NOTE

CRIMINAL JURISDICTION OF TRIBAL COURTS OVER NONMEMBER INDIANS: THE CIRCUIT SPLIT

I. INTRODUCTION

Since at least the 19th century the plight of the American Indian has occupied a place in the consciousness and conscience of many Americans. Students of American history know of the injustices that often have been done to Indians. As a result of increased concern in the past twenty years over Indian rights, the federal government has adopted policies designed to enhance the tribes' independence and self-governance.[1]

To exercise fully the powers of an independent government, a sovereign government must be able to enforce its laws and resolve disputes through the exercise of judicial power. The extent to which Indian tribes have jurisdiction over disputes affecting their interests and the enforcement of their laws is an important measure of their sovereignty, as it is with state and federal governments.

An important and yet unresolved question directly related to the sovereignty of Indian tribes is whether the tribes have criminal jurisdiction over Indians who are not members of the tribe, but who commit crimes on the tribes' reservations. To answer this jurisdictional question requires an understanding of many significant factors and principles controlling Indian tribe jurisdiction, including the special status the tribes have under federal and state law.

The Indian tribes have a unique relationship with the United States government.[2] Once a people who possessed full sovereignty over their lands,[3] the European conquest drastically altered the Indians' status to

1. *See infra* notes 183-89 and accompanying text.

2. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). Justice Marshall speaking for the Court stated that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."

3. Having complete sovereignty over their territories implies that the tribes possessed "all the powers of any sovereign state." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942) (quoting statement by the Department of the Interior explaining retained sovereign powers of the Indian tribes).

one of semi-independence.[4] As a result of this transformation, Indian tribes became dependent on the United States "to restrain the disorderly and licentious from intrusions into their country . . . ."[5] Despite the fact that Indian tribes are under extensive federal control, they have remained "a separate people, with the power of regulating their internal and social relations . . . ."[6] According to federal law, the tribes retain all aspects of sovereignty that have not been terminated by Congress and are not "inconsistent with their status" as a dependent nation.[7] Thus, a tribe has the power to determine tribal membership,[8] to regulate domestic relations among its members,[9] and to prescribe rules for the inheritance of property.[10] In addition, an Indian tribe undisputably has the authority to enforce its criminal laws against its own members.[11]

Determing who is a member of a tribe, and dealing with members and nonmembers of tribes, has become more complicated as of late. Through intermarriage and government programs that increase contact between tribes, Indians often reside on reservations or have significant contacts with tribes to which they do not belong.[12] As a result of their

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4. *Cherokee Nation,* 30 U.S. (5 Pet.) at 16.

5. Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832).

6. United States v. Kagama, 118 U.S. 375, 381-82 (1886); *see also Cherokee Nation,* 30 U.S. (5 Pet.) at 16 (Cherokees recognized by the United States "as a distinct political society, separated from others, capable of managing [their] own affairs and governing [themselves]. . . ."); Act of Aug. 7, 1789, ch. 8, art. 3, 1 Stat. 50, 52 ("The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed . . . .").

The Department of the Interior has described the retained powers of the Indian tribes as follows:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) 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, . . . but does not by itself affect the internal sovereignty of the tribe . . . . (3) These [internal] powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

Quoted in F. COHEN, *supra* note 3, at 123.

7. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); United States v. Wheeler, 435 U.S. 313, 323 (1978).

8. *See, e.g.,* Cherokee Intermarriage Cases, 203 U.S. 76, 95 (1906); Roff v. Burney, 168 U.S. 218, 222 (1897).

9. *See, e.g.,* Fisher v. District Court, 424 U.S. 382, 389 (1976) (adoption of Indian child by Indians within jurisdiction of tribal court to the exclusion of state courts); United States v. Quiver, 241 U.S. 602, 604 (1915).

10. *See* Jones v. Meehan, 175 U.S. 1, 29 (1899); United States *ex rel.* Mackey v. Coxe, 59 U.S. (18 How.) 100, 102 (1855).

11. United States v. Wheeler, 435 U.S. 313, 322 (1978).

12. *See infra* notes 29-33 and accompanying text.

contacts with the reservations, these nonmember Indians[13] have an impact upon the sovereignty and interests of the tribal government. This impact manifests itself in the resolution of the complicated and important question whether a tribal court possesses criminal jurisdiction over nonmember Indians who have significant ties to a reservation.

Criminal jurisdiction rules for crimes committed on Indian reservations form a confusing maze of federal, state, and tribal court authority. Which court can assert jurisdiction depends upon what type of crime was allegedly committed, and whether non-Indians and Indians were involved.[14] Unfortunately, the relevant treaties, federal statutes, and Supreme Court decisions do not explicitly define where *nonmember* Indians fit into this jurisdictional scheme. If they are treated as non-Indians, the proper forum will be either a state or federal court.[15] Only if these nonmember Indians are considered tribal members may a tribal court maintain criminal jurisdiction over them.[16]

Two circuits have addressed the question of criminal jurisdiction over nonmember Indians who allegedly committed crimes on the reservation. In *Duro v. Reina,*[17] the United States Court of Appeals for the Ninth Circuit held that Indian tribal courts have jurisdiction over nonmember Indians who have significant contacts to the reservation and

13. A "nonmember Indian" is an individual of Indian blood who is not officially enrolled in the tribe at issue. *See, e.g.,* Washington v. Confederated Tribes, 447 U.S. 134, 160 (1980) ("nonmembers" include those Indians "resident on the reservation but not enrolled in the governing Tribe"); Duro v. Reina, 851 F.2d 1136, 1138 (9th Cir. 1988) (enrolled member of Torrez-Martinez band of Mission Indians is a nonmember of the Salt River Indian Reservation); Greywater v. Joshua, 846 F.2d 486, 487 (8th Cir. 1988) (enrolled members of the Turtle Mountain Band of Chippewa Indians are nonmembers of the Devils Lake Sioux Tribe).

14. *See infra* notes 57-82 and accompanying text.

15. *See infra* note 27, 70 and accompanying text.

16. *See infra* note 66 and accompanying text. Also, a tribal court has civil jurisdiction over non-Indians in certain instances. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (Blackfeet Tribal Court had jurisdiction over conduct of non-Indian in personal injury claim); Williams v. Lee, 358 U.S. 217, 223 (1959) (Naveja Tribal Court had jurisdiction over non-Indian in civil collections suit).

17. 851 F.2d 1136 (9th Cir. 1988). The United States Supreme Court has granted review on *Duro.* 109A S. Ct. 1930 (1989). The questions presented on review are stated as follows:

> (1) In light of fact that Indian tribes cannot exercise criminal jurisdiction over non-Indians, does Salt River Pima-Maricopa tribe have criminal jurisdiction over petitioner, who is not member of the tribe? (2) Are equal protection guarantees of Indian Civil Rights Act, 25 U.S.C. 1302, violated if Indian tribes are precluded from exercising criminal jurisdiction over non-member, non-Indians, but may exert jurisdiction over similarly situated nonmember Indians based solely on race? (3) May petitioner, who is Cahuilla Indian, be subjected to criminal jurisdiction of Salt River Pima-Maricopa tribe because his girlfriend was tribal member and he temporarily resided on Salt River reservation? (4) Can criminal jurisdiction over non-member Indians be predicated, on case-by-case basis, because of significant "contacts" between accused and Indian tribe?

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are accused of committing crimes there. In *Greywater v. Joshua,*[18] the United States Court of Appeals for the Eighth Circuit reached the opposite result, holding that the exercise of jurisdiction conflicts with an Indian tribe's status as a dependent nation.

Despite the inconsistency in these holdings, both courts based their analysis on the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe.*[19] In *Oliphant,* the Court held that tribal courts do not have criminal jurisdiction over non-Indians.[20] In holding so, the Court established a three-part test for determining whether a tribe has been deprived of some aspect of its sovereignty and, hence, its jurisdiction. Indian tribes, according to the Court, may not exercise powers of a sovereign state that have been withdrawn by either (1) treaty, or (2) statute, or (3) that conflict with the tribes' status as dependent nations.[21] The dependent status prong of the *Oliphant* test focuses on whether the exercise of some aspect of tribal power conflicts with an overriding federal interest.[22]

This Note analyzes criminal jurisdiction over nonmember Indians and the conflicting opinions of the Eighth and Ninth Circuits in light of the three part test set forth in *Oliphant.* First, in order to give context to the current disputes, the Note examines the realities of tribal composition and tribal membership rules.[23] Second, the Note argues that the treaties between the federal government and the tribes do not divest the tribes of criminal jurisdiction over nonmember Indians.[24] Third, the discussion points out that current laws neither expressly assign criminal jurisdiction over nonmembers to the federal or state courts, nor preclude the jurisdiction of the tribal courts; thus, the laws leave open the possibility of tribal court jurisdiction over nonmember Indians.[25] Finally, the Note concludes, contrary to the Eight Circuit's holding in *Greywater,* that the exercise of criminal jurisdiction over nonmembers does not stand out as inconsistent with a tribe's dependent status as described in Supreme Court decisions and current federal policy, nor with the practical realities of tribal membership and self-governance.[26]

18. 846 F.2d 486 (8th Cir. 1988).
19. 435 U.S. 191 (1978).
20. *Id.* at 212.
21. *Id.* at 208.
22. *Id.* at 209.
23. *See infra* notes 27-56 and accompanying text.
24. *See infra* notes 120-36 and accompanying text.
25. *See infra* notes 137-46 and accompanying text.
26. *See infra* notes 147-214 and accompanying text.

II. TRIBAL COMPOSITION AND MEMBERSHIP RULES

Historically, the focus of U.S. law has been on the Indian tribes rather than on Indians as individuals.[27] This emphasis on tribal entities, which continues today, furthers current federal policy aimed at strengthening tribal governments and promoting the separate cultural, political, and economic development of Indians.[28]

However, the organization of the Indians into various tribes sometimes came as a result of external force, rather than natural familial and cultural groupings. Prior to the Europeans' arrival in America, changes in tribal composition occurred when members of one tribe captured members of another in war, or when members of different tribes intermarried.[29] After the establishment of the United States government, scattered Indian communities with no formal political organization were often forced into tribal groupings and a "chief" was appointed by a federal agent or by Indians themselves, to facilitate treaty-making with the United States.[30] Similarly, Congress often has created "consolidated" or "confederated" tribes, sometimes composed of Indians that do not even speak the same language, to form a single political entity with which the government can carry on relations.[31] Once established, these "tribes" largely have continued to exist as units.[32]

Over time, the tribes solidified internal control by establishing membership rules similar to those existing in natural tribal groups. Although

27. The European colonists who arrived in North America naturally negotiated with tribes rather than individuals because the tribes treated land as a collective resource and possessed considerable military power. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979, 986 (1981). The U.S. government continued the practice by dealing with the Indians collectively in both treaties and statutes. *Id.* at 987.

28. *Id.* at 988-89.

29. Miller v. Crow Creek Sioux Tribe, 12 Ind. L. Rptr. 6008, 6009 (Intertr. Ct. App. 1984).

30. Clinton, *supra* note 27, at 987-88. *See, e.g.,* Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 664 n.5 (1979) (territorial officials aggregated loose bands into tribes and appointed chiefs when treaties securing fishing rights were signed); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 192 (1978) (related Indian villages bordering Puget Sound were aggregated into a series of tribes prior to the 1855 treaty); United States v. Washington, 520 F.2d 676, 682 (9th Cir. 1975) (as part of treaty negotiations, scattered Indian communities were united into a number of tribes with appointed chiefs).

31. Clinton, *supra* note 27, at 987-88. Such composite tribes include the Wind River Tribes (the Shoshone and Arapahoe Indians), the Cheyenne-Arapahoe Tribes of Oklahoma, the Cherokee Nation of Oklahoma (including the Cherokees, Delawares, Shawnees, and others), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

32. *See, e.g., Washington,* 520 F.2d at 692 (Muckleshoot Indian tribe, a product of arbitrary consolidation in 1855, continues as a discrete tribe today).

tribal constitutions include among their recognized members those Indians whose names appear on an official census roll,[33] the qualifications for membership vary considerably from tribe to tribe. For example, some constitutions provide that every child born to any member of the tribe or community automatically becomes a tribe member,[34] whereas others provide that interested Indians must apply for membership,[35] or that a child may not become a member until he reaches the age of majority.[36] Some tribes have patrilineal membership rules, altogether excluding from membership children from intertribal marriages who live on the mother's reservation.[37] Further, some constitutions permit new membership for Indians who simply become residents of the reservation[38] or desire affiliation with the reservation,[39] whereas others have no such provision.[40] Finally, other constitutions recognize a loss of membership when a member Indian moves away from the reservation[41] or is found guilty of misconduct on the reservation,[42] whereas others have no provision for deprivation of membership status.[43]

Thus, as a practical matter, the wide array of tribal membership requirements make it possible for an Indian to reside indefinitely on the reservation of a tribe without ever becoming a member, even if membership in another tribe has terminated. For example, an Indian of the Wrangell Cooperative Association in Alaska who moves away from the reservation and establishes residence with the Prairie Island Indian Community in Minnesota will lose his membership with the Wrangells,[44] but

33. *See, e.g.*, CONST. OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY OF MINN. art. II, § 1(a); CONST. AND BYLAWS OF THE PRAIRIE ISLAND INDIAN COMMUNITY IN MINN. art. III, § 1(a); CONST. AND BYLAWS OF THE AKIACHAK NATIVE COMMUNITY art. II, § 1.

34. *See, e.g.*, CONST. AND BYLAWS OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICH., art. III, § 1(b).

35. *See, e.g.*, REVISED CONST. AND BYLAWS OF THE MINN. CHIPPEWA TRIBE art. II, § 1(b).

36. *See, e.g.*, CONST. AND BYLAWS OF THE METLAKATLA INDIAN COMMUNITY art. II § 2; CONST. AND BYLAWS OF THE PETERSBURG INDIAN ASS'N, art. II, § 3.

37. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 49 (1978).

38. *See, e.g.*, CONST. AND BYLAWS OF THE PETERSBURG INDIAN ASS'N art. II, § 1(b); CONST. AND BYLAWS OF THE AKIACHAK NATIVE COMMUNITY art. II, § 4.

39. *See, e.g.*, CONST. AND BYLAWS OF THE KEWEENAW BAY INDIAN COMMUNITY art. II, § 2.

40. *See, e.g.*, CONST. AND BYLAWS OF THE PRAIRIE ISLAND INDIAN COMMUNITY IN MINN. art. III.

41. *See, e.g.*, CONST. AND BYLAWS OF THE AKIACHAK NATIVE COMMUNITY art. II, § 3; CONST. AND BYLAWS OF THE NATIVE VILLAGE OF DEERING art. II, § 3; CONST. AND BYLAWS OF THE AKIAK NATIVE COMMUNITY art. II, § 3.

42. *See, e.g.*, CONST. AND BYLAWS OF THE ORGANIZED VILLAGE OF KAKE art. II, § 3; CONST. AND BYLAWS OF THE HYDABURG COOPERATIVE ASS'N art. II, § 2(c).

43. *See* CONST. OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY OF MINN. art. II.

44. *See* CONST. AND BYLAWS OF THE WRANGELL COOPERATIVE ASSOCIATION art. II, § 3(a).

still not qualify for enrollment with the Prairie Island Community.[45] Similarly, a full-blooded Indian having parents of different tribal backgrounds may be ineligible for tribal membership on the reservation where he resides.[46] While nonmember status prevents an Indian from voting or holding tribal office,[47] nonmembers who reside on the reservation or regularly participate in reservation life are generally accepted by other residents as an integral part of the tribal community.[48]

In recent years, federal governmental policies regarding the Indians have encouraged movement of Indians among tribes. During the height of the assimilation period, the Vocational Training Program[49] removed large groups of Indians from reservations and placed them in urban areas which became "melting pots" for Indians of different tribal ancestry.[50] The establishment of the Bureau of Indian Affairs (B.I.A.),[51] which set up an employment preference for Indians in Indian programs, resulted in the presence of many nonmember Indians on reservations. Likewise, the Indian Child Welfare Act,[52] which gave tribes the authority to transfer court proceedings involving minors back to tribal courts and established an order of preference for adoptive[53] and pre-adoptive[54] placement of Indian children, also led to the placement of children from one tribe on to the reservation of another.[55]

Such practices and policies have resulted in continually changing tribal compositions. Thus, today there are two situations of note: tribes

45. *See* CONST. AND BYLAWS OF THE PRAIRIE ISLAND INDIAN COMMUNITY IN MINN. (June 20, 1976).

46. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (full-blooded Indian children of Santa Clara Pueblo mother and Navajo father ineligible for tribal membership since Santa Clara Pueblo membership rule was patrilineal).

47. Greywater v. Joshua, 846 F.2d 486, 493 (1988).

48. Clinton, *supra* note 27, at 1015-16.

49. 25 U.S.C. § 309 (1982).

50. Miller v. Crow Creek Sioux Tribe, 12 Ind. L. Rptr. 6008, 6009 (Intertr. Ct. App. 1984).

51. Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, 564.

52. 25 U.S.C. § 1901 (1982).

53. 25 U.S.C. § 1915(a) (1982) provides the following:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

54. 25 U.S.C. § 1915(b) provides the following:

> In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
> (i) a member of the child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

55. Miller v. Crow Creek Sioux Tribe, 12 Ind. L. Rptr. 6008, 6010 (Intertr. Ct. App. 1984).

currently encompass Indians of not necessarily the same background, and many nonmembers ineligible for tribal enrollment presently reside on reservations.[56]

III. THE CURRENT STATUTORY SCHEME FOR CRIMINAL JURISDICTION IN INDIAN COUNTRY

As a result of the dependent status of the Indian tribes, the federal government has plenary authority to enact legislation that deprives the tribes of important aspects of their inherent sovereignty.[57] Congress has freely exercised its powers to alter the jurisdiction of tribal courts.[58] The most recent changes reflect the federal government's increased concern with crimes committed by and against Indians in Indian country and the need to ensure that the courts and laws dealing with these crimes prove adequate. Presently, criminal jurisdiction within "Indian country"[59] is divided among federal, state, and tribal courts.[60] Although many statutes touch on the issue of criminal jurisdiction in Indian country, the three most important statutes for the purposes of this Note are the General Crimes Act,[61] the Major Crimes Act,[62] and Public Law 280.[63]

The General Crimes Act, passed in its original form in 1817,[64] provides the federal government with broad jurisdiction over all crimes involving an Indian and a non-Indian that occur in Indian country. The

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56. *Id.*

57. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896); United States v. Kagama, 118 U.S. 375, 380 (1886); *Ex parte* Crow Dog, 109 U.S. 556, 559 (1883).

58. *See, e.g.,* General Crimes Act, 18 U.S.C. § 1152 (1988) (discussed *infra* notes 64-66 and accompanying text); Major Crimes Act, 18 U.S.C. § 1153 (1988) (discussed *infra* notes 68-72 and accompanying text); Act of Aug. 15, 1953, Pub. L. No. 83-280 §§ 1-4, 6, 7, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1982), 28 U.S.C. § 1360 (1982 & Supp. V 1987), and 25 U.S.C. §§ 1321-1326 (1982)) (discussed *infra* notes 73-82 and accompanying text).

59. "Indian country" is defined in 18 U.S.C. § 1151 (1988):

> "Indian country" . . . 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 territories thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinquished, including rights-of-way running through the same.

60. *See generally* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze,* 18 ARIZ. L. REV. 503 (1976) (explaining when the federal government, the states, and the Indian tribes have jurisdiction).

61. 18 U.S.C. § 1152 (1988).

62. 18 U.S.C. § 1153 (1988).

63. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 1-4, 6, 7, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 28 U.S.C. § 1360 (1982), and 25 U.S.C. §§ 1321-1326 (1982)).

64. Act of March 3, 1817, ch. 92, § 1, 3 Stat. 383, 383 ("any Indian, or other person or persons . . . within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of

1817 Act incorporated prior federal statutes and treaties that had divested tribes of exclusive jurisdiction over crimes committed in Indian territories.[65] In its current form, the Act explicitly excepts from federal jurisdiction any crime committed by one Indian against another, any Indian already punished by a tribal court, and any crime for which tribal jurisdiction is explicitly authorized by treaty.[66] Although no exception is built into the language of the Act for crimes between non-Indians which occur on a reservation, the Supreme Court has held that such crimes fall under state, rather than federal, jurisdiction.[67]

The Major Crimes Act further extends federal jurisdiction over crimes committed in Indian country. The Act's predecessor was enacted by Congress in response to the Supreme Court's 1883 holding in *Ex parte Crow Dog.*[68] In *Crow Dog,* the Court ordered the defendant's release from prison because it found, based on the existing federal statutes and the Treaty of 1868 with the Sioux, that the district court did not have jurisdiction over an Indian who had murdered another Indian within Indian country.[69]

Currently, the Act confers federal jurisdiction over fourteen major crimes involving Indian perpetrators.[70] Although the primary purpose

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Indians" are under federal criminal jurisdiction, except crimes "committed by one Indian against another, within any Indian boundary").

65. *See generally* Clinton, *supra* note 60, at 522 n.89 (listing prior statutes and the treaties which they replaced). The effect of the General Crimes Act is to extend federal enclave law to Indian country where a crime involves both Indians and non-Indians. A federal enclave is a federally created and administered area "within the exclusive jurisdiction of the United States," 18 U.S.C. § 1153 (1988), such as a national park, which draws its criminal law from both state defined and federally-defined crimes as dictated by the Assimilative Crimes Act, 18 U.S.C. § 13 (1988).

66. 18 U.S.C. § 1152 (1988). The exact wording of the General Crimes Act reads as follows:

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

Because an Indian already tried and punished in a tribal court is not subject to federal jurisdiction, federal jurisdiction over Indians is not exclusive, but concurrent with tribal jurisdiction.

67. New York *ex rel.* Martin, 326 U.S. 496, 497 (1946); Draper v. United States, 164 U.S. 240, 247 (1896); United States v. McBratney, 104 U.S. 621, 624 (1881). The Court depends on the insignificance of any Indian interest in crimes between non-Indians on Indian land. The rationale behind the Court's awarding jurisdiction over crimes between non-Indians to states is that no Indian interest is involved in crimes of this sort. Therefore, the Court sees no need to invoke federal jurisdiction to fulfill the guardianship responsibility of the federal government.

68. 109 U.S. 556 (1883).

69. *Id.* at 567-68.

70. 18 U.S.C. § 1153 (1988). The exact wording of the Major Crimes Act reads as follows:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming,

of the Act is to punish an Indian who commits a major crime against another Indian as if the crime had been committed in a federal enclave,[71] the Act applies whether the victim is an Indian or not. It is not clear whether jurisdiction under the Major Crimes Act rests exclusively in the federal courts or whether tribal courts retain concurrent jurisdiction.[72]

Public Law 280 is the third major federal statute controlling criminal jurisdiction in Indian country. Public Law 280 was passed in 1953 during the height of the "termination era,"[73] when Congress focused on making "the Indians within . . . the United States subject to the same

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a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title 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. (b) Any offense referred to in subsection (a) of this section that is 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 original predecessor to the Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385, conferred federal jurisdiction over only seven major crimes: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

71. *See supra* note 65.

72. Unlike the General Crimes Act, the Major Crimes Act does not expressly exclude federal court jurisdiction where the crime has already been tried by a tribal court. For a case supporting concurrent jurisdiction, see Talton v. Mayes, 163 U.S. 376 (1896) (Supreme Court let murder conviction by court of the Cherokee Nation stand even though the defendant was convicted in 1892, seven years after the Major Crimes Act was passed). *See also* Clinton, *supra* note 60, at 559 n.295 (pointing out that the legislative history of the Major Crimes Act supports concurrent jurisdiction). *But see* Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967) (prosecution of Indian for rape of another Indian within Indian country is case not within tribal court jurisdiction); Glover v. United States, 219 F. Supp. 19, 20 (D. Mont. 1963) (jurisdiction of criminal offenses by Indians in the Indian country rests with Indian tribes, except where withdrawn by Congress); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 18 (W.D.S.D. 1955) (since Congress authorized the creation of tribal courts, the tribal court had jurisdiction to try aceused for adultery). It is clear, however, that the federal jurisdiction conveyed by the Major Crimes Act excludes state jurisdiction. United States v. Kagama, 118 U.S. 375, 383-84 (1886) (Act of March 31, 1885 implicitly excludes states from exercising jurisdiction over Indians for matters covered by the Act).

A supplement to the Major Crimes Act was enacted in 1948. 18 U.S.C. § 3242 (1988). Section 3242 provides that an Indian "shall be tried in the same courts and in the same manner as are all other persons committing such offense." In other words, an Indian tried in federal court is subject to the same procedures as a non-Indian. *See* Keeble v. United States, 412 U.S. 205, 208 (1973) ("defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offeuse and acquit hiin on the greater"). To the extent the Major Crimes Act governs offenses committed by an Indian against the person or property of a non-Indian, it overlaps with the General Crimes Act. Although the Supreme Court has never ruled on the question of which statute takes precedence when both may apply, lower courts faced with this situation have held that the Major Crimes Act controls. United States v. John, 587 F.2d 683, 685 (5th Cir. 1979); Henry v. United States, 432 F.2d 114, 118 (9th Cir. 1970).

73. The "termination era" extended from the 1940 to the early part of the 1960. During this period, federal trust responsibilities were terminated for approximately 109 Indian tribes and bands, and in some cases, tribes were disbanded altogether. In addition, Bureau of Indian Affairs programs encouraged urbanization of Indians. *See generally* M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 83-86 (1983) (summary of termination period policies and programs).

laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States."[74] The law mandated six states[75] to assume exclusive criminal jurisdiction over crimes committed "by or against Indians" on Indian reservations within their territories.[76] In addition, Public Law 280 provided that any other state could discretionarily assume Public Law 280 jurisdiction by legislative action.[77] Six additional states have taken that step.[78]

Fifteen years after enactment, Public Law 280 was significantly amended by the Indian Civil Rights Act of 1968.[79] In accordance with the new "self-determination" policy, which the federal government began to pursue in early 1960,[80] the revised Public Law 280 required tribal consent prior to any state's assumption of jurisdiction.[81] Significantly, no tribe has consented to state jurisdiction since the statute's enactment in 1968. In addition to the twelve states that assumed jurisdiction under Public Law 280 prior to 1968, about eight states still exercise some degree of criminal jurisdiction over Indians in Indian country pursuant to other federal legislation.[82]

In summary, the federal government has exclusive jurisdiction over crimes committed in Indian country by non-Indians against Indians, and concurrent jurisdiction over crimes perpetrated by Indians if the victim was a non-Indian and the defendant has not been tried already by a tribal

74. H.R. Con. Res. 108, 67 Stat. B132 (1953).

75. When originally enacted, Public Law 280 conferred jurisdiction on five states: California, Minnesota, Nebraska, Oregon, and Wisconsin. When Alaska was admitted as a state, it was added to the list. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 1, 72 Stat. 545, 545.

76. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 1-4, 67 Stat. 588, 588-90 (codified as amended at 18 U.S.C. § 1162 (1982), 28 U.S.C. § 1360 (1982 & Supp. V 1987), 25 U.S.C. §§ 1321-1326 (1982)). California and Nebraska were granted criminal jurisdiction over all reservations within their boundaries. The Red Lake Reservation was excluded from Minnesota's mandatory jurisdiction, the Warm Springs Reservation was excluded from Oregon's mandatory jurisdiction, and the Menominee Reservation was excluded from Wisconsin's mandatory jurisdiction.

77. *Id.* §§ 6, 7.

78. Florida, Idaho, Montana, Nevada, Utah, and Washington all assumed criminal jurisdiction over all or part of Indian reservations within their states under the discretionary provision of Public Law 280. *See* FLA. STAT. ANN. § 285.16 (West 1975); IDAHO CODE §§ 67-5101 to -5103 (1989); MONT. CODE ANN. §§ 83-801 to -806 (1966); NEV. REV. STAT. § 41.430 (1986); UTAH CODE ANN. §§ 63-36-9 to -21 (1989); WASH. REV. CODE ANN. §§ 37.12.010 to -.070 (1964).

79. Pub. L. No. 90-284, §§ 201-03, §§ 301-02, §§ 401-06, 82 Stat. 73 (codified as amended at 25 U.S.C. §§ 1301-03, 1311-12, 1321-26 (1982 & Supp. V 1987)).

80. *See infra* notes 183-89 and accompanying text. The policy of self-determination remains the current federal viewpoint.

81. 25 U.S.C. §§ 1321-22 (1982). The requirement for tribal consent was not made retroactive. States may, if they choose, retrocede the jurisdiction they obtained under Public Law 280. 25 U.S.C. § 1323 (1982).

82. The eight states are Arizona, Iowa, Kansas, New Mexico, New York, North Carolina, North Dakota, and Oklahoma. For a full explanation of the source and extent of the various states' jurisdiction, see Clinton, *supra* note 60, at 577-83.

court. The federal government also has jurisdiction if the crime allegedly committed by one Indian against another fits one of the fourteen crimes specified in the Major Crimes Act. State courts have exclusive jurisdiction over crimes committed by a non-Indian against another non-Indian in Indian country, and jurisdiction over crimes committed by or against Indians on reservations within their boundaries, provided that jurisdiction has been conferred pursuant to Public Law 280 or other statutes. Tribal courts in states other than those presently governed by Public Law 280 or similar statutes have exclusive jurisdiction over all crimes committed by an Indian except those in the Major Crimes Act, and may have concurrent jurisdiction over those crimes as well.

The current jurisdictional scheme does not specify clearly which court has jurisdiction over nonmember Indians in the case of non-major crimes. However, as the *Duro* court pointed out and as will be explained further in section IV, the statutory scheme supports the argument that a tribal court has jurisdiction in these cases.

IV. THE CIRCUIT SPLIT

The leading Supreme Court case in this area, *Oliphant v. Suquamish Indian Tribe,* involved a non-Indian who had been arrested by tribal authorities for assaulting a tribal officer and resisting arrest.[83] Oliphant claimed that the Suquamish Indian Provisional Court did not have criminal jurisdiction over non-Indians, and he petitioned the district court for a writ of habeas corpus. The district court denied the petition, and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari to determine whether Indian tribal courts have criminal jurisdiction over non-Indians. The Court ruled that they do not.[84]

In reaching this conclusion, the Court's analysis followed three steps. First, the Court noted that federal legislation implies that tribal courts do not have jurisdiction over non-Indians.[85] Second, the Court examined the particular treaty involved in the case for evidence that the tribe had relinquished its jurisdiction over non-Indians.[86] Finally, the Court concluded that tribal court jurisdiction over non-Indians would be inconsistent with the tribes' status as dependent nations because of the conflicting (and superior) federal interest in protecting its citizens "from unwarranted intrusions on their personal liberty."[87]

83. 435 U.S. 191, 194 (1978).
84. *Id.* at 194-95.
85. *Id.* at 203-06.
86. *Id.* at 206-08.
87. *Id.* at 210.

The Ninth Circuit in *Duro v. Reina*[88] and the Eighth Circuit in *Greywater v. Joshua*[89] addressed the related issue, whether tribal courts have jurisdiction over nonmembers, in light of *Oliphant*'s proclamation that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'* "[90] Their conflicting applications of the *Oliphant* opinion are addressed in turn.

A. Duro v. Reina.

In *Duro v. Reina,*[91] the Ninth Circuit held that a nonmember Indian who had significant contacts with the Salt River Indian Reservation was subject to the criminal jurisdiction of the tribal court for discharging a firearm against another nonmember.[92] The court initially applied the jurisdictional analysis set forth in *Oliphant,*[93] but ultimately determined that this analysis did not resolve the issue. Evidence both for and against jurisdiction could be found in the treaties and statutes—the first two prongs of the *Oliphant* analysis.[94]

Moreover, the third prong of the test that focused on the tribe's dependency status was not dispositive. In *Oliphant,* the Court held that tribal jurisdiction over non-Indians conflicted with the overriding federal interest in protecting personal liberties of U.S. citizens and, therefore, conflicted with the tribe's status as a dependent nation.[95] The Ninth Circuit, however, found that this federal interest did not dictate the same result in *Duro* as in *Oliphant*[96] since both tribal members and nonmember Indians had been made U.S. citizens in 1952,[97] and no "overriding

88. 851 F.2d 1136 (9th Cir. 1988).

89. 846 F.2d 486 (8th Cir. 1988).

90. *Oliphant,* 435 U.S. at 208.

91. 851 F.2d 1136 (9th Cir. 1988). This opinion superceded the Ninth Circuit's first opinion reported at 821 F.2d 1358 (9th Cir. 1987). Although both opinions found that the tribe had jurisdiction over the non-member Indian, the revised opinion added an additional ground for the court's holding based on the federal jurisdictional scheme.

92. *Id.* at 1145. The court framed the issue before it as "a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question." *Id.* at 1139. The question of jurisdiction over non-member Indians had not previously arisen in federal court. The modern day reality of displaced tribes, the heterogenity of present day reservations and the increasing sophistication of tribal courts made it issue. *Id.*

93. 435 U.S. 191, 208 (1978). *See supra* text accompanying notes 21-22 (describing *Oliphant*'s triparate test).

94. *Duro,* 851 F.2d at 1141.

95. *Oliphant,* 435 U.S. at 210.

96. *Duro,* 851 F.2d at 1142.

97. 8 U.S.C. § 1401(a) (1982).

federal interest" precluded tribal court jurisdiction over criminal defendants who concurrently are members of the tribe and U.S. citizens.[98] Subsequent Supreme Court cases have further confused this issue. Some of them assume, in dicta, that *Oliphant*'s reasoning should apply to nonmember Indians as well as non-Indians,[99] whereas others do not.[100]

The *Duro* court explained that "what is more dispositive of this case is the [evidence found in the] federal criminal statutory scheme and its treatment of crimes committed by Indians;" the court reasoned that this treatment established the member/nonmember distinction as unimportant for purposes of criminal jurisdiction.[101] The federal scheme subjects individuals to prosecution under the federal statutes based on their status as Indians or non-Indians, not based on their membership in the tribe governing the reservation where the offense occurred.[102] Because tribal jurisdiction over Indians covers everything not granted to the federal government, the court reasoned that a tribe's jurisdiction also must depend on an Indian's status as an Indian, and not on whether he is a member of the tribe.[103]

After having determined that the tribal court had not been divested of criminal jurisdiction over nonmembers, the Ninth Circuit then turned to an equal protection analysis to ascertain whether subjecting a nonmember to tribal court jurisdiction would deprive him of equal protection of tribal laws in violation of the Indian Civil Rights Act.[104] The

98. *Duro,* 851 F.2d at 1142. Although this portion of the *Duro* opinion is confusing, the court seemed to reason that if U.S. citizenship is the dispositive factor in determining whether tribes have been divested of jurisdiction over certain persons, then they would no longer be able to exercise jurisdiction over member Indians since they too are citizens. Such a conclusion would clearly make the firmly established concept of self-governance meaningless. Thus, U.S. citizenship cannot be the dispositive factor.

99. The court cited Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171-73 (1982) (Stevens, J. dissenting) and United States v. Wheeler, 435 U.S. 313, 326 (1978). *Duro,* 851 F.2d at 1140.

100. The court cited National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 853-55 (1985) and Washington v. Confederated Tribes, 447 U.S. 134, 153 (1980). *Duro,* 851 F.2d at 1140.

101. *Duro,* 851 F.2d at 1142.

102. *Id.* at 1142-43. *See infra* notes 138-41 and accompanying text.

103. *Id.* (citing Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683, 686 (9th Cir. 1969)).

104. 25 U.S.C. § 1302 (1982 & Supp. V 1987). The Act provides guarantees analogous to those provided in the Constitution's Bill of Rights to those appearing before a tribal court. For example, it guarantees the right against self-incrimination, double jeopardy, and cruel and unusual punishment, as well as the right to equal protection and due process of law. The Act does differ from federal constitutional standards in certain respects. For instance, the sixth amendment's guarantee of the right to counsel includes the assurance that an attorney will be provided if the defendant is not able to afford one. The Indian Civil Rights Act, on the other hand, provides that although a defendant is entitled to counsel in every case, it must be at his own expense. 25 U.S.C. § 1302(6).

court found no impermissible racial discrimination[105] and held that Duro's "significant contacts" with the Tribe—he lived and worked on the Salt River Indian Reservation—were sufficient to justify the tribal court's assertion of criminal jurisdiction.[106] In using the "minimum contacts" test, the court was extending the rationale of *International Shoe Co. v. Washington,* in which the Supreme Court held that "minimum contacts" between a nonresident defendant and a state seeking to exercise long arm jurisdiction over the defendant must satisfy due process fairness requirements,[107] to Indian affairs.

In further support of its conclusion that tribal court jurisdiction over noumembers was a rational exercise of the tribe's sovereignty, the court noted that treating noumembers as members for jurisdictional purposes "would strengthen tribal authority over the reservation"[108] and would assure that nonmembers do not fall through the jurisdictional void that often results from inadequate state and federal prosecutions.[109]

B. Greywater v. Joshua.

Greywater v. Joshua involved two members of the Turtle Mountain Band of Chippewa Indians who were charged by the Devils Lake Sioux Tribe under its Tribal Code with possession of alcohol in a motor vehicle, public intoxication, and disorderly conduct.[110] When the tribal court refused to dismiss the charges for lack of criminal jurisdiction, the defendants filed petitions for writs of habeas corpus in United States district

105. *Duro,* 851 F.2d at 1144. Since the court concluded that the tribal court's extension of criminal jurisdiction over Duro was not based on race alone, but rather on the "totality of circumstances" as to who qualifies as an Indian, the classification was subject merely to a rationality standard. *Id.* at 1144-45. For a discussion of the equal protection issue, see Note, *Who is an Indian?:* Duro v. Reina's *Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians,* 1988 B.Y.U. L. REV. 161, 177-81 (Ninth Circuit's recognition of tribal criminal jurisdiction not limited to a narrow racial classification but is a rational broadening of the definition of who is an Indian); Note, *Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?,* 1988 UTAH L. REV. 379, 402-06; Comment, *Jurisdiction Over Nonmember Indians on Reservations,* 1980 ARIZ. ST. L.J. 727, 749-55 (arguing that nonmember Indians must be treated like non-Indians).

106. *Duro,* 851 F.2d at 1145.

107. 326 U.S. 310, 316 (1945).

108. *Duro,* 851 F.2d at 1145.

109. *Id.* at 1145-46. The court explained that if the tribal court were denied jurisdiction, only a state court would be able to try Duro because his status would be as a non-Indian for jurisdictional purposes. As a practical matter, the court noted, state courts often do not exercise their jurisdiction in cases of this nature; thus, Duro would fall through the resulting jurisdictional void. However, the court failed to recognize that the federal government could assume jurisdiction in Duro's case under the Major Crimes Act, for murder. See *infra* notes 143-46 and accompanying text for a discussion of when a jurisdictional void would exist.

110. 846 F.2d 486, 487 (8th Cir. 1988).

court. The district court dismissed the petitions, and an appeal to the Court of Appeals for the Eighth Circuit followed.

The Eighth Circuit held in *Greywater* that the tribal court did not have jurisdiction over the nonmember Indians. In considering whether the tribe's sovereign power over nonmembers had been "divested by necessary implication of the Sioux Tribe's status as a dependent nation,"[111] the court found that the Supreme Court's analysis in *Oliphant* compelled it to conclude that the tribal court could not try nonmember Indians. The court reasoned that the overriding federal interest recognized in *Oliphant* to protect individual liberties of citizens also applied to nonmember Indians.[112]

In support of its holding, the court relied on language in Supreme Court cases decided after *Oliphant* which buttress its assertion that nonmembers were included in *Oliphant*'s holding. The first case that the court discussed at length was *United States v. Wheeler.*[113] The *Greywater* court pointed out that the Supreme Court in *Wheeler* explicitly referred to the tribes' power over "members" when discussing the retained sovereign powers of Indian tribes.[114]

Similarly, the court cited *Washington v. Confederated Tribes of the Colville Indian Reservation* in support of its decision. The Court in *Colville* allowed a state to tax Indians living on the reservation who were not enrolled in the tribe, on the grounds that the tax would not undermine tribal self-government since "nonmembers are not constituents of the governing Tribe."[115] Employing reasoning similar to *Colville,* the Eighth Circuit held that the exercise of criminal jurisdiction over the nonmember petitioners was not necessary to guarantee the tribe's right to self-government because the petitioners could not vote, hold tribal office, sit on tribal juries, or siguificantly share in tribal disbursements.[116]

V. APPLICATION OF *OLIPHANT*'S THREE-PART TEST OF DIMINISHED SOVEREIGNTY TO CRIMINAL JURISDICTION OVER NONMEMBER INDIANS

As stated above, Indian tribes retain those aspects of sovereignty that have not been withdrawn either explicitly by treaty or congressional

111. *Id.* at 489. Because the court found that Congress has not explicitly terminated the criminal jurisdiction of the Devil Lake Sioux Tribe over nonmember Indians, it limited its anaysis to the third prong of the *Oliphant* test. *Id.*

112. *Id.* at 493 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978)).

113. 435 U.S. 313 (1978).

114. *Greywater,* 846 F.2d at 491-92.

115. 447 U.S. 134, 161 (1980).

116. *Greywater,* 846 F.2d at 493.

statute, or implicitly as a result of their dependent status.[117] The following discussion addresses each of these areas that alter tribal soverignty as they apply to the inherent authority of a tribe to exercise criminal jurisdiction over nonmember Indians who have allegedly committed a crime on the tribe's reservation.[118] As both the *Duro* court and the *Greywater* court concluded, and as illustrated below, the first two inquiries clearly do not preclude exercise of such jurisdiction.[119] The dependent status question, however, demands careful attention. Neither the Eighth nor the Ninth Circuits adequately explored this question as the *Oliphant* analysis requires. Therefore, the remainder of this Note concentrates on this final inquiry.

A. *Treaty Analysis.*

As recognized by both the Eighth Circuit in *Greywater*[120] and the Ninth Circuit in *Duro,*[121] the treaties executed between the United States and the Indian tribes do not divest the Indian tribes of their inherent power to exercise jurisdiction over nonmember Indians.[122] The treaties, which were primarily concerned with establishing peaceful, friendly relations between the Indian tribes and the federal government, simply did not distinguish the treatment of nonmember Indians from other Indians. Rather, they established a procedure by which crimes that involved U.S. citizens and Indians would be punished peacefully in an effort to avoid private retaliation.[123]

A typical treaty from the earliest period of treaty-making with the Indians provided that if any Indian or person residing among them committed a crime against a U.S. citizen, the tribe was obliged to "deliver

117. *See supra* notes 21-22 and accompanying text.

118. As pointed out by the *Duro* court, some level of minimum contact with the reservation is necessary in order for a tribal court to claim jurisdiction over a nonmember. Duro v. Reina, 851 F.2d 1136, 1144 (9th Cir. 1987). Without such minimal contact, a tribe could not claim that jurisdiction is necessary for adequate self-governance. Furthermore, it would be a weak argument to propose in that case that tribal interest in jurisdiction is any stronger than the state or federal interest.

119. *Duro,* 851 F.2d at 1141; *Greywater,* 846 F.2d at 489.

120. 846 F.2d at 489 (Congress has not explicitly terminated the Devils Lake Sioux Tribe's authority to prosecute nonmember Indians).

121. 851 F.2d at 1141 ("[T]he historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians.").

122. The signing of new treaties ceased in 1871 with the passage of the Indian Appropriations Act, which included a provision stating that Indian tribes would no longer be recognized as independent nations with whom the United States could contract by treaty. Act of March 3, 1871, ch. 120, 16 Stat. 544, 566 (current version at 25 U.S.C. § 71 (1982)).

123. *See, e.g.,* Treaty with the Quapaws, Aug. 24, 1818, art. 6, 7 Stat. 176, 177-78 (where "the friendship . . . between the United States and the said tribe or nation, should be interrupted by the misconduct of individuals," the offender was to be "deliver[ed] up" for punishment).

him . . . up to be punished according to the laws of the United States."[124] Similarly, if a U.S. citizen committed a crime against an Indian, he was to be punished "in the same manner as if the [crime] had been committed . . . against a citizen [of the United States]."[125] These early treaties made no distinction between Indians of the signatory tribe and Indians of other tribes.

Later treaties included similar provisions, yet they often referred explicitly to the tribes of signatory Indians.[126] These later treaties resulted in federal jurisdiction over crimes that specifically involved member Indians and U.S. citizens.[127] However, no treaty stipulated that the federal government would have jurisdiction over crimes involving nonmember and member Indians. That issue was simply not addressed.

Several of the later treaties did provide that disputes between the signatory tribe and some other tribe would be subject to federal jurisdiction.[128] A typical treaty provision of this sort was involved in *Ex parte Crow Dog*.[129] The treaty provision stated:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States to be tried and punished according to its laws . . . .[130]

It has been argued that such provisions made no sense unless they meant the federal government was responsible for punishing crimes committed by an Indian against a member of a different tribe.[131] On the other hand, the apparent purpose behind these provisions was to avoid tribal war in the event of an intertribal dispute. For example, the treaty with the Unpquas and Calapooias stated: "Nor will [the signatory tribe] make war on any other tribe except in self-defense, but will submit all

124. Treaty with the Cherokees, July 2, 1791, art. 10, 7 Stat. 39, 40.

125. *Id.* art. 10, at 41.

126. *See, e.g.*, Treaty with the Quapaws, Aug. 24, 1818, art. 6, 7 Stat. 176, 177 (offenders of the "said tribe or nation" were to be "deliver[ed] up" for punishment).

127. *See* Comment, *supra* note 105, at 737-38. If the treaty did not expressly require that federal law should apply, these treaty provisions necessarily implied that it should because tribal court systems at that time were not sophisticated. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978) (noting that few tribes had formal court systems in the 19th century).

128. *See, e.g.*, Treaty with the Umpquas and Calapooias, Nov. 29, 1854, art. 8, 10 Stat. 1125, 1127 (providing that the signatory tribes would not "make war on any other tribe except in self-defence, but [would] submit all matters of difference . . . to the government of the United States").

129. 109 U.S. 556 (1883) (ruling that district court was without jurisdiction because federal legislation, which excluded crimes committed in Indian country by one Indian against another, had not been repealed).

130. *Id.* at 563 (quoting Treaty with the Sioux Indians, Apr. 29, 1868, art. 1, 15 Stat. 635, 635).

131. *See* Comment, *supra* note 105, at 737-41.

matters of difference between them and other Indians to the government of the United States . . . ."[132] Individual crimes between members and nonmembers were not necessarily the type of dispute these treaties addressed. Therefore, the tribes arguably retained jurisdiction over nonmembers for crimes committed on their reservations.[133]

The courts have never addressed the question whether these treaties awarded the federal government criminal jurisdiction over nonmember Indians. Yet the Attorney General in 1883 issued an opinion, *Crimes Committed Against Indians,*[134] rejecting the argument that the government had jurisdiction over nonmembers. Furthermore, some treaties explicitly recognized tribal court jurisdiction over any person (including nonmembers as well as non-Indians) who committed a crime within the tribe's territory.[135]

Courts will not divest the inherent sovereignty of the Indian tribes based on treaty authority without express intent in treaty language.[136] Because of the lack of express intent in the treaties to divest the tribes of criminal jurisdiction over nonmember Indians, jurisdiction cannot be denied under the first prong of the *Oliphant* test.

132. Treaty with the Umpquas and Calapooias, Nov. 29, 1854, art. 8, 10 Stat. 1125, 1127.

133. One commentator has argued that an analysis of the treaties between the U.S. and the Indian tribes reveals that non-members were treated like non-Indians. Therefore, according to the Comment, a strong argument can be set forth that nonmembers are not subject to tribal court jurisdiction, since non-Indians are not. Comment, *supra* note 105, at 735 n.59, 737-41. However, because the intent behind the treaty provisions providing for federal jurisdiction over intertribal disputes was most likely to prevent intertribal warfare—no evidence to the contrary exists—the treaties cannot be read to have divested tribal courts of jurisdiction over nonmember Indians for crimes committed on the reservations. Moreover, a settled principle of treaty interpretation is that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973) (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

134. 17 Op. Att'y Gen. 556 (1883). This opinion was authored by the Solicitor General and later approved by the Attorney General.

135. *See, e.g.,* Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 6, 11 Stat. 611, 612 ("Any person duly charged with a criminal offense against the laws of either the Choctaw or the Chickasaw tribe, and escaping into the jurisdiction of the other, shall be promptly surrendered, upon the demand of the proper authorities of the tribe, within whose jurisdiction the offense shall be alleged to have been committed.").

136. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n.17 (1978). *But see* Comment, *supra* note 105, at 737-42 (asserting that the treaties did divest tribes of criminal jurisdiction over nonmember Indians).

B. *Statutory Analysis.*

Statutes, as discussed in section III, may have the effect of divesting a tribe of some aspects of sovereignty.[137] However, Congress has not enacted a statute that expressly removes criminal jurisdiction over nonmember Indians. Federal Indian law fails to distinquish between member and nonmember Indians. The only statute that defines "Indian," the Indian Reorganization Act of 1934, specifically characterizes "Indians" as "all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction . . . ."[138] Moreover, all statutes providing services to Indians extend their protections and benefits to all Indians, whether they reside on their own tribes' reservation or on the reservation of some other tribe.[139]

Similarly, the two statutes that specifically address the allocation of criminal jurisdiction in Indian country, the General Crimes Act and the Major Crimes Act, apply to *all* Indians, not just to member Indians of the tribe in question.[140] As explained by the *Duro* court, the relevant question for the purposes of determining federal jurisdiction under both of these statutes is whether the Indian who has committed a crime "is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred."[141]

Statutory authority also does not implicitly divest tribes of criminal jurisdiction over nonmembers. As explained more fully in section III, criminal jurisdiction over Indians in Indian country is as follows: (1)

137. *Oliphant,* 435 U.S. at 208. If there is a conflict between a statute and a treaty, the general rule is that the one later in time governs. *See* Thomas v. Gay, 169 U.S. 264, 271 (1898); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871).

138. 25 U.S.C. § 479 (1982).

139. *See, e.g.,* Indian Reorganization Act, 25 U.S.C. § 4 (1982); Indian Self-Determination Act and Educational Assistance Act, 25 U.S.C. § 1901 (1982); Indian Child Welfare Act, 25 U.S.C. § 1901 (1982); Indian Financing Act, 25 U.S.C. § 1451 (1982); *cf.* 25 C.F.R. § 11.2(a) (1989) (regulatory scheme establishing courts of Indian Offenses provides that these courts "shall have jurisdiction over all offenses . . . when committed by any Indian, within the reservation or reservations for which the court is established").

140. *See supra* notes 64, 70.

141. Duro v. Reina, 851 F.2d 1136, 1142-43 (9th Cir. 1988); *see also* United States v. Kagama, 118 U.S. 375, 383 (1886) (finding the Major Crimes Act applies as long as the Indian is of some federally recognized tribe); United States v. Burland, 441 F.2d 1199, 1203 (9th Cir. 1971) (General Crimes Act applied to member of the Confederated Salish and Kouterai Tribes who committed crime on Flathead Reservation); *Ex Parte* Pero, 99 F.2d 28, 30-32 (7th Cir. 1938) (Indian's relationship to federal government supported federal jurisdiction); *cf.* United States v. Heath, 509 F.2d 16, 19-20 (9th Cir. 1974) (Klamath Indian was not subject to federal jurisdiction under Major Crimes Act for killing a member of the Warm Springs Reservation because her tribe had been "terminated" from federal supervision; there was no indication that federal jurisdiction was lacking because she was not a member of the Warm Springs Tribe); Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683, 686 (9th Cir. 1969) (federal government gave power to tribe to govern mothers due to its relationship).

federal courts have jurisdiction over all Indians committing major crimes on reservations; (2) tribal courts have exclusive jurisdiction over all Indians (on reservations in states not governed by Public Law 280 or similar legislation) committing offenses not covered by the Major Crimes Act against other Indians; and (3) tribal courts and federal courts have concurrent jurisdiction over all Indians committing offenses not covered by the Major Crimes Act against non-Indians.[142]

If a tribal court does not have jurisdiction over nonmember Indians for non-major crimes involving other Indians in Indian country, it is important to realize that no court will have jurisdiction. The federal courts do not have jurisdiction over such crimes, for the General Crimes Act explicitly excepts from jurisdiction Indians committing crimes against other Indians.[143] Similarly, state courts that do not act under the auspices of Public Law 280 or similar statutes have no jurisdiction over Indians.[144] For a nonmember Indian to be tried in a state court, she would have to be considered a non-Indian. It seems farfetched to assume that Congress intended that a nonmember Indian should be divested of his classification as an "Indian" for the sole purpose of trying his criminal act in a state court.[145] Further, Congress would not knowingly create a jurisdictional void.[146] The necessary conclusion is that federal law does not deprive the Indian tribes of criminal jurisdiction over nonmember Indians.

C. *Inconsistency with the Tribe's Dependent Status Analysis.*

After the Supreme Court in *Oliphant* determined that a tribal court did not have criminal jurisdiction over non-Indians based on the relevant treaty or statutes, the Court turned to a third line of analysis. This third prong added a new dimension to the traditional inherent sovereignty analysis previously established by the Court.[147] Prior to *Oliphant,* tribal

142. *See supra* notes 57-81 and accompanying text.

143. *See supra* note 66.

144. *See supra* notes 73-82 and accompanying text; *cf.* State v. Lohnes, 69 N.W.2d 508, 517 (N.D. 1955) (holding that under state law the state had not consented to jurisdiction over Indians despite the fact that Congress had passed Act of May 31, 1946, 60 Stat. 229, which granted the state concurrent criminal jurisdiction over Indians on the Devils Lake Reservation).

145. A state would have even less interest in a crime committed on a reservation within its territory than the federal government. Under the current self-determination policy, tribal sovereignty is analogous to state sovereignty. Just as one state cannot intrude upon the internal affairs of another state, a state cannot interfere with tribal self-government. However, the federal government's relationship with the Indian tribes is "that of a ward to his guardian," Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), thus putting the federal government in a position to exercise more control over Indian affairs than a state can exercise.

146. *See* Duro v. Reina, 851 F.2d 1136, 1145-46 (9th Cir. 1988).

147. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

sovereignty was defined according to the criteria set forth in *Worchester v. Georgia.*[148] Under *Worchester,* Indian tribes retained those aspects of internal sovereignty they possessed prior to conquest, except for those powers expressly withdrawn by treaty or statute.[149] Relying on two cases from the Marshall era, the *Oliphant* Court expanded the traditional analysis to include a concern for the "inconsistency [of the sovereignty of tribes] with their dependent status."[150] In the first of these two cases, *Johnson v. M'Intosh,* the Court identified an intrinsic limitation on the tribes' abilities to dispose of their lands at will.[151] In the second case, *Cherokee Nation v. Georgia,* the Court explained that "any attempt [by foreign nations] to acquire [Indian lands], or to form a political connexion with [the Indians], would be considered by all as an invasion of our territory and an act of hostility."[152]

The *Oliphant* Court interpreted these two decisions to stand for the proposition that once the Indian tribes came under the dominion of the United States, "their exercise of separate power [was] constrained so as not to conflict with the interests of th[e] overriding sovereignty" of the United States.[153] Based on this analysis, the *Oliphant* Court found that when the United States' interest to protect its citizens "from unwarranted intrusions on their personal liberty" comes into conflict with the tribes' competing interest to try non-Indian citizens who have committed crimes on their reservations, the Indian tribes' inherent sovereignty must yield.[154]

The question remains whether the United States' interest in protecting its citizens from unwarranted intrusions on their personal liberty at the expense of tribal court jurisdiction extends to nonmember Indians as well as non-Indians. To answer this question, this Note first reviews the post-*Oliphant* caselaw of the Supreme Court. It then examines current congressional and executive policy regarding the status of the Indian tribes. Finally, finding neither of the former two sources of authority determinative, this Note examines whether the assertion of tribal court criminal jurisdiction over nonmembers is indeed inconsistent with the tribe's dependent status in light of the present-day realities of tribal membership.

148. 31 U.S. (6 Pet.) 515, 576 (1832).

149. *Id.*

150. *See Oliphant,* 435 U.S. at 208.

151. 21 U.S. (8 Wheat.) 543, 574 (1823).

152. 30 U.S. (5 Pet.) 1, 16 (1831).

153. *Oliphant,* 435 U.S. at 209.

154. *Id.* at 210.

1. *Post-*Oliphant *Dicta Regarding the Treatment of Nonmember Indians.* As the Ninth Circuit opinion in *Duro* demonstrates, the Supreme Court cases after *Oliphant* equivocate on the treatment of nonmember Indians for jurisdictional purposes.[155] While some cases have assumed that nonmembers are the same as tribal members, language in other cases suggests that nonmembers are more like non-Indians. A survey of these cases indicates that the Court has used the terms "member/nonmember" and "Indian/non-Indian" imprecisely and has not based its holdings on such distinctions. This Note therefore concludes that the Court has yet to extend *Oliphant*'s holding—that tribal courts lack jurisdiction over non-Indians—to cover nonmember Indians.

The Eighth Circuit in *Greywater* relied on *United States v. Wheeler,*[156] decided only sixteen days after *Oliphant,* to support the extension of *Oliphant*'s holding to apply to nonmember Indians.[157] In *Wheeler,* the Supreme Court considered whether the double jeopardy clause of the fifth amendment[158] barred the federal government from prosecuting a tribal member under the Major Crimes Act who had been convicted previously of a lesser-included offense in a tribal court.[159] After concluding that a tribe's power to punish its members was an implicit part of its retained sovereignty, the Court held that "[s]ince tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offense,' and the Double Jeopardy Clause thus does not bar one when the other has occurred."[160] Throughout its discussion, the Court referred to a tribe's sovereign power over tribal *members.* For example, the Court described the powers of self-government as "involv[ing] only the relations among members of a tribe."[161] Moreover, when citing the holding of *Oliphant,* the Court stated that tribal courts "cannot try *nonmembers* in tribal courts."[162]

The *Greywater* court reasoned that the Supreme Court's use of the terms "members" and "nonmembers" in *Wheeler* was a deliberate clarification of its prior holding in *Oliphant*;[163] tribal court jurisdiction over nonmembers includes Indians as well as non-Indians, and is thus inconsistent with a tribe's dependent status. If the *Greywater* court's conclusion, that *Wheeler*'s language extends *Oliphant*'s holding to nonmember

155. Duro v. Reina, 851 F.2d 1136, 1141 (9th Cir. 1988).
156. 435 U.S. 313 (1978).
157. Greywater v. Joshua, 846 F.2d 486, 489-92 (8th Cir. 1988).
158. U.S. CONST. amend. V.
159. *Wheeler,* 435 U.S. at 314.
160. *Id.* at 329-30.
161. *Id.* at 326.
162. *Id.*
163. Greywater v. Joshua, 846 F.2d 486, 489-92 (8th Cir. 1988).

Indians, is correct, then clearly there would be no need for further discussion of whether a tribal court has jurisdiction. This Note argues, however, that the Eighth Circuit's reasoning is flawed for two reasons.

First, the Supreme Court is not likely to extend its holding in *Oliphant* to include the additional category of nonmember Indians, who constitute a significant portion of most reservations,[164] without a more deliberate and explanatory discussion of its reasons for such an extension. For instance, in *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* the Court refused to extend the holding of *Oliphant* to include civil jurisdiction over non-Indians without "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[165] Because neither the tribal court nor the district court had employed such a careful examination, the Court remanded the case to the tribal court to analyze whether it retained civil jurisdiction over non-Indians in light of these more demanding criteria.[166] Applying *Oliphant* to *criminal* jurisdiction over nonmember Indians thus would seem to require, at a minimum, the same "careful examination."

The second reason the *Greywater* court's interpretation of *Wheeler* suffers arises from the Court's reasoning in *Wheeler.* Although the Court in *Wheeler* failed to explicitly include nonmember Indians in its discussion of the tribes' retained powers over their own members,[167] and the Court specifically did say that "nonmembers" may not be tried by a tribal court, closer analysis shows that little significance should be attached to the Court's use of the category "nonmembers" for purposes of jurisdiction over nonmember *Indians* committing crimes on the reservation. The question before the Court in *Wheeler* was whether a tribe member was deprived of due process. Understandably, the Court's detailed discussion of the retained powers of sovereignty, including the tribes' power to "prescribe and enforce internal criminal laws,"[168] established that a tribal court has inherent power over members of its own

164. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION REPORT: AMERICAN INDIANS, ESKIMOS, AND ALEUTS, vol. 2, table 4 (1985) (13% of persons residing on Indian reservations are not enrolled in the tribe); *id.* at table 7 (23.1% of Indians one year and older did not always reside on the reservation, implying that they have resided elsewhere, perhaps on other reservations and may not have been born members); *see also infra* notes 175-81 and accompanying text.

165. 471 U.S. 845, 855-56 (1985).

166. *Id.* at 856-57.

167. United States v. Wheeler, 435 U.S. 313, 322-26 (1978).

168. *Id.* at 326.

tribe. Nothing about the facts in *Wheeler* indicate that the Court gave attention to the distinction between members and nonmember *Indians* with significant contacts to the reservation. Just as easily, one can conclude that by "nonmember" the Court meant "non-Indian," or alternatively nonmember Indian without significant contacts with the reservation. Evidence of the continuing ambiguity is also found in the Court's plainly imprecise use of the terms "nonmember" and "non-Indian" in subsequent opinions.[169] The separate and clearly distinct issue of jurisdiction over nonmembers as defined in this Note was never explicitly addressed in any of the Court's opinions, nor was it resolved by implication.

The *Greywater* court relied on *Washington v. Confederated Tribes of the Colville Indian Reservation* [170] as further evidence that the Court's use of the term "non-Indian" in *Oliphant* was intended to include nonmember Indians.[171] *Colville* is the only Supreme Court case in which an Indian's status as a nonmember was specifically applicable to the Court's holding. The important issue in the case for the purposes of this Note was whether the state of Washington possessed the power to apply a sales and cigarette tax to nonmember Indians.[172] Finding that the state's interest in taxing nonmembers outweighed any tribal interest to prevent such a tax, the Court held that Washington indeed possessed this taxing power. The Court based its holding, in part, on the premise that allowing the state to tax nonmembers would not "contravene the principle of tribal self-government" since the nonmember purchasers "are not constituents of the governing tribe" and do not "have a say in tribal affairs or significantly share in tribal disbursements."[173] The Court declared, "for most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation."[174]

Although the case held that nonmember Indians do not enjoy the same state-tax immunity as member Indians, the Court's analysis in *Colville* may support—rather than detract from—the conclusion that tribal courts have criminal jurisdiction over nonmember Indians. Criminal jurisdiction is one area in which nonmembers do not "stand on the same footing as non-Indians." A tribe has an undeniably strong interest in maintaining peace on its reservation. To maintain peace, the tribe's

169. *See infra* notes 170-82 and accompanying text.

170. 447 U.S. 134 (1980).

171. Greywater v. Joshua, 846 F.2d 486, 492-93 (8th Cir. 1988).

172. Confederated Tribes of the Colville Indian Reservation v. United States, 447 U.S. 134, 138 (1980).

173. *Id.* at 161.

174. *Id.*

power must extend to all Indians who reside on the reservation or significantly participate in reservation activities, whether they are members or nonmembers. Since criminal jurisdiction is intimately related to effective self-governance, the tribal courts' interest clearly would seem to outweigh any state or federal interest in punishing Indian defendants.[175] Unlike permitting a state to tax nonmember Indians, divesting tribes of jurisdiction over nonmember Indians who have committed crimes on the reservations would "contravene the principle of tribal self-government." Indeed, it is difficult to conceive of any tribal interest that would carry greater weight for purposes of self-government and domestic tranquility.

Finally, throughout its discussion of the other issues presented in *Colville,*[176] the Court imprecisely and interchangeably used the terms "non-Indian" and "nonmember." For example, in describing the retained sovereignty of the Indians to tax *"non-Indians"* on their reservations, the Court quoted an opinion of the Solicitor of the Department of the Interior that described the tribes' taxing power "over *nonmembers,* so far as such nonmembers may accept privileges of trade, residence, etc. . . . ."[177] In other words, when specifically confronted with the problem of treatment of nonmembers, the Court referred to them as "Indians resident on the reservation but not enrolled in the governing Tribe";[178] yet when not specifically addressing the status of nonmembers, the Court used the terms non-Indians and nonmembers interchangeably.

Another case demonstrating the Supreme Court's indiscriminate use of the terms "non-Indian" and "nonmember" is *Merrion v. Jicarilla Apache Tribe.*[179] The issue in *Merrion* was whether the tribe had the power to impose an oil and gas severance tax on non-Indians. In upholding the tribe's power to tax as a power derived from its powers to exclude non-Indians from its reservation, the Court explained:

> When a tribe grants a *non-Indian* the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the *non-Indian* as long as the *non-Indian* complies with the initial conditions of entry. However, . . . [a] *nonmember* who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power to tax

175. By contrast, in *Colville,* the Court found "that the State's interest in taxing [nonmembers] outweighs any tribal interest that may exist in preventing the State from imposing its taxes." *Id.* at 161.

176. The other issues before the Supreme Court in *Colville* were: 1) whether the appeal was properly before the Court; 2) whether Washington's motor vehicle and motor home, camper and trailer taxes could be imposed on members; and 3) whether Washington lawfully asserted civil and criminal jurisdiction over the Makahand Lummi Indian Reservations. *Id.* at 145, 162, 164.

177. *Id.* at 153.

178. *Id.* at 160.

179. 455 U.S. 130 (1982).

> when it initially grants a *non-Indian* entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.[180]

Surely, the Court was referring to the same class of persons when it mentioned "non-Indian" and "nonmember" in this opinion.

Similarly, in *Montana v. United States,*[181] the Court discussed the inherent powers of Indian tribes in the context of its holding that the Crow Tribe did not have the power to regulate hunting and fishing on non-Indian lands within boundaries of the reservation. The Court noted:

> [I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among *members,* and to prescribe rules of inheritance for *members* . . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.[182]

Again, the use of the word "members" instead of "those Indians participating on the reservation," or similar language implying tribal authority over both nonmember and member Indians, should not be interpreted as significant in light of the issue before the Court—the Crow Tribe's power over *non-Indian* land. Further, while regulatory power over non-Indian land falls "beyond what is necessary to protect tribal self-government or to control internal relations," criminal jurisdiction over nonmembers residing on the reservation *is* necessary to control internal relations.

In light of the Supreme Court's imprecise use of the terms non-Indian and nonmember, the *Greywater* court's conclusion that *Wheeler* and *Colville* extend *Oliphant* to exclude nonmember Indians from tribal court criminal jurisdiction seems at best tenuous.

2. *Current Federal Policy.* The current federal policy guiding the federal government's relationship to the Indians is embodied in the Indian Self-Determination and Education Assistance Act.[183] The thrust of the self-determination policy is that because the Indians are a separate people with a unique cultural background, they should be encouraged to protect and develop their own customs, system of government, laws, and judicial system.[184] The purpose of the Act is clearly set forth in the statutory language:

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180. *Id.* at 144-45 (emphasis added).

181. 450 U.S. 544 (1981).

182. *Id.* at 564 (citations omitted); *see also* Rice v. Rehner, 463 U.S. 713, 720-21 & n.7 (1983) (because regulating sales to nonmembers or non-Indians does not interfere with the tribe's self-government, the tribe is subjected to the state regulations unless Congress has pre-empted such action).

183. 25 U.S.C. § 450f-n (1983 & Supp. 1989).

184. Cheyenne River Sioux Tribe v. Kleppe, 424 F. Supp. 448 (1977).

> the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities . . . .[185]

The Indian Self-Determination and Education Assistance Act has its roots in several earlier congressional acts. The Tribal Federal Jurisdiction Act of 1966[186] empowered tribes to sue on their own behalf to enforce their constitutional, treaty, or statutory rights. The American Indian Religious Freedom Act[187] prohibits federal action from impairing the Indians' religious freedom, and the Indian Child Welfare Act of 1978[188] granted tribes and Indian families a greater role in Indian child placement. In addition, the American Indian Policy Review Commission was established by Congress in 1975 to review federal Indian policy and to consider "alternative methods to strengthen tribal government."[189]

Like Congress, the executive branch supports Indian self-determination. As President Reagan stated in his policy statement on Indian affairs: "This administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments . . . to resume control over their affairs."[190]

Recognition of tribal court jurisdiction over nonmember Indians who are living on the reservation or otherwise have significant ties to the reservation, is entirely compatible with the current congressional and executive policy regarding Indian self-determination. Such jurisdiction provides tribes with greater control over the affairs of their reservations. In fact, further restriction of the tribes' sovereignty by limiting their criminal jurisdiction over nonmembers would contravene congressional and executive policy.

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185. 25 U.S.C. § 450(a)(1) (1983).

186. Pub. L. No. 89-635, § 1 (codified at 28 U.S.C. § 1362 (1982)).

187. Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 & note).

188. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-03 (1982)).

189. § 2(6), Pub. L. No. 93-580, 88 Stat. 1910, 1912 (1975) (not codified but set forth in full at 25 U.S.C. § 174 note).

190. Presidential Statement on Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98, 101 (Jan. 24, 1983); *see also* President Nixon's Message to the Congress Transmitting Recommendation for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970):

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

3. *Practical Considerations.* Under *Oliphant*'s dependent status analysis,[191] a court must determine whether a particular exercise of sovereignty by the Indian tribes conflicts with an overriding federal interest. As pointed out in the preceding sections, neither the Supreme Court's treatment of nonmember Indians nor federal policy precludes tribes from maintaining criminal jurisdiction over nonmembers closely associated with their reservations. This section explores the practical considerations involved in tribal membership and nonmembership, as they relate to Indian self-governance, to determine whether recognizing tribal court criminal jurisdiction over nonmember Indians who have significant contacts with the reservation is necessary for self-governance. If criminal jurisdiction is necessary for effective self-governance, then it is difficult to imagine a federal interest that would override the tribes' significant interest in exercising that jurisdiction.

The court in *Greywater* noted that the Indian tribes' criminal jurisdiction over nonmembers "is of a completely different character than their broad power to control internal affairs."[192] The court based its assertion on the principle that a sovereign should govern only those who have consented to its governance. Since nonmembers do not actively participate in the government of the tribe, the court concluded that a tribe's authority over them is "appropriately limited."[193]

The fact that nonmember Indians do not have a say in tribal affairs to the same extent as tribal members[194] does not necessarily justify denying tribal courts jurisdiction over them in criminal cases. Aliens, who do not enjoy the duties and privileges of U.S. citizenship, are nevertheless subject to its laws.[195] Similarly, when a resident of one state commits a crime in another state, the state where the crime occurred has the power to try the nonresident defendant and, if necessary, to seek his extradiction from his state of residence.[196] When an Indian who is not technically enrolled in a tribe enjoys the benefits of life on a particular reservation (and even might not have contact with any other reservation), it is appropriate that the tribal government has some control over him.

191. *See supra* notes 147-53 and accompanying text.

192. Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988).

193. *Id.*

194. *Id.* at 493; Duro v. Reina, 851 F.2d 1136, 1145 (9th Cir. 1988).

195. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 422(1) (1986) ("A court in the United States may try a person only for a violation of United States law, not for violation of the penal law of a foreign state.").

196. U.S. CONST. art. IV, § 2.

The Supreme Court has held that the need for internal control does not automatically invest a tribal court with power over non-Indians.[197] The *Greywater* court found it "anomalous" that nonmembers should be subject to a tribe's jurisdiction while non-Indians are not, since non-Indians and nonmembers are both present in significant numbers on Indian reservations.[198] However, while federal law draws a bright-line distinction between Indians and non-Indians, it does not distinguish between member and nonmember Indians.[199]

Further, the *Greywater* court's focus is the opposite of what it ought to be. The jurisdiction question should not be, as the Eighth Circuit apparently assumes, how far tribal court jurisdiction may extend. Rather, the proper inquiry is how far may federal courts infringe on the inherent sovereignty of the tribes in the absence of Congress's express divestment of tribal sovereignty. When no conflicting federal interest requires the curtailment of any particular power of an Indian tribe, no justification exists for doing so.[200] Certainly the federal government has an interest in assuring that a criminal is tried and punished if gnilty of a "major" crime in Indian country, whether the defendant is an Indian or a non-Indian. When a major crime is not involved, however, Congress has not divested the tribal courts of jurisdiction over "Indians." This supports the conclusion that any federal interest in a crime committed by a nonmember on a reservation would not outweigh a tribe's interest in self-governance.[201]

In addition to the apparent absence of an overriding federal interest that precludes criminal court jurisdiction over nonmember Indians, the tribal interest in such jurisdiction outweighs any competing state interest. The Supreme Court has held that states have no criminal jurisdiction over Indians unless it is expressly granted by statute.[202] The reasoning behind this denial of state jurisdiction is that the Indian territories are

197. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

198. Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988). Statistics are available showing the relative percentages of nonmember Indians and non-Indians residing on the reservations. *See supra* note 164.

199. *See supra* notes 101, 138-46 and accompanying text; *see also* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1009-10 (1981) (explaining that federal law draws a line between Indians and non-Indians in granting Indians a lesser burden of proof in land cases, in giving them employment preferences in hiring by the Bureau of Indian Affairs, and in giving them greater fishing and water rights).

200. *See supra* notes 150-54 and accompanying text.

201. *See supra* note 70 (discussing enactment of the Major Crimes Act).

202. Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621, 624 (1881) (dictum). Of course, when Public Law 280 applies, the state will have at least concurrent jurisdiction. *See supra* notes 73-82 and accompanying text. Only if nonmembers were awarded the status of non-Indians wonld a state not governed by Public Law 280 or similar legislation have jurisdiction over them. However, there is little reason to divest an Indian of his ethnological heritage

sovereign bodies on equal footing with the states and possessing an equivalent right to self-governance.[203] A state certainly has no more interest in a crime committed on an Indian reservation than the tribe itself would have, and argnably the state has less of an interest. Rather, it is essential to a tribe's efficient and effective self-governance that it retain a large portion of the power to punish those who have violated its laws.

The examination in section I of the modern concept of enrollment in a tribe as a "member" illustrates how depriving tribal courts of jurisdiction on the basis of tribal membership can be inappropriate and arbitrary. Modern tribes are not necessarily composed of Indians whose descendants shared a common culture and ethnic background. As a result of tribal conquests and intermarriages, for example, members of one tribe often became members of another.[204] And throughout American history, the federal government has forced scattered, unrelated Indian communities into tribes in order to facilitate negotiations between the government and the tribes.[205] Moreover, recent government programs have stimulated the additional movement of Indians among tribes.[206] As a result of these practices and programs, the modern tribe often has become a "melting pot" of Indians.

Current tribal provisions for membership may prevent nonmember Indians who have significant contacts with a reservation and are generally considered integral parts of reservation life by tribal members from becoming tribal members. As a result, an Indian may lose his status as a member of one tribe and still not qualify for enrollment in another.[207] Thus, a denial of criminal jurisdiction over nonmember Indians who actively participate in the benefits of reservation life is inappropriate since it creates a class of persons who are without a jurisdictional home.[208]

Nonmember status deprives an Indian of his right to vote or hold tribal office.[209] At first glance, it seems fair that one who cannot actively

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by classifying him as a non-Indian when there is no advantage to trying him in a state court rather than in a tribal court.

203. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("[T]he soverign power to punish trial offenders has never been given up . . . .").

204. *See supra* note 29 and accompanying text.

205. *See supra* notes 30-32 and accompanying text.

206. *See supra* notes 49-55 and accompanying text.

207. *See supra* notes 33-47 and accompanying text.

208. A counter argument to this analysis can be made. Because a tribe is responsible for establishing constitutional provisions for membership, the tribe is not in a position to complain that it is deprived of jurisdiction when the accused is not a tribe member. There is some merit to this contrary position, but it seems unreasonable to expect tribes to be able to amend their constitutional enrollment provisions to provide membership to *all* Indians who have significant contact with the reservation over time as the kind of contacts may vary widely, merely to ensure jurisidiction over these Indians.

209. Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988).

participate in a tribal government should not be subject to its criminal jurisdiction.[210] However, as pointed out above, participation in government is not a necessary criteria for asserting jurisdiction over a defendant in any forum—whether state, federal, or tribal court.[211]

With no emphasis on the potential for political participation, the Supreme Court has recognized tribal sovereignty to the greatest extent possible, unless it has been explicitly withdrawn by treaty or conflicts with an overriding federal interest.[212] In explaining its holding in *United States v. Mazurie* that a tribal council had authority to regulate the sale of alcoholic beverages by non-Indians on the reservation, the Court stated: "The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion."[213] Similarly, in *Oliphant,* the Court's finding that a tribe's exercise of criminal jurisdiction over non-Indians was inconsistent with its dependent status was premised upon the overriding interest of the federal government to protect its citizens' individual freedoms and not on the fact that these non-Indians did not participate in tribal government.[214]

VI. CONCLUSION

Whether Indian tribes have inherent sovereignty to exercise criminal jurisdiction over nonmember Indians who allegedly have committed crimes on their reservations presents a perplexing issue. Analyzing this issue in light of the Supreme Court's three part test for divested sovereignty set forth in *Oliphant* is not an easy task. The historical evidence, as encompassed in treaties and legislation, is ambiguous and provides little guidance, except for the conclusion that Congress has not yet specifically addressed the jurisdictional status of nonmember Indians.

Moreover, the final prong of the *Oliphant* test—whether a particular aspect of sovereignty is inconsistent with the tribes' status as dependent nations—is troublesome to apply. Although the language of the test itself promises to provide a useful strategy to answer this jurisdictional question, the Court's brief discussion of what constitutes "inconsistency with the tribes' dependent status" unfortunately does not offer much guidance.[215]

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210. *See id.*

211. *See supra* notes 194-96 and accompanying text.

212. United States v. Wheeler, 435 U.S. 313, 322 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); *see supra* notes 147-53 and accompanying text.

213. 419 U.S. 544, 557 (1975).

214. *Oliphant,* 435 U.S. at 210-12.

215. *See supra* text accompanying notes 95-100.

When confronted with only ambiguous authority on the question whether tribal courts may exercise criminal jurisdiction over nonmember Indians, the Eighth Circuit in *Greywater* and the Ninth Circuit in *Duro* reached opposite conclusions. But both courts inadequately applied the *Oliphant* test. The Ninth Circuit, finding that the Court's application of *Oliphant* to non-Indians was not dispositive of the question before it, chose to dismiss the *Oliphant* analysis altogether. Although recognizing the third prong of the *Oliphant* analysis as the key to answering the jurisdictional question, the Eighth Circuit, in an equally disappointing opinion, relied in its analysis on inconclusive and imprecise language in Supreme Court cases decided subsequent to *Oliphant*.

After a more thorough application of the third prong requirement of *Oliphant,* this Note concludes that tribal courts should have criminal jurisdiction over nonmembers. The current federal policy of self-determination, which advocates giving the tribes as much authority over their territories as possible, and the diminishing importance of tribal membership relative to the significance of contacts to a tribe's reservation, strongly supports acknowledging a tribe's criminal jurisdiction over nonmembers.

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