federal government and function as agencies of the United States. The Indian Courts of Claims administer justice under the authority of the Department of the Interior, and can exercise jurisdiction over non-Indians only if they consent. 25 C.F.R. § 11.22 (1973). *See* Note, *Indian Tribal Courts,* 18 ST. LOUIS U.L.J. 461, 463–64 (1973).

63. The statute provides that if the tribe has already punished the offender, he may not be retried in federal court. 18 U.S.C. § 1152 (1970). *See* note 39 *supra.* Since wholly intra-Indian crimes are excepted from federal jurisdiction in a separate clause, the double jeopardy clause would be meaningless unless it refers to crimes by Indians against non-Indians.

64. 544 F.2d at 1010–11.

B. States' Jurisdiction over Non-Indians Within Indian Country

The personal jurisdiction limitation of *Kenyon* has implied support from a line of cases based upon two Supreme Court decisions—*United States v. McBratney*[65] and *Draper v. United States*.[66] These cases indicate that a state, rather than the federal government, has jurisdiction over an offense on the reservation committed by a non-Indian against a non-Indian victim. The reasoning in these cases is inconsistent with the requirement of express withdrawal of tribal power advanced by the court in *Oliphant*. The Supreme Court in each case held that, even though no federal statute had conferred jurisdiction upon the states, they had jurisdiction by virtue of their sovereignty over the territory within the state boundaries.[67] These holdings create problems for the *Oliphant* court's equation of inherent sovereignty and territorial jurisdiction.[68]

Traditional common law views of sovereignty and criminal jurisdiction, however, support the theory that tribal jurisdiction is territorial.[69] Analogical support may also be found in international law, where the rationale for territorial criminal jurisdiction is that crimes should be dealt with by the government whose social order is most clearly affected.[70] Felix Cohen cautioned against reading the common law principle of territoriality into tribal law.[71] He noted that exceptions to the doctrine of territoriality include the power of the federal govern-

65. 104 U.S. 621 (1881).

66. 164 U.S. 240 (1896). *See also* People *ex rel.* Ray v. Martin, 326 U.S. 496 (1946). In each of these cases, the Court held that the individual state had jurisdiction over the crime of murder of a non-Indian by a non-Indian on the reservation.

67. Draper v. United States, 164 U.S. 240, 247 (1896); United States v. McBratney, 104 U.S. 621, 623–24 (1881).

68. Oliphant v. Schlie, 544 F.2d 1007, 1009–10 (1976) *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribes, 97 S. Ct. 2919 (1977). *See* text accompanying notes 8–9 *supra*.

69. *See, e.g.*, 1 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 17 (1974) ("Traditionally, at least under the common law, jurisdiction to subject an accused to prosecution resides in the courts of the state or county in which the crime was committed."); CLARK & MARSHALL, TREATISE ON THE LAW OF CRIMES § 3.00 (7th ed. 1967).

70. One commentator stated:

> The territoriality of criminal jurisdiction is founded on various principles. Its normal justification is that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected, and in general this will be the State on whose territory the crimes are committed.

J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 251 (7th ed. 1972) (footnote omitted). *See also* W. BISHOP, INTERNATIONAL LAW 343, 444 (1962).

71. F. COHEN, *supra* note 14, at 360.

ment to punish citizens for offenses committed abroad, federal jurisdiction over Indian affairs off the reservation, federal jurisdiction over United States citizens in "uncivilized countries," and the broad geographical jurisdiction of courts in civil cases.[72] These exceptions, however, are all extensions of jurisdiction to extra-territorial acts; they do not lend support to an extra-territorial jurisdictional limitation based on racial classification. The unique position of the Indian tribes, as quasi-sovereigns in a federalist system, requires that a determination of their status be made essentially by rules that are sui generis.

Several criticisms can be made of *McBratney, Draper,* and their successors. First, they represent judicial disregard of the principle established in *Worcester* that, at least so far as the power of the states is involved, the tribes have "territorial boundaries, within which their authority is exclusive."[73] Second, the *McBratney-Draper* rule is inconsistent with the accepted view that the original sovereignty of the tribes remains undiminished to the extent that it has not been expressly limited by the acts of the superior government.[74]

Finally, the rule is in apparent conflict with the language of section 1152, which ostensibly extends federal jurisdiction to all offenses committed in Indian country, the only exceptions being those instances where the tribes have exclusive jurisdiction.[75] The Court's disregard of that clear language, which should give federal courts at least concurrent jurisdiction over non-Indian offenses, and its emphasis on state sovereignty, implies that Congress lacks the power to create federal jurisdiction over non-Indian crimes.[76] Such a view seems threatened by the supremacy clause[77] and the trend toward expansion of the role of federal preemption in the field of Indian jurisdiction.[78] The

72. *Id.*
73. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 517 (1832).
74. *See* F. COHEN, *supra* note 14, at 146; notes 2, 32 & 33 and accompanying text *supra.*
75. The Supreme Court has recently recognized the broad language of the statute, but noted that "the respondents correctly argued that, had the perpetrators of the crimes been non-Indians, the courts of Idaho would have had jurisdiction over these charges." United States v. Antelope, 97 S. Ct. 1395, 1397 n.4 (1977) (rejecting an equal protection challenge to federal convictions of Indians under the Major Crimes Act).
76. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze,* 18 ARIZ. L. REV. 503, 526 n.103 (1976).
77. U.S. CONST. art. VI, cl. 2.
78. *See* notes 29–34 and accompanying text *supra.*

McBratney-Draper rule could also be undermined if the "infringement test," which has developed in civil cases,[79] were to be applied to preclude state jurisdiction over crimes involving only non-Indians. In at least one case, the Court has declined to follow the rule. In *Pickett v. United States,*[80] the Court found that federal jurisdiction under section 1152 extended to the murder of one black by another black on the reservation. The crime occurred in a territory rather than a state; therefore, the case is not in direct conflict with *McBratney-Draper.* That case does, however, imply that section 1152 authorizes federal jurisdiction over crimes involving only non-Indians. The validity of the *McBratney-Draper* rule should be reexamined in light of established principles of Indian law and current government policy recognizing the Indian right to self-determination.[81]

C. *Federal Preemption and Indian Tribal Jurisdiction*

Jurisdictional standards established in civil cases shed little light on the nature of tribal criminal jurisdiction.[82] Nevertheless, the dissent in *Oliphant* relied on the "preemption theory" of *McClanahan v. Arizona State Tax Commission,*[83] a civil case, to reconcile the *Worcester* decision with a personal limitation on tribal jurisdiction.[84] The dissenting judge argued that territorial jurisdiction should not be inferred from inherent tribal sovereignty, because the Supreme Court in *McClanahan* had discovered a "trend . . . away from the idea of in-

79. *See* notes 93–95 and accompanying text *infra.*

80. 216 U.S. 456 (1910).

81. *See* H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970) (message from Pres. Nixon to Congress on Indian Affairs, introducing a legislative package transferring many functions from the Bureau of Indian Affairs to tribal governments); Memorandum to Deputy Solicitor, *supra* note 57.

82. The territorial nature of tribal jurisdiction recently has been upheld in a case involving both civil and criminal elements. A tribal court of appeals held that a tribal trial court properly exercised jurisdiction over a forcible detainer action brought by the Navajo Tribe against non-Indian corporations on the reservation. Navajo Tribe v. Orlando Helicopter Airways, Navajo Ct. App. (Jan. 12, 1972). The case is not officially reported, but is the subject of a note in 18 ST. LOUIS L.J. 461 (1974).

83. 411 U.S. 164 (1973). *McClanahan* involved Arizona's attempt to impose its personal income tax on a reservation Indian whose entire income derived from reservation sources. The court held the tax unlawful as an interference with matters secured to the tribe and the federal government by treaty. *See* Note, *State Taxation of Indians—Federal Preemption of Taxation Against the Backdrop of Indian Sovereignty,* 49 WASH. L. REV. 191 (1973) (noting *McClanahan*).

84. 544 F.2d at 1014–15 (Kennedy, J., dissenting).

herent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."[85]

The dissent, however, misapplied the language found in *McClanahan*. It is a misreading of the opinion to construe it as a rejection of the principle of sovereignty. The Court expressly stated that it was not fashioning any new principles;[86] it also cited cases, including *Worcester*, supporting the sovereignty doctrine, which it characterized as providing "a backdrop against which the applicable treaties and federal statutes must be read."[87] The Court concluded that because federal treaties and statutes nearly always define jurisdictional boundaries, the issue of residual Indian sovereignty is "now something of a moot question."[88] In the *Oliphant* situation, however, the question was not moot because no federal statute expressly limits tribal jurisdiction over non-Indians.

The principal function of the preemption doctrine has been to restrain *state* intrusion into Indian affairs. In *Bryan v. Itasca County*,[89] the Court characterized the preemption analysis as drawing support from "the policy of leaving Indians free from state jurisdiction and control"[90] and from the view that "state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."[91] Indeed, courts have normally applied the preemption doctrine only to limit state action, thereby preserving a measure of tribal autonomy.[92] It would seem

85. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973).
86. 411 U.S. at 168–69.
87. *Id.* at 172.
88. *Id.* at 172 n.8.
89. 426 U.S. 373 (1976) (county had no authority to tax a mobile home owned by an Indian on the reservation because the federal statute extending state civil jurisdiction to the reservation did not mention authority to tax).
90. *Id.* at 376 n.2 (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973)).
91. *Id.* (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170–71 (1973)).
92. Bryan v. Itasca County, 426 U.S. 373 (1976) (county had no authority under Public Law 280 to impose its personal property tax on a mobile home owned by an Indian and located on the reservation); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (Court applied the *McClanahan* preemption analysis to prevent state taxation of cigarette sales by tribal members to Indians residing on the reservation); Fisher v. District Court, 424 U.S. 382 (1976) (tribe has exclusive jurisdiction over adoption in which all parties are tribal members; if state jurisdiction had ever existed, it was preempted by the creation of tribal courts pursuant to the Indian Reorganization Act of 1934). The *Fisher* court used language consistent with the *Oliphant* view that tribal sovereignty is limited only by express withdrawal. "No federal statute sanctions this interference with tribal self-government." *Id.* at 388. One

anomalous to apply the doctrine to limit *tribal* sovereignty. Thus, the policy advanced by the development of preemption analysis actually supports the result reached in *Oliphant*.

Moreover, the *McClanahan* Court expressly distinguished "situations involving non-Indians" as being governed by the test, established in *Williams v. Lee*,[93] of whether state action "infringed on the right of reservation Indians to make their own laws and be ruled by them."[94] That test was developed to resolve conflicts between the state and the tribe where both could fairly claim an interest in asserting jurisdiction; it provides that a state may protect its interest so long as tribal self-government would not be affected.[95] While the "infringement test" does not apply in a federal-tribal jurisdictional conflict under section 1152, it could be relevant where the state claims jurisdiction under the *McBratney-Draper* rule. The *Williams* infringement test, however, would seem automatically satisfied when the issue is one of tribal criminal jurisdiction over acts committed in Indian country. The right to self-government is *necessarily* infringed by the inability to maintain law and order on the reservation. Indians cannot really "make their own laws and be ruled by them" when they have no control over behavior on their own reservation. Thus, the potential applicability of the infringement test to a denial of tribal jurisdiction over non-Indians, as well as the underlying rationale of the preemption doctrine, effectively refutes the dissent's argument that *McClanahan's* "federal preemption" theory applied to limit the use of the inherent sovereignty doctrine in *Oliphant*.

III. CONCURRENT FEDERAL-TRIBAL JURISDICTION UNDER 18 U.S.C. § 1152.

Section 1152, which extends general federal criminal jurisdiction to

commentator has summarized the meaning of the above cases: "The recent Supreme Court cases stand for the proposition that federal legislation is to be examined to ascertain the congressional intent to preserve tribal self-government and that state jurisdiction is therefore precluded unless expressly authorized." Lynaugh, *Developing Theories of State Jurisdiction over Indians: The Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63, 92 (1977).

93. 358 U.S. 217 (1959).

94. 411 U.S. at 179 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). The *Williams* decision limited jurisdiction in reservation-based contract cases exclusively to tribal courts. The "infringement test" has been extended to reservation-based torts. *See* Kain v. Wilson, 83 S.D. 482, 161 N.W.2d 704 (1968).

95. 411 U.S. at 179.

Indian country, does not expressly characterize federal jurisdiction as either exclusive or concurrent.[96] The dissenting judge in *Oliphant* claimed that the section carries an implication of exclusivity because it exempts from federal jurisdiction crimes by Indians against Indians and crimes by Indians who have already been punished by the law of the tribe.[97] The language of the statute, however, is more consistent with the view that the statute extends *concurrent* federal jurisdiction to all crimes not expressly reserved to the exclusive jurisdiction of the tribes.[98] Moreover, the latter view is supported by the well-established principles that Indian tribes retain all attributes of sovereignty except those which have been expressly limited,[99] and that "legislation affecting the Indians is to be construed in their interest."[100]

A. Legislative History of the Statute

The legislative history of section 1152 itself indicates congressional contemplation of concurrent federal-tribal jurisdiction.[101] The debates and committee reports preceding the enactment of an earlier version of section 1152, the Trade and Intercourse Act of 1834,[102] indicate

96. *See* note 39 *supra*.
97. 544 F.2d at 1017–19 (Kennedy, J., dissenting).
98. The words "sole and exclusive" in the statute, *see* note 39 *supra*, do not apply to the federal jurisdiction extended over the Indian country, but are used only in the description of the laws that are extended to it. *Ex parte* Wilson, 140 U.S. 575 (1891); *Ex parte* Nowabbi, 60 Okla. Crim. 111, 61 P.2d 1139 (1936).
99. *See* note 2 *supra*; notes 52 & 53 and accompanying text *supra*.
100. United States v. Nice, 241 U.S. 591, 599 (1916). *Accord,* Squire v. Capoeman, 351 U.S. 1, 6–7 (1956); Choate v. Trapp, 244 U.S. 665, 675 (1912); Santa Rosa Band of Indians v. King County, 532 F.2d 655 (9th Cir. 1975).
101. An early version of § 1152, the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729, was one of three companion bills intended to set up a comprehensive scheme of Indian administration. The legislative history for all three bills is found in H.R. REP. No. 474, 23d Cong., 1st Sess. 1 (1834). One of the other bills was an act to establish a western Indian territory. The Intercourse Act and the Western Territory Bill were evidently conceived as complementary pieces of legislation, although the latter was never enacted. The committee report stated, "Although they are not so connected as to render it absolutely necessary that they should be passed contemporaneously, yet, as parts of a system, it is very desirable that they should so pass, and during the present session." *Id.* at 23.

The strength of the evidence for concurrent jurisdiction is somewhat altered by the fact that these remarks were made in contemplation of the establishment of a vast "Indian Territory," in which non-Indians would have notice of tribal jurisdiction. However, an amendment to the Intercourse Act provided for Indian agents "until a Western Territory shall be established." Act of June 30, 1834, ch. 161, 4 Stat. 729, 734. That amendment indicates that the bill was intended to establish the kind of concurrent jurisdiction contemplated in the debates over the Western Territory bill.
102. Act of June 30, 1834, ch. 161, 4 Stat. 729.

that the Act was designed to confer concurrent jurisdiction. First, the House Report on the proposed legislation stated that, at least with respect to non-Indians residing in Indian country, the tribes were to have concurrent jurisdiction.[103] Second, a companion bill for the establishment of a western Indian territory included a provision that whenever the tribe convicted a non-member and sentenced him to death, the governor would have power to suspend the execution.[104] This provision demonstrates that tribal jurisdiction was not to be limited to members of the tribe.[105] Third, an objection to the possibility of double jeopardy by John Quincy Adams during a congressional debate[106] is meaningful only if the Indians were meant to retain concurrent jurisdiction. Finally, the Report of the Commissioner of Indian Affairs, appended to the House Report, stated that the proposed Intercourse Act could be enacted "without impairing in the least the independence of a tribe within its own limits."[107] Indeed, there is evidence that the legislators considered such concurrent jurisdiction only a temporary measure to be adopted until the *tribes* were capable of assuming exclusive jurisdiction.[108]

The court in *Oliphant* thus felt convinced that section 1152 was not intended to prohibit tribal prosecution of non-Indians for offenses committed on the reservation: "Section 1152 can be explained more rationally as an attempt to protect Indian tribes, who had no estab-

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103. The report stated: "As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribe." H.R. REP. No. 474, 23d Cong.. 1st Sess. 18 (1834).

104. *Id.* at 36–37.

105. The House report, in providing for a federal check on improper acts of a proposed federal confederation, promised: "This, and the pardon of offenders in capital cases, are the only instances in which the political power of the United States will interfere with that of the tribes, or of the confederation." *Id.* at 19–20.

106. Adams objected to the effect of the proposed legislation: "The bill created a double jurisdiction; it rendered a man liable to be punished twice for the same offense: for one and the same act might be an offense against both codes of law." 10 CONG. DEB. 4771 (1834).

107. The Commissioner's report detailed the expected effect of the provision: "Within these limits the municipal laws of the tribes may be enforced; and should the laws of the tribes and the laws of the United States give concurrent remedies, this would create no difficulty." H.R. REP. No. 474, 23d Cong., 1st Sess. 100 (1834).

108. The House Report stated:

> [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 is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government.

Id. at 14.

lished legal system and whose authority was frequently challenged by unsympathetic state governments."[109]

B. *Double Jeopardy*

The *Oliphant* court did not elaborate on the nature of the concurrent jurisdiction established by section 1152. The ordinary kind of concurrent jurisdiction occurs when two tribunals have jurisdiction over the subject matter, and both may apply the same substantive law.[110] The other type of "concurrent" jurisdiction arises when an act or omission constitutes a crime under two separate governmental systems.[111] The Supreme Court has ruled that, in such a case, the defendant may be successively prosecuted and punished by both governments.[112] Section 1152 creates the latter kind of concurrent jurisdiction because an offense under the federal statute may also be a violation of tribal law. In that situation, the two court systems might apply different law to the same set of facts.

If federal-tribal jurisdiction is analogized to federal-state jurisdiction, the fifth amendment prohibition against double jeopardy would not protect a non-Indian defendant in federal court who had been convicted in tribal court on the same set of facts, because the Supreme Court has ruled that the fifth amendment double jeopardy prohibition applies only to successive prosecutions by "arms of the same sovereign."[113] The Court of Appeals for the Ninth Circuit, however, has concluded that the fifth amendment prohibits presecution in a federal court once the defendant has been tried and convicted in a tribal court for the same or a lesser included offense. In *United States v. Wheeler,*

109. 544 F.2d at 1011.

110. This type of concurrent jurisdiction applies to actions brought in federal court on the grounds of diversity of citizenship, where there is federal-state concurrent jurisdiction, but the federal court will apply state substantive law. *See, e.g.,* Guaranty Trust Co. v. York, 326 U.S. 90 (1958); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

111. The Supreme Court has acknowledged this concept as applied to state and federal governments. *See, e.g.,* United States v. Lanza, 260 U.S. 377, 382 (1922) ("[An] act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each").

112. Bartkus v. Illinois, 359 U.S. 121 (1959) (unsuccessful federal prosecution for robbery of a federally insured bank was not a bar to state prosecution for robbery); United States v. Lanza, 260 U.S. 377 (1922) (conviction under state law for making, transporting, and selling intoxicating liquors was not a bar to prosecution for the same acts under the federal prohibition law).

113. Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922).

the court held that tribal courts and federal courts are not arms of separate sovereigns for double jeopardy purposes.[114] If this decision is followed, the fifth amendment's application in federal court and the double jeopardy prohibition in the 1968 Civil Rights Act[115] should provide a non-Indian defendant with full protection against double jeopardy in federal or tribal court.

Section 1152 expressly protects Indian defendants from double jeopardy by providing that the section does not extend to an Indian who has been punished by the local law of the tribe.[116] The absence of a provision to protect non-Indians from double jeopardy, however, does not imply that federal jurisdiction over non-Indians was to be exclusive. The section was passed rapidly and almost without debate.[117] Furthermore, the legislators may have been confused about whether the fifth amendment would protect non-Indian defendants in tribal court. Only later did the Supreme Court hold that the Bill of Rights does not restrain tribal court actions,[118] and that the fifth amendment provision in any case applies only to courts that are not arms of separate sovereigns.[119]

C. *Historical Nonassertion of Tribal Jurisdiction over Non-Indians*

In *Oliphant,* the dissent argued that, in view of the tribes' history of nonassertion of jurisdiction over non-Indians, congressional silence on

114. 545 F.2d 1255, 1258 (9th Cir. 1976) (earlier conviction of Indian defendant in tribal court for contributing to the delinquency of a minor barred prosecution in federal court under the Major Crimes Act for carnal knowledge of a female Indian under the age of 16 years).

115. 25 U.S.C. § 1302 (1970) states: "No Indian tribe in exercising powers of self-government shall . . . (3) subject any person for the same offense to be twice put in jeopardy."

116. *See* note 39 *supra.*

117. The double jeopardy provision was considered and passed after a brief explanation by Rep. Greenwood:

> Thus a conflict of jurisdiction grew up, and the Senate thought proper to make a provision to the effect that, when an *individual* guilty of an offense of that character [selling spirituous liquors] and other similar, had been tried and punished in the Creek or any other nation, such trial and conviction should be a bar to subsequent prosecution in the district court of the United States.

32 CONG. GLOBE 700–01 (1896) (emphasis added). Thus, the bill was explained in the House as a protection for any "individual," although the bill itself referred to "any Indian."

118. *See* note 31 *supra.*

119. *See* note 113 and accompanying text *supra.*

the matter should not be interpreted as assent to such jurisdiction.[120] As the *Oliphant* majority noted, that is a misstatement of the problem.[121] The dissenting judge's contention conflicts with the fundamental principles of Indian sovereignty,[122] the rule of construction favoring Indian interests,[123] and the principle that "power and authority rightfully conferred do not necessarily cease to exist in consequence of long nonuser."[124]

Indeed, there are numerous reasons for the tribes' historical failure to exercise jurisdiction over non-Indians. The disastrous policies of removal and assimilation left their mark on tribal organization. Indians lost their land, their governments, and in some cases, the tribal organization itself was terminated.[125]

Jurisdiction over non-Indians was of little importance when reservations were usually located a considerable distance from other settlements and when few non-Indians entered the reservations. Until recently, many Indian tribes limited their jurisdiction to members by provisions in their own codes, often adopting the model code drafted by the Bureau of Indian Affairs.[126] Such voluntary limitation was undoubtedly due in part to reliance on government advice that tribal jurisdiction was so limited.[127] In recent years, however, there has been an influx of non-Indians into Indian country, and tribal jurisdiction over non-members may now be essential to the maintenance of

120. Oliphant v. Schlie, 544 F.2d 1007, 1019 (9th Cir. 1976) *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977) (Kennedy, J., dissenting).

121. *Id.* at 1009.

122. *See* F. COHEN, *supra* note 14, at 146; notes 2, 32 & 33 and accompanying text *supra.*

123. *See* note 100 *supra.*

124. F. COHEN, *supra* note 14, at 125–26; United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (C.C. Neb. 1879) (No. 14891).

125. *See* H.R. REP. No. 1804, 73d Cong., 2d Sess. (1934); 4 NATIONAL AMERICAN INDIAN COURT JUDGES ASSOC., JUSTICE AND THE AMERICAN INDIAN 27–39 (1974). For a case examining the effects of termination upon a tribe, see Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

126. *See* Barsh & Henderson, *Tribal Courts, the Model Code and the Police Idea in American Indian Policy,* 40 LAW & CONTEMP. PROB. 25 (1976).

127. *See* notes 55 & 56 and accompanying text *supra.*

law and order on the reservation.[128] Lack of jurisdiction over non-Indians should not be inferred from the tribes' failure to exercise such jurisdiction in the past.

V. CONCLUSION

An examination of the sources of tribal authority reveals that Indian tribes possess all attributes of internal sovereignty, except as limited by express acts of Congress or by treaty. Considered in the light of the principle that legislation affecting the Indians is to be construed in their interest, section 1152 does not preclude tribes from exercising criminal jurisdiction over non-Indians. A recent opinion of the Commissioner of Indian Affairs is in accord: "The right of tribal self-government means more than simple freedom from the laws of others. It means the power to govern over those matters which affect the interests of the tribes regardless of the race or political affiliation of the party involved."[129]

In cases where the tribe has a functioning law and order system, recognition of tribal jurisdiction to prosecute non-Indian offenders would alleviate many law enforcement problems and would enhance the quality of the independent Indian judiciary.[130] The decision by the Court of Appeals for the Ninth Circuit in *Oliphant* is supported both by the historical view of the tribe as sovereign and by current policy favoring Indian self-determination.

Kathleen A. Miller

128. *See* Oliphant v. Schlie, 544 F.2d 1007, 1013–14 (9th Cir. 1976) *cert. granted sub nom.* Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977); 1 NATIONAL AMERICAN INDIAN COURT JUDGES ASSOC., JUSTICE AND THE AMERICAN INDIAN 5–10 (1974); M. PRICE, LAW AND THE AMERICAN INDIAN 171 (1973); The Indian Civil Rights Act Five Years Later 25–35 (Report and Evaluation by Indian Lawyers, Tribal Council Reps., and Indian Court Judges for American Indian Lawyer's Assoc.) (1973).

129. Memorandum to Deputy Solicitor, *supra* note 57.

130. *See* D. Klein, *supra* note 12.