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MODERN PROBLEMS OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

Kevin Meisner*

I. Introduction: Criminal Jurisdiction in Indian Country

This comment discusses modern problems of criminal jurisdiction in Indian Country,¹ including an analysis of the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*.²

Today three sovereign entities have criminal jurisdiction over crimes committed on Indian reservations: the Indian tribes, the federal government, and the states. Who has jurisdiction over a criminal offense depends on many factors, including location and degree of the crime, who committed the crime, and whom the crime was committed against. At one time the Indian tribes had jurisdiction over all people who committed crimes in Indian Country.³ This jurisdiction has been chipped away by Congress, however, through statutes such as the Major Crimes Act,⁴ which transferred jurisdiction over some offenses committed on Indian reservations to the federal government, and Public Law 280,⁵ which transferred complete civil and criminal jurisdiction to several states.

The Supreme Court has also chipped away at tribal jurisdiction over crimes committed on Indian reservations. In *Oliphant*, the Court

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This comment was written prior to the Supreme Court's decision in *Duro v. Reina* (495 U.S. 676 (1990)). Since that decision, Congress has passed legislation providing tribes criminal jurisdiction over nonmember Indians. Elsewhere in this issue of the *Review*, Professor Nell Jessup Newton discusses the congressional remedies. See Professor Newton's commentary, *Permanent Legislation to Correct Duro v. Reina*, *supra* page 109. — *Ed.*

1. The term "Indian Country" includes Indian reservations. This discussion focuses primarily on criminal jurisdiction on Indian reservations that have tribal courts, but all the principles of criminal jurisdiction discussed apply to other "Indian Country" as well. For an excellent discussion of "what is Indian Country," see FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 5-8 (1942 ed.) [hereinafter COHEN (1942 ED.)].

2. 435 U.S. 191 (1978).

3. COHEN (1942 ED.), *supra* note 1, at 364.

4. 18 U.S.C. § 1153 (1988).

5. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 590 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)).

held that Indian tribes lack criminal jurisdiction over non-Indians who commit crimes in Indian Country.⁶ Since there is much non-Indian crime on today's Indian reservations,⁷ the tribes are forced to rely on state and federal courts to try non-Indian offenders. Unfortunately for the tribes, state and federal prosecutors either lack jurisdiction over such cases or are reluctant or unwilling to prosecute Indian reservation criminal offenders. As a result of *Oliphant*, frequently there is no one willing or able to prosecute non-Indian offenders for crimes committed on Indian reservations.

While tribal jurisdiction over non-Indian crime was the issue in *Oliphant*, the Court occasionally used the broader term "nonmembers" to describe the non-Indians at issue. The use of this term has brought into question tribal criminal jurisdiction over nonmember Indians. For the purposes of this comment, nonmember Indians are Indian people who live on or are visiting the forum reservation but are not of the forum tribe.⁸ For example, a Sioux Indian who lives on or visits the Wind River Indian Reservation, home of the Shoshone and Arapaho Indians, could be considered a nonmember Indian for purposes of criminal jurisdiction.

Federal courts disagree as to whether the Indian tribes have criminal jurisdiction over nonmember Indians. Two courts of appeal have come to opposite conclusions. In *Duro v. Reina*,⁹ the Ninth Circuit held that tribal courts have such criminal jurisdiction.¹⁰ In *Greywater v. Joshua*,¹¹ the Eighth Circuit came to the contrary conclusion.¹² To settle the conflict in the courts of appeal, the Supreme Court granted certiorari in *Duro*.¹³

6. *Oliphant*, 435 U.S. at 196.

7. See 4 NATIONAL AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 51-52 (1974); *Hearings on S. 1 and S. 1400 (Reform of the Federal Criminal Laws; Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 6469 (1973).

8. A nonmember Indian by definition is someone who is not a recognized member of the Indian tribe. Sometimes this has nothing at all to do with race. There are Indians who are racially full blooded "Apaches" or "Cherokees" but for some reason (i.e. their ancestors are not on the tribal role) are not considered members of the Indian tribe in question. There are Indian people who belong to "terminated" tribes (i.e. the Klamath Tribe) who are racially 100% Indian, but are not considered "Indians" for purposes of federal jurisdiction. Some tribes are divided into two or more groups (e.g. Northern and Southern Arapaho or Eastern and Western Shoshone) and the groups are settled on different reservations. Members of the divided tribes are of the same "race" and many are closely related to members of the other group. But a Northern Arapaho is not a member of the Southern Arapaho tribe for purposes of federal acknowledgment.

9. 851 F.2d 1136 (9th Cir. 1987), *rev'd*, 495 U.S. 676 (1990).

10. *Id.* at 1146.

11. 846 F.2d 486 (8th Cir. 1988).

12. *Id.* at 493.

13. 490 U.S. 1034 (1989).

Two problems may arise from the Court's decision in *Duro*. First, if the Supreme Court holds that the tribes lack criminal jurisdiction over nonmember Indians, the existing jurisdictional void will be expanded. Alternatively, if the Court holds that the tribes retain criminal jurisdiction over nonmember Indians, equal protection questions will be raised.

This comment discusses possible solutions to each of these problems. Solutions are available to both the United States Congress and the Indian tribes. At least two solutions are available to Congress. Congress could recognize the tribal right to criminal jurisdiction over all who enter the forum Indian reservations. This would eliminate the jurisdictional void and the equal protection problems completely. Alternatively, Congress could recognize tribal criminal jurisdiction over all who have significant contacts with the Indian reservations. This would significantly reduce the jurisdictional void problem and eliminate the equal protection problem.

At least three solutions are available to the Indian tribes. First, for purpose of criminal jurisdiction, the tribes could expand their definition of "tribal member" to include those people who have significant contacts with the reservation and who thus benefit from the protection of tribal laws. Second, because the tribes have extensive civil jurisdiction over all persons who enter their reservations, the tribes could replace their criminal codes with extensive civil prohibitions against unlawful conduct on the reservations. Finally, as a last resort, the tribes could exclude all nonmembers from their territory. Each of these solutions would reduce or eliminate the jurisdictional void problem and eliminate the equal protection problem.

II. Limitations and Problems of Tribal Criminal Jurisdiction in Indian Country

A. Congressional Action

Congress, pursuant to its plenary power over the Indian tribes, has acted to limit tribal criminal jurisdiction on Indian reservations. The Constitution states that "Congress shall have the power . . . [to] regulate commerce with foreign nations, and among the several states, and with the Indian tribes."¹⁴ From this sparse language, the Supreme Court declared that the "conquered" Indian tribes were "domestic, dependent nations" subject to the plenary power of Congress.¹⁵

The "plenary power" doctrine has severely affected the American Indian tribes, and is seriously questioned by some Indian law experts

14. U.S. CONST. art. I, § 8; see *United States v. Antelope*, 430 U.S. 641, 645 (1977); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

15. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

today.¹⁶ Practically, plenary power means that Congress can declare that a tribe no longer exists,¹⁷ sell tribal lands,¹⁸ and deem the tribal laws null and void.¹⁹ Congress used its plenary power when it passed the Major Crimes Act²⁰ in 1885 and Public Law 280²¹ in 1953.

Both the Major Crimes Act and Public Law 280 represent major incursions on traditional tribal powers. The Major Crimes Act was Congress' response to the Supreme Court's decision in the famous case, *Ex parte Crow Dog*.²² In *Crow Dog*, the Supreme Court held

16. See NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, *RETHINKING INDIAN LAW* 117-18, 131 (1982); S. James Anaya, Address at 14th Annual Indian Law Conference (Apr. 7, 1989).

17. In 1953 the federal government officially adopted a policy of assimilation through termination. See FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 152 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN (1982 ED.)]. Termination was designed to phase out the federal government's trust relationship with the Indian tribes. If Congress determined that a tribe was economically stable and capable of managing its own affairs, the tribe could be "terminated." Upon termination, the federal government was no longer required to hold the tribe's land in trust or provide services to the tribe.

18. It was President Arthur's conviction that the Indians should be assimilated and acculturated. Congress followed suit with the Dawes Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, designed to encourage individual Indians to privately farm parcels of land allotted to them in fee simple. Congress gave individual tribal members title to tracts of land on a reservation, typically 160 acre plots. Once each tribal member was allotted his 160 acres, the rest of the reservation land was opened up for settlement for non-Indians.

The Dawes Act was a failure. The concept of fee ownership was foreign to the Indians; the earth was sacred and could belong to no man or woman. On the whole, Indian attempts at farming also failed. As a result of the Dawes Act, Indian lands were reduced from 136,397,985 acres in 1887 to 48,000,000 acres by 1934. As one legal scholar noted:

[T]he blow was less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed. Indian poverty, ignorance, and ill health were the results. The admired order and the sense of community often observed in the early Indian communities were replaced by the easily caricatured features of rootless, shiftless, drunken outcasts, so familiar to the reader of early twentieth-century newspapers.

CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 21 (1987).

The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-497 (1988)) (Wheeler-Howard Act) effectively ended allotment in 1934, and granted additional reservation lands to some Indian tribes; see WILKINSON, *supra*, at 21; see also NATIONAL ASS'N OF ATTORNEYS GENERAL, *LEGAL ISSUES IN INDIAN JURISDICTION* 3 (1974).

19. As in Public Law 280 states.

20. 18 U.S.C. § 1153 (1988).

21. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 590 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)).

22. 109 U.S. 556 (1883). One day after a tribal council meeting, Crow Dog, a Sioux Indian leader, had a confrontation with his political enemy Spotted Tail, another Sioux. Spotted Tail drew his pistol, but before he could fire Crow Dog mortally

that the United States District Court of South Dakota lacked jurisdiction over a Sioux Indian who had already been punished by his tribe for the killing of another Indian.²³ The Major Crimes Act granted the federal government jurisdiction over a number of crimes committed on Indian reservations, including murder, kidnapping, rape, and robbery.²⁴ The effect of the Major Crimes Act may have been less than originally intended. Some tribes continue to exercise jurisdiction over these crimes, arguing that the Act did not rescind tribal jurisdiction, but that Congress and the Indian tribes have concurrent jurisdiction over these offenses.²⁵

Public Law 280 was part of Congress' termination policy. Specifically, Public Law 280 granted six states — Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin — broad civil and criminal jurisdiction over Indian reservations. Eight other states²⁶ were given the right to amend their state constitutions or to enact legislation to assume jurisdiction at their discretion.²⁷ Like the Major Crimes Act, Public Law 280 has had less effect than its draftsmen intended. With the enactment of the Indian Civil Rights Act of 1968,²⁸ the efficacy of Public Law 280 was greatly diminished. States that had not assumed jurisdiction over reservation Indians were denied that power without the consent of the Indian tribes. States that had assumed jurisdiction

wounded him with a rifle. Crow Dog fled to hide in the mountains. After a while, Crow Dog returned to face the Sioux Tribal Council. Using traditional Sioux Indian law principles of restitution, the Council sentenced Crow Dog to take Spotted Tail's family into his lodge, providing Spotted Tail's wives with a husband and Spotted Tail's children with a father and provider.

People in the surrounding non-Indian communities were outraged that the "Indian murderer" Crow Dog was free. Subsequently Crow Dog was arrested, jailed, and sentenced to death by the United States District Court of Dakota. On appeal to the Supreme Court of the United States, Crow Dog was granted a writ of habeas corpus, the Court holding that the district court had no jurisdiction over him. With Crow Dog again free, the non-Indians were more outraged than before. In response to much political pressure, Congress passed the Major Crimes Act, 18 U.S.C. § 1153 (1988).

23. *Crow Dog*, 109 U.S. at 572.

24. The Major Crimes Act also covers arson, assault, maiming, larceny, receiving stolen property, false pretenses/fraud on the high seas, manslaughter, attempted homicide, conspiracy to commit murder, and statutory rape. 18 U.S.C. § 1153 (1988).

25. See COHEN (1982 ED.), *supra* note 17, at 339-41; Telephone Interview with Judy Leaming, In-House Counsel with the Ute Mountain Ute Tribe (October, 1989), indicating that in the absence of federal prosecution, the Ute Mountain Ute tribe and other tribes will assume criminal jurisdiction over crimes included in the Major Crimes Act, 18 U.S.C. § 1153 (1988).

26. Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.

27. Greg P. Mackey, *Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?*, 1988 UTAH L. REV. 379, 385.

28. 25 U.S.C. § 1302 (1988).

over Indians were given the right to return jurisdiction to the federal government.²⁹ Today states may assume jurisdiction over Indian tribes only with the consent of the tribes. Public Law 280 thus is not a great force in Indian law outside of the few states that have retained jurisdiction gained pursuant to the Act.

B. Court Action: The Effects of United States v. McBratney, Oliphant v. Suquamish Indian Tribe, and Duro v. Reina

The federal courts have also acted to limit tribal criminal jurisdiction on Indian reservations. For example, in *United States v. McBratney*,³⁰ the Supreme Court in 1882 held that the states have criminal jurisdiction over crimes committed by one non-Indian against another on Indian reservations.³¹ However, apart from this special case, the tribes' jurisdiction over non-Indians generally continued to be unchallenged for nearly a century.

Until recently, it was well settled that an Indian tribe retained sovereign powers unless removed by federal statute or relinquished by treaty.³² However, in *Oliphant*,³³ the Supreme Court in 1978 expanded its own authority to limit tribal powers by holding that powers not "inherent" or historically held by the tribes do not exist unless delegated to the tribes by Congress.³⁴ Two weeks later, in *United States v. Wheeler*,³⁵ the Court held that it could invalidate tribal powers that are "inconsistent" with an Indian tribe's "dependent status."³⁶

In *Oliphant*, the Court eliminated tribal criminal jurisdiction over non-Indians, even in cases where the party harmed by the crime was the tribe or its members.³⁷ In the case, two non-Indian residents, Oliphant and Belgarde, were arrested by the Suquamish Tribe for alleged crimes committed on the Port Madison Indian Reservation. The Suquamish Tribe's 1973 Law and Order Code extended the tribe's criminal jurisdiction to both Indians and non-Indians. The tribe posted

29. *Id.*

30. 104 U.S. 621, 624 (1881).

31. *Id.* at 622.

32. See *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Williams v. Lee*, 358 U.S. 217, 219 (1959); *United States v. Kagana*, 118 U.S. 375, 381-82 (1886); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 196 (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832).

33. 435 U.S. 191 (1978).

34. *Id.* at 204-05.

35. 435 U.S. 313 (1978).

36. It would be difficult to show how criminal jurisdiction over non-Indians and nonmember Indians would be inconsistent with the tribes' "dependent status," since the tribes have no one but themselves to rely on for enforcement of tribal laws. *Id.* at 323.

37. *Oliphant*, 435 U.S. at 212.

signs at the entrances to the reservation informing the public that all who entered the reservation impliedly consented to be subject to the laws of the tribe. Oliphant was arrested during the Suquamish Tribe's "Chief Seattle Days" celebration and charged with assaulting a tribal officer and resisting arrest. Belgarde was arrested after an alleged high-speed race on reservation highways that ended when Belgarde crashed into a tribal police vehicle. Both defendants argued that the tribe lacked jurisdiction over them because they were non-Indians.

The Supreme Court in *Oliphant* held that because criminal jurisdiction over non-Indians was not an "inherent," or historically held, sovereign right of the Indian tribes, the Suquamish Tribe lacked criminal jurisdiction over Oliphant and Belgarde.³⁸ The *Oliphant* decision is discussed in detail below.

1. *The Jurisdictional Void*

Non-Indian crime is prevalent on Indian reservations.³⁹ Since the Indian tribes lack criminal jurisdiction over non-Indians, *Oliphant* has forced the Indian tribes to depend on state and federal courts to prosecute non-Indians who commit crimes on reservations. It appears, however, that the tribes have no one to depend on but themselves. In *Oliphant*, for example, the Suquamish Indian Tribe, in anticipation of the thousands of people who were expected to crowd a small area on the Port Madison Indian Reservation for the weekend of the Chief Seattle Days celebration, requested law enforcement assistance from the local county and from the Bureau of Indian Affairs (BIA) Western Washington Agency. The county provided a single deputy for one eight-hour period, and the BIA refused assistance. The Supreme Court did not mention these facts in its opinion. The Court also failed to mention the jurisdictional void problem, which was a significant concern of the lower court.⁴⁰

While Congress has provided for concurrent federal jurisdiction over crimes committed between Indians and non-Indians in Indian Country,⁴¹ federal prosecutors have not often pursued such jurisdiction, except in the most serious cases.⁴² This is partially due to the

38. *Id.*

39. See *supra* note 7 and accompanying text.

40. See *Oliphant v. Schlie*, 544 F.2d 1007, 1013 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978).

41. See 18 U.S.C. §§ 1152-1153 (1988). Section 1152 extends federal enclave law to Indian Country, although not to offenses committed by an Indian against another Indian nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13 (1988), federal enclave law incorporates local state law where federal law defines no equivalent offense. See also *Williams v. United States*, 327 U.S. 711, 717 (1946).

42. COHEN (1982 ED.), *supra* note 17, at 340; see NATIONAL AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 42 (1978).

fact that many of the crimes committed on Indian reservations are misdemeanors. With crowded dockets, often backlogged with several years worth of cases to be heard, federal courts place criminal misdemeanors committed on Indian reservations low on their priority lists. Testimony at congressional hearings has revealed that federal prosecution has been inadequate.⁴³

Thus state prosecutors are, practically speaking, often responsible for prosecuting non-Indian criminal offenders on Indian reservations. Unfortunately, the state prosecutors, unsure of their state's jurisdiction over crimes committed on Indian reservations, hesitate to prosecute such offenders.⁴⁴ They are equally reluctant to spend their time on the minor offenses often at issue. Thus, non-Indians who commit crimes on Indian reservations are frequently not prosecuted.

2. *The Nonmember Indian Controversy*

The Court in *Oliphant* was not considering tribal criminal jurisdiction over nonmember Indians. As a result, there has been confusion over whether the Indian tribes have criminal jurisdiction over nonmember Indians. Subsequently, language in three Supreme Court opinions has seemingly broadened the holding in *Oliphant*. In *Wheeler*,⁴⁵ decided two weeks after *Oliphant*, Justice Stewart in dictum stated that *Oliphant* stood for the proposition that "nonmembers" of an Indian tribe could not be tried for crimes in tribal court. In *Montana v. United States*,⁴⁶ a 1980 case, the Court stated that *Oliphant* supported the proposition that "the inherent sovereign powers of an Indian tribe do not extend to nonmembers of the tribe."⁴⁷ And in *Merrion v. Jicarilla Apache Tribe*,⁴⁸ a 1982 case, Justice Stevens, dissenting, stated that *Oliphant* held that the Indian tribes lack criminal jurisdiction over crimes committed by nonmembers on the Indian reservation.⁴⁹

This language from these several opinions has been cited to the federal courts to argue that Indian tribes lack criminal jurisdiction

43. *Jurisdiction on Indian Reservations: Hearing on S. 3092 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27-28 (1985).

44. Interview with Agnes Cunha, Tribal Chairperson of the Paucatuck Eastern Pequot Tribe (Oct. 22, 1989).

45. 435 U.S. 313 (1978).

46. 450 U.S. 544 (1981).

47. *Id.* at 549. But see *National Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845, 853-55 (1985); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). Both cases say *Oliphant* is limited to non-Indians.

48. 455 U.S. 130 (1982).

49. *Id.* at 171-73 (Stevens, J., dissenting).

over nonmember Indians.⁵⁰ The Supreme Court will soon decide this question in *Duro v. Reina*.⁵¹

a) *Expanded Jurisdictional Void*

In *Duro*, the Court faces a difficult problem. The facts of *Duro* are far more favorable to the forum Indian tribe than were the facts of *Oliphant*. In *Oliphant*, 63% of the Port Madison Reservation's 7276 acres were owned in fee simple by non-Indians, and only fifty members of the Suquamish Indian tribe lived among 2928 non-Indian residents of the Port Madison Reservation. In *Duro*, the criminal defendant in the case was an Indian, but not a member of the forum tribe. He lived on the Salt River Indian Reservation and worked for a tribal-owned construction company. The tribe owned 24,859 of the 49,294 acres of the Salt River Reservation,⁵² and 2470 Indians resided on the reservation.⁵³ Under these facts, the Eighth Circuit held that the forum tribe had criminal jurisdiction over nonmember Indians.⁵⁴

If the Supreme Court holds in *Duro* that tribes lack criminal jurisdiction over nonmember Indians, the existing jurisdictional void will be expanded. Except for Major Crimes Act crimes,⁵⁵ the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against Indians in Indian Country.⁵⁶ Most state courts lack criminal jurisdiction over crimes committed on Indian reservations by Indians against Indians.⁵⁷ At least one state court has specifically held that it lacked criminal jurisdiction over a nonmember Indian.⁵⁸ If the federal prosecutors remain reluctant to prosecute people for crimes committed on Indian reservations, a Supreme Court ruling that the tribes lack criminal jurisdiction over nonmember Indians would create a complete jurisdictional void. The Indian tribes would lose important police powers that determine the safety and order of life on their Indian reservations because nonmember Indian people who live and work on the forum reservation would

50. See *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1987), *rev'd*, 495 U.S. 676 (1990); *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988).

51. The U.S. Supreme Court reversed *Duro* on May 29, 1990. *Duro v. Reina*, 495 U.S. 676 (1990). See the addendum to this comment.

52. 24,435 acres had been allotted. See *Duro*, 851 F.2d at 1136.

53. See DEPARTMENT OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS (1974).

54. *Duro*, 851 F.2d at 1146.

55. See *supra* note 4 and accompanying text.

56. *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980).

57. See *United States v. John*, 437 U.S. 634, 651 (1978); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *United States v. Mazurie*, 419 U.S. 544, 555 (1975); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-69 (1973).

58. See *State v. Allan*, 607 P.2d 426, 429 (Idaho 1980).

be outside the reach of the community laws.⁵⁹ During Indian social gatherings, like the Chief Seattle Days celebration in *Olipphant*, the forum tribes would have no authority to enforce tribal laws against visiting nonmember Indians.

b) Equal Protection

On the other hand, if the Supreme Court holds that the tribes retain criminal jurisdiction over nonmember Indians, equal protection questions will be raised. Why should the tribal courts have jurisdiction over nonmember Indians when they lack criminal jurisdiction over non-Indians? Nonmember Indians often do not have any more of a relationship with the forum tribe than do non-Indians. For example, non-Indian residents have many more contacts with a forum reservation than do nonmember Indian visitors. Thus nonmember Indians could argue that criminal jurisdiction over them violates the Equal Protection Clause of the United States Constitution, because the only reason the tribal court would have jurisdiction over them is their status as Indians.

"Indian" has been held not to be a race-based classification.⁶⁰ For example, members of terminated tribes do not qualify as Indians, regardless of their race,⁶¹ while a person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated may be recognized as an Indian.⁶² Federally recognized tribes are political rather than racial groups.⁶³ If "Indian" were considered a race-based classification, most federal Indian law would be unconstitutional, because

59. There is often a significant number of "nonmember" Indians residing on Indian reservations. The definition of "member" is not clear, ranging from "enrolled" member to member of the community. If member means "enrolled" member, a large percentage of Indians on many reservations would be considered "nonmembers." "Member of the community" could mean any Indian with significant contacts. It should be noted that enrollment, or lack of enrollment, is not determinative of a person's status as Indian for purposes of federal criminal jurisdiction. See *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939). The determination of tribal membership is a power retained by the tribes. This is discussed *infra* notes 138-40.

60. The Court has held that "Indian" is not a race based classification in cases that uphold Indian preferences and cases in which federal statutes treat Indians differently from non-Indians. See *United States v. Antelope*, 430 U.S. 641, 645-47 (1977); *Fisher*, 424 U.S. at 390-91; *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974).

61. See *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974).

62. *Pero*, 99 F.2d at 31; RONALD FLOWERS, CRIMINAL JURISDICTION ALLOCATION IN INDIAN COUNTRY 6 (1983).

63. Race is only one factor considered in determining whether an individual is an Indian. Federal courts identify Indians by reference to an individual's degree of Indian blood and his or her tribal or government recognition as an Indian. See *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859 (1979); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846).

federal Indian law is based upon treating Indian people and non-Indian people differently.

The cases considering the constitutional status of "Indians" classification, however, do not solve all equal protection issues. The question of criminal jurisdiction over nonmember Indians is a case in which Indians from one tribal group are pitted against Indians from other tribes. It is not a situation in which the use of a race-based classification would restructure or constitutionally nullify the United States-tribal relationship under federal Indian law. Thus it is possible that alleged violations of equal protection could be reviewed with strict scrutiny by the federal courts. Additionally, the Supreme Court has held that strict scrutiny review should be applied for questions of equal protection when a segment of the population with no representation in the government is singled out to bear an extra burden.⁶⁴ Since nonmember Indians have no say in the making of tribal laws, cannot vote in tribal elections, and can do nothing to change these facts, the nonmember Indian could argue that jurisdiction over him amounts to a race-based classification. If the forum tribe had criminal jurisdiction over non-Indians, nonmember Indians could not make this argument, because the nonmember Indian would no longer be singled out from other nonmembers.

If the Court did not accept the race-based classification argument, nonmember Indians could argue that because the distinction between non-Indians and nonmember Indians is kin to ethnic distinctions, middle-level equal protection scrutiny should be applied to determine whether tribal criminal jurisdiction over nonmember Indians violates constitutional equal protection standards.⁶⁵ Assuming middle-level scrutiny does not apply, nonmember Indians could argue that the rational basis equal protection review should be applied.⁶⁶ The important point is that these equal protection arguments could be made. If the Supreme Court holds that forum tribes have criminal jurisdiction over nonmember Indians, exercise of such criminal jurisdiction might violate the Equal Protection Clause of the United States Constitution.

III. Solutions

There are a number of solutions to these modern Indian Country criminal jurisdiction problems. The rest of this discussion points out some of these solutions and explains how they would work.

64. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

65. *See Regents v. Bakke*, 438 U.S. 265, 328-78 (1978).

66. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587-93 (1979).

A. Solutions by the United States Government

1. Tribal Criminal Jurisdiction Over All Who Commit Crimes on the Reservation

Congress could eliminate the jurisdictional void and the equal protection problems by recognizing the tribal right to criminal jurisdiction over all, Indians and non-Indians, who commit crimes on Indian reservations.

A decision to this effect would involve reconsidering the Supreme Court's decision in *Oliphant*. In *Oliphant*, the Court held that the Suquamish Indian Tribe lacked criminal jurisdiction over two non-Indians accused of committing crimes on the Port Madison Indian Reservation during the Suquamish Tribe's "Chief Seattle Days" celebration.⁶⁷

Admittedly, it would have been politically difficult for the Supreme Court to hold that the Suquamish Tribe had criminal jurisdiction over non-Indians. Of the Port Madison Reservation's 7276 acres, 63% were owned in fee simple by non-Indians. There were approximately 2928 non-Indians living on the reservation, but only fifty members of the Suquamish Indian Tribe. The Court would have made an unpopular decision if it held that a band of fifty Indians retained absolute criminal jurisdiction over thousands of non-Indians who owned 63% of the Indian Country forum. If the dispute had arisen on, for example, the Navaho Indian Reservation, which is located on nearly 14,000,000 acres in Arizona, New Mexico, and Utah, with a population of nearly 150,000 Indians, the Court might have ruled differently.

However, notwithstanding the unfavorable fact pattern, *Oliphant* ignored the well-settled Indian law principle that an Indian tribe's sovereign powers survive unless removed by federal statute or relinquished by treaty.⁶⁸ Congress had not acted to remove criminal jurisdiction over non-Indians, nor had the tribes relinquished the power by treaty. In spite of this, the Court held that because criminal jurisdiction was not an "inherent" or historically held right of the tribes, the Suquamish Tribe lacked jurisdiction over non-Indians.⁶⁹ Because the Court did not find evidence indicating that the Indian tribes exercised criminal jurisdiction over non-Indians in the past, the

67. *Oliphant*, 435 U.S. at 212.

68. See *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Williams v. Lee*, 358 U.S. 217, 219 (1959); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 196 (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832).

69. The Court today will also invalidate sovereign powers that are "inconsistent" with the Indian tribes' "dependent status." *Oliphant*, 435 U.S. at 212; see *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

Court held that the Indian tribes do not have this power today.⁷⁰ Thus the Indian law rule of sovereignty, "what is not given away is retained," was ignored.

Even if we accept the *Oliphant* Court's "inherent right" test, it is not clear that criminal jurisdiction over non-Indians was not an "inherent" or historically held right of the Indian tribes. The Court cited case law, statutes, and treaties to support its position.⁷¹ However, whether the tribes actually punished non-Indians committing offenses in Indian Country is a significant historical question.

The Court's conclusions show a lack of understanding of Indian history and culture. The *Oliphant* Court explained that the exercise of criminal jurisdiction over non-Indians by the Indian tribes was a relatively new phenomenon. "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes."⁷² The Court quoted an 1834 opinion of the Commissioner of Indian Affairs describing the status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."⁷³

The traditional Indian "criminal justice" system was based upon restitution rather than punishment. Indian offenses were handled by social and religious pressure rather than formal adjudication. A glance at United States history reveals that settlements in the early colonies also handled offenses through social and religious pressure, and not through formal courts. The Indian system did not empower Indian "chiefs" with absolute authority to exercise restraint. Chiefs, as chosen leaders, were not monarchs with ultimate authority to wield the law. Because the tribal system of justice was so different from the United States legal system and because the tribes were secretive in important tribal decisions, the statements of the Court fall short of the truth. Tribal exercise of criminal jurisdiction is not a new phenomenon.

Case law, statutes, and treaties were not the best historic record, and these sources were valuable only for discerning which sovereign powers had been recognized by the three branches of the United States

70. *Oliphant*, 435 U.S. at 212. Even if the tribe never exercised its power of criminal jurisdiction over non-Indians, the Court has held that the fact that a sovereign power has never before been exercised does not mean that the power does not exist. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

71. *Oliphant*, 435 U.S. at 206-08.

72. *Id.* at 197.

73. *Id.* (citing H.R. REP. NO. 474, 23d Cong., 1st Sess. 91 (1834)).

government. While it is fair to say that traditional Anglo-American courtroom style adjudications were not often used, it is reasonable to believe that offenses committed against a tribe or tribal member by a non-Indian were indeed punished in some manner. Serious historical research would have been required to determine what actually happened to nonmember offenders.

*a) Review of Treaties, Statutes and Case Law
Cited by the Oliphant Court*

Assuming that treaties, statutes, and case law were an adequate historical record for the purpose of determining whether the tribes exercised criminal jurisdiction over non-Indians, the materials cited by the Court in *Oliphant* do not unequivocally show that the Suquamish Tribe lacked such jurisdiction.

(1) Treaties

The *Oliphant* Court held that "from the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect."⁷⁴ However, in Felix S. Cohen's original *Handbook of Federal Indian Law* (published in 1942), the learned treatise on Indian law, Cohen cited six treaties that acknowledge tribal criminal jurisdiction "over white trespassers on tribal lands."⁷⁵ Even without Cohen's opinion that the Indian tribes originally had criminal jurisdiction over non-Indians, and the existence of the six treaties, the treaty provisions cited by the *Oliphant* Court do not support the Court's holding that Indian tribes lack criminal jurisdiction over non-Indians.

In the 1832 case of *Worcester v. Georgia*,⁷⁶ Chief Justice Marshall wrote that

the language used in treaties with the Indians shall never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be construed only in the latter sense.⁷⁷

74. *Id.* at 197.

75. COHEN (1942 ED.), *supra* note 1, at 146 n.212. The treaties cited are: Treaty of Fort M'Intosh, Jan. 21, 1785, U.S.-Sachems et al., 7 Stat. 16; Treaty of Hopewell, Jan. 10, 1786, U.S.-Chickasaw Nation, 7 Stat. 24; Treaty of Peace and Friendship, Aug. 7, 1790, U.S.-Creek Nation, 7 Stat. 35; Treaty of Peace and Friendship, July 2, 1791, U.S.-Cherokee Nation, 7 Stat. 39; Treaty of Peace, Aug. 3, 1795, U.S.-Wyandots et al., 7 Stat. 49.

76. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

77. *Id.* at 582.

It is well settled that when reviewing treaties between an Indian tribe and the United States, the treaties must be construed “in the sense in which they would be naturally understood by the Indians.”⁷⁸ The intent of the parties must be discerned, and the United States, “as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.”⁷⁹

The first treaty ever signed by the United States with an Indian tribe was the 1778 Treaty with the Delawares. It provided that neither party would punish members of the other until a

fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties and natural justice: The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of . . . deputies of the Delaware nation.⁸⁰

The Court in *Oliphant* used this treaty to show that the United States government intended for non-Indians to be tried only under the auspices of the United States and in a manner fixed by the Continental Congress. But the treaty specifically states that Congress and deputies of the Delaware Nation will fix the mode of criminal trials.⁸¹ The treaty did not say that non-Indians can only be tried under the auspices of the United States and in a manner fixed by the Continental Congress. Therefore these treaty provisions do not support the Court’s finding that Indian tribes historically lacked criminal jurisdiction over non-Indians.

In forming its view, the Court heavily relied upon an 1830 treaty with the Choctaw Indian Tribe. That treaty provided that the Choctaw tribe be guaranteed “the jurisdiction of all persons and property that may be within their limits.”⁸² This provision is at best ambiguous. “Within their limits” could mean only members of the tribe. At the same time, however, “within their limits” could mean anyone, Indian or non-Indian, residing within the Choctaw territory. Since ambiguous provisions such as this should be construed in the favor of the Indian tribes, the Court should not have cited this section of the treaty to support the proposition that the Indian tribes lacked criminal jurisdiction over non-Indians. Had the Court construed the treaty in favor

78. *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

79. *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 675-76 (1979).

80. Treaty with the Delawares, Sept. 17, 1778, U.S.-Delaware Nation, art. 4, 7 Stat. 14.

81. *Id.*

82. Treaty of Perpetual Friendship, Cession, and Limits, Sept. 27, 1830, U.S.-Choctaw Nation, 7 Stat. 333.

of the Choctaws, as mandated, a non-Indian living among the Choctaws would be subject to their criminal jurisdiction. This treaty section did not support the Court's finding that Indians historically lacked criminal jurisdiction over non-Indians.

To support their reliance on the 1830 treaty with the Choctaws, the *Olipphant* Court noted that the Choctaws had expressed a wish "that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations."⁸³ The Court felt that this request was inconsistent with the notion that the Choctaws originally had criminal jurisdiction over non-Indians. However, this language could be interpreted in more than one way. Many Indian tribes treating with the United States were in an unequal bargaining position. While this language could be interpreted to mean that the Choctaw Tribe lacked criminal jurisdiction over non-Indians prior to the treaty and were requesting such jurisdiction at the time of the treaty, the language could also be interpreted as a request that the United States recognize the Choctaw's continued criminal jurisdiction. Since treaty language is to be interpreted in favor of the Indian tribes, the Court should have seen this language as a request for recognition of continued jurisdiction over non-Indians committing crimes in Choctaw country, instead of evidence that the tribe lacked such jurisdiction.

In fact, an earlier treaty with the Choctaws provided that "[i]f any citizens of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians to live on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please."⁸⁴ Cohen specifically cites this language to support the proposition that the Indians had criminal jurisdiction over non-Indians who settled in their territory.⁸⁵ The Supreme Court in *Olipphant* said that this provision was put into the

83. *Id.* In the 1800s, when the Choctaws attempted to exercise their criminal jurisdiction over non-Indians, the United States Attorney General concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. 7 Op. Att'y Gen. 174 (1855); 2 Op. Att'y Gen. 693 (1834). However, the refusal of the Attorney General to uphold the treaty provisions neither ratified lack of jurisdiction over non-Indians nor nullified the treaty provisions.

84. Treaty of Hopewell, Jan. 3, 1786, U.S.-Choctaw Nation, art. 4, 7 Stat. 22. The *Olipphant* Court noted that later treaties deleted this language and instead often included the following clause: "any citizen of the United States, who shall do an injury to any Indian of the [Tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." Treaty of the Great Miami, Jan. 31, 1786, U.S.-Shawnee Nation, art. 3, 7 Stat. 26. However, this provision does not expressly remove criminal jurisdiction from the tribes. It shows the Indians' agreement that the laws of the United States would be used when determining punishment of non-Indian offenders.

85. COHEN (1942 ED.), *supra* note 1, at 146 n.212.

treaty merely to discourage people from settling on the Indian lands, and was not meant to recognize tribal criminal jurisdiction.⁸⁶ If this were true, the provision could not possibly have any deterrent effect upon prospective non-Indian settlers. A treaty provision of no consequence would discourage no one. It is doubtful that the chiefs who signed the treaty would have agreed with the *Oliphant* Court that these important clauses had no effect.

Finally, the Court considered the Treaty of Point Elliot,⁸⁷ which included the United States' agreement with the Suquamish Indian tribe. The Treaty of Point Elliot originally contained a provision that "[i]njuries committed by Whites towards [Indians are] not to be revenged, but on complaint being made they shall be tried by the laws of the United States and if convicted the offenders punished."⁸⁸ However, this provision was mysteriously dropped during the negotiations with the Suquamish Tribe. The Court explained that there was no evidence that the Indians objected to the provision; therefore it must have been deleted because the Commission of Indian Affairs must have preferred not to include it.⁸⁹ But there is no evidence for the Court's interpretation either. Because criminal jurisdiction over non-Indians was not removed by the Treaty of Point Elliot, and the only provision that approached the matter was dropped during negotiations with the tribe, the Court should have construed the treaty in favor of the Indians. For this reason the Treaty of Point Elliot at the very least was not evidence that indicated an historical lack of tribal criminal jurisdiction over non-Indians.

The Court concluded that merely by "recognizing their dependence" upon the United States, the tribes probably recognized that the United States would arrest and prosecute non-Indian criminals who came onto the reservations. Because the Indians agreed not to harbor non-Indian criminals, and because federal enclave law applied to the Indian Country, the Court implied that the Indians were to deliver up any non-Indian offender and not punish him themselves.⁹⁰ However, the treaty sections cited to support the Court's position that the Indian tribes historically lacked criminal jurisdiction over non-Indians fail to do so. If the Court had construed these provisions in the favor of the Indian tribes, it could not have come to this conclusion.

(2) Case Law

The *Oliphant* Court also cited *Ex parte Kenyon*⁹¹ and *Ex parte Mayfield*⁹² to support its position. Neither case affirmatively stated

86. *Oliphant*, 435 U.S. at 198 n.8.

87. Treaty of Point Elliot, Jan. 22, 1855, U.S.-Dwamish et al., 12 Stat. 927.

88. *Oliphant*, 435 U.S. at 207 n.16.

89. *Id.* at 207.

90. *Id.* at 208.

91. 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7720).

that the Indian tribes historically lacked criminal jurisdiction over non-Indians.

In *Kenyon*, the District Court for the Western District of Arkansas held in 1878 that in order for a tribal court to have criminal jurisdiction, the offender must be an Indian, and the offended must be an Indian.⁹³ The Supreme Court in *Oliphant* noted that this conclusion in *Kenyon* was reaffirmed in a 1970 opinion of the Solicitor of the Department of the Interior.⁹⁴ However, in *Kenyon*, the district court held that the Cherokee Nation lacked criminal jurisdiction over Kenyon because at the time the alleged crime was committed, Kenyon was no longer a resident of the Cherokee district.⁹⁵ The *Oliphant* Court relied heavily on the fact that the judge who heard the case handled many cases involving Indian law, and that the Indians of the district deeply respected him. It may have been the opinion of this one judge that the Indians in his district lacked criminal jurisdiction over non-Indians at the time he was deciding the *Kenyon* case, but the opinion does not say that criminal jurisdiction over non-Indians was never a power of the tribes. This was the Supreme Court's rationale in *Oliphant*, but *Kenyon* does not support it.

The Court also looked to the 1891 decision of the Supreme Court in *Mayfield* to demonstrate Congress' intent to reserve to the federal courts jurisdiction over offenses committed in Indian Country involving non-Indians. However, *Mayfield* held only that the Cherokee Nation had exclusive criminal jurisdiction over member Indians.⁹⁶ The issue in *Mayfield* was whether the treaty with the Cherokee Nation reserved exclusive criminal jurisdiction over offenses by one Indian against another. In support of Mayfield's petition for a writ of habeas corpus, the Court said in dictum that "the general object of [Congress'] statutes is to vest in the courts of the [Indian] nation[s] jurisdiction of all controversies between Indians . . . and to reserve to the courts of the United States jurisdiction of all actions to which its citizens are parties on either side."⁹⁷ However, the statutes discussed in *Mayfield* provided only that the Indians retain exclusive jurisdiction over all controversies between Indians.⁹⁸ They did not remove Indian jurisdiction over offenses involving non-Indians. Therefore the dictum in *Mayfield* does not support the Court's conclusion that the Indian

93. *Id.* at 116.

94. That opinion was subsequently withdrawn in 1974. See *Oliphant*, 435 U.S. at 201 n.11.

95. *Oliphant*, 435 U.S. at 200.

96. *Mayfield*, 141 U.S. at 116.

97. *Oliphant*, 435 U.S. at 204.

98. *Id.*

tribes historically lacked criminal jurisdiction over non-Indians.

(3) *Statutes*

The Supreme Court has held, and it is well settled, that “statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.”⁹⁹ This is the same principle applied in construing treaties. The *Oliphant* Court relied on a number of statutes, but failed in each instance to construe the acts in favor of the Indian tribes.¹⁰⁰ When the statutes are read in a way favorable towards the Indians, the statutes do not support the Court’s proposition that the Indian tribes historically lacked criminal jurisdiction over non-Indians.

In 1790, through the Federal Trade and Intercourse Act,¹⁰¹ Congress extended its jurisdiction to Indian Country to provide protection to the Indians “from the violence of the lawless part of our frontier inhabitants.”¹⁰² The government feared that if they did not protect the Indians on the frontier, the Indians would become violent and retaliate. Congress then extended federal enclave law to Indian Country, assuming jurisdiction for all criminal offenses except for offenses “committed by one Indian against another.”¹⁰³

Congress did not say that this jurisdiction was exclusive — that it removed criminal jurisdiction from the tribes — but, the *Oliphant* Court held that this was the “unspoken assumption.” This “unspoken assumption,” the Court said, “was also evident in other Congressional actions during the 19th century.”¹⁰⁴ For example, the Trade and Intercourse Act was amended in 1854 to protect Indians from double jeopardy in federal court after facing trial in the tribal court.¹⁰⁵ Because Congress did not provide similar protection for non-Indians, the Supreme Court saw this as an indication of the Indian tribes’ lack of criminal jurisdiction over non-Indians.¹⁰⁶

Given the Court’s duty to construe ambiguous statutes in favor of the Indian tribes, this amendment of the Trade and Intercourse Act should not have been used to support the *Oliphant* Court’s argument that the Indian tribes historically lacked criminal jurisdiction over non-Indians. At the time the Trade and Intercourse Act was amended

99. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918).

100. *Oliphant*, 435 U.S. at 204.

101. Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790).

102. Seventh Annual Address of President George Washington (Dec. 8, 1795), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 182, 185 (James D. Richardson ed., 1896).

103. 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (1988)).

104. *Oliphant*, 435 U.S. at 203.

105. 10 Stat. 270, § 3 (current version at 18 U.S.C. § 1152 (1988)).

106. *Oliphant*, 435 U.S. at 203.

tribal courts rarely prosecuted non-Indians. As in *Kenyon*,¹⁰⁷ the federal courts reserved the habeas corpus power to review decisions of the Indian courts against non-Indian citizens whose constitutional rights had supposedly been violated. Non-Indians were entitled to a petition for writ of habeas corpus, and these writs were often granted.¹⁰⁸ Therefore it is likely that Congress did not have non-Indians in mind when it amended the Trade and Intercourse Act to protect Indians from double jeopardy. Congress' failure to mention non-Indians in its amendment of the Trade and Intercourse Act had nothing to do with the question of tribal criminal jurisdiction over non-Indians. Favorably construed, the amendment is irrelevant.

The Court was similarly misguided in its analysis of Congress' interesting but unpassed Western Territory Bill.¹⁰⁹ The Court extracted from Congress' language the notion that the Indian tribes would not have had criminal jurisdiction over non-Indians in that territory. The Western Territory Bill was a proposal to give the Indian tribes their own state in the West. The bill places "officers, and persons in the service of the United States, and persons required to reside in the Indian Country by treaty stipulations" under the protection of the laws of the United States. This stipulation did not purport to take away Indian criminal jurisdiction over non-Indians, but the Court called that an "unspoken assumption" of the bill.¹¹⁰ Travellers were also to be protected under the bill, but non-Indians settling in the territory without government business were not to be protected. The Court assumed that the reason was to discourage non-Indians from settling on the Indian land. The words, however, are inescapable: protection is not extended to non-Indians settling without government business in Indian territory.¹¹¹

In his opinion for the majority, Justice Rehnquist relied heavily on the Western Territory Bill, noting that

Congress' great concern over criminal jurisdiction in this proposed Indian territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view . . . that Indian tribal courts were without jurisdiction to try non-Indians.¹¹²

107. 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7720).

108. COHEN (1982 ED.), *supra* note 17, at 336.

109. H.R. REP. No. 474, § 6.

110. *Oliphant*, 435 U.S. at 202.

111. *Id.*

112. *Id.* at 205.

But how does the contrast show this? Perhaps Congress knew that the Indian tribes retained jurisdiction and thus it did not need to discuss the issue. Probably the issue was not urgent enough for Congress to pay it any heed. After all, the bill was not passed. Even today, when the question of Indian criminal jurisdiction over the reservations clearly calls for action, Congress has not spoken. If doubtful expressions are to be construed in favor of the Indian tribes, the only way to interpret the Western Territory Bill is to conclude that the Indian tribes would have had criminal jurisdiction over non-Indians who settled without government business on the Indian lands.

The *Oliphant* Court used the same misguided logic in considering the Major Crimes Act of 1885.¹¹³ That Act granted the federal courts concurrent jurisdiction over fourteen enumerated crimes committed by Indians in Indian Country. Because the Act does not explicitly extend itself to non-Indians, the Court reasoned, a tribal court must not have jurisdiction over such people.¹¹⁴ The Act itself says that "[a]ny Indian . . . shall be subject to the same law and penalties as any other persons committing any of the above offenses."¹¹⁵ On its face, the Act gives the impression that such jurisdiction already exists for non-Indians. As mentioned above, the federal courts additionally have jurisdiction to grant the writ of habeas corpus to such non-Indians. When considering the history and reasoning behind the Major Crimes Act, it is unsurprising that non-Indian offenders were not mentioned.¹¹⁶ When construing the presumptions in favor of the Indian tribes, one can see that this legislation did not provide unequivocal evidence that the Indian tribes historically lacked criminal jurisdiction over non-Indians.

*(4) Conclusion about Oliphant's "Inherent Right"
Test and the Combined Presumptions of Congress,
the Courts and the Executive*

While the Court in *Oliphant* admitted that the "presumptions of Congress" were not conclusive, it held that the combined "presump-

113. Act of Mar. 3, 1885, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1988)).

114. *Oliphant*, 435 U.S. at 203.

115. *Id.*

116. It is also possible that non-Indians were not mentioned in the Major Crimes Act because crimes committed by non-Indians were not at issue in *Ex parte Crow Dog*, 109 U.S. 556 (1883), discussed *supra* note 22 and accompanying text. Congress had no reason to mention non-Indians in the Major Crimes Act because the district courts already had jurisdiction over them. This also tends to show that the fact that non-Indians were not provided for in the Major Crimes Act does not support the Court's argument that the Indian tribes historically lacked criminal jurisdiction over non-Indians.

tions" of Congress, the Executive, and the lower federal courts carried considerable weight.¹¹⁷ However, as seen above, there is substantial doubt that these bodies individually or collectively held the presumption that Indian tribes historically lacked criminal jurisdiction over non-Indians.

After an examination of the case law, statutes, and treaties cited by the Supreme Court, it is hardly clear that criminal jurisdiction over non-Indians was not an "inherent" or historically held right of the Indian tribes. On the contrary, it appears that the Indian tribes did indeed exercise criminal jurisdiction over non-Indians at one time.¹¹⁸ The old Indian law rule that a tribe's sovereign powers remain unless relinquished by treaty or removed by statute should have been followed by the Court. Since there is no evidence that criminal jurisdiction over non-Indians was relinquished or removed in *Oliphant*, that tribal power should have remained. Congress should consider this when reviewing the history of criminal jurisdiction in Indian Country.

b) Reaffirmance of the Old Indian Law Rule

In 1982 the Supreme Court decided *Merrion v. Jicarilla Apache Tribe*,¹¹⁹ which held that the fact that a sovereign power has not been exercised before does not mean that the power does not exist today.¹²⁰ This decision is counter to the Court's reasoning in *Oliphant*.¹²¹

Merrion upheld a severance tax imposed by the Jicarilla Apache tribe on non-Indian mining activities on its reservation. The Court noted that "[a] nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power."¹²² In support of its decision, the Court noted that non-Indian miners on the reservation "benefit from the provision of police protection and other governmental services . . . assured by the existence of tribal government."¹²³ Because the tribe's taxing power was a necessary tool of self-government and territorial control, and because the power was not preempted by federal statutes, the Court upheld the power.¹²⁴

117. *Oliphant*, 435 U.S. at 206.

118. COHEN (1942 ED.), *supra* note 1, at 364.

119. 455 U.S. 130 (1982).

120. *Id.* at 145.

121. 435 U.S. 191 (1978). Ironically, in *Jicarilla* Justice Stevens stated in dissent that *Oliphant* held that the Indian tribes lack criminal jurisdiction over crimes committed by nonmembers on the Indian reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982) (Stevens, J., dissenting).

122. *Merrion*, 455 U.S. at 145.

123. *Id.* at 137-38.

124. *Id.* at 141.

Similarly, non-Indians and nonmember Indians living on a reservation benefit from the protections of tribal criminal codes. Like the taxing power, criminal jurisdiction over nonmember Indians is a necessary tool of self-government. Without criminal jurisdiction over non-Indians and nonmember Indians, there is often no law enforcement over such offenders. Congress should consider this *Merrion* opinion in conjunction with a review of *Oliphant* when considering the modern problems of criminal jurisdiction in Indian Country.

2. *Arguments Against Tribal Criminal Jurisdiction over Non-Indians and Nonmember Indians*

Although *Oliphant* appears to depend on faulty historical analysis, to some the result in the case has some inherent appeal. The Supreme Court believed that subjecting non-Indians to tribal laws would be unfair.¹²⁵ The Court said that since tribal laws are so different from state laws, federal laws, and the laws of other tribes, they create cultural standards non-Indians and nonmember Indians are not accustomed to.¹²⁶ Others have argued that because non-Indians and nonmember Indians do not participate in the tribal government and have no say in the creation of the tribal laws, they should not be subject to those laws.¹²⁷ Finally, because Indian tribal courts are not bound by the United States Constitution, it is feared that people charged with offenses in the tribal courts may be denied their constitutional rights to equal protection and due process.¹²⁸

While there is merit to these arguments, a closer look shows that they are not as powerful as they sound. The arguments are not strong enough to overcome the old Indian Law rule that the tribes retain what has not been taken away.¹²⁹ Congress should consider each of these arguments against tribal criminal jurisdiction over non-Indians and nonmember Indians, and the counter arguments presented below.

125. *Oliphant*, 435 U.S. at 210-11.

126. *Id.* at 211; see *Wounded Head v. Tribal Council*, 507 F.2d 1079, 1082-83 (8th Cir. 1975); *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973).

127. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980); cf. *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975).

128. The Supreme Court has held that the Indian tribes are not bound by the limitations of the United States Constitution, except to the extent that Congress imposes those standards on the tribes. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Talton v. Mayes*, 163 U.S. 376 (1896) (Fifth Amendment's requirement of grand jury indictment did not limit the authority of the Cherokee Nation to prosecute a person under its jurisdiction).

129. See *Morton v. Mancari*, 417 U.S. 535 (1974).

a) *Modern Indian Tribal Codes Are Not So Different from State and Federal Laws*

In *Ex parte Crow Dog*,¹³⁰ the Supreme Court held that because United States law was foreign to the Indians, Indians would be judged by an unfamiliar standard not created for them. Thus the Court ruled that it would be unfair to subject the Indians to United States law.¹³¹ Using the reverse rationale, the Court in *Oliphant* said that the same is true today when non-Indians are tried in the Indian courts.¹³²

The laws used in the tribal courts do not significantly differ from state laws, federal laws, and the laws of other tribes; non-Indians and nonmember Indians would recognize most of the criminal prohibitions and would not be subjected to unusual cultural standards if tried in these courts. In fact, most tribal codes are patterned after state and federal codes.¹³³ Tribal codes prohibit common criminal offenses, such as assault and battery, disorderly conduct, resisting lawful arrest, trespass, theft, breaking and entering, and illegal possession and purchase of alcohol.¹³⁴ Tribal codes are written in the same familiar, often identical, language as state and federal codes. The codes include sections outlining and defining civil procedure, criminal procedure, probate law, traffic law, employment rights, land and natural resources regulations, and housing and building ordinances.¹³⁵

These prohibitions are obviously not derived from ancient tribal laws. While some Indian tribes have continued to practice their ancient tribal laws in addition to formal tribal courts, non-Indians are often not even aware that these ancient practices exist. Some Indian tribes maintain a traditional system of government in which members of the tribe are subject to ancient tribal laws. "Hearings" are conducted by tribal elders and "sentences" are imposed on tribal members who breach the tribal laws. These "hearings" are often secret and never open to non-Indians.¹³⁶ There is no chance that non-Indians and

130. 109 U.S. 556 (1883).

131. *Id.* at 571.

132. *Oliphant*, 435 U.S. at 210-11.

133. Interview with John St. Clair, Chief Judge of the Shoshone and Arapaho Tribal Court, Fort Washakie, Wyoming and drafter of the Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation (June, 1989); Interview with Andrew Baldwin, In-House Counsel for the Northern Arapaho Indian Tribe, Ethete, Wyoming (June, 1989).

134. *E.g.*, The Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation, tit. VII (1988). Other criminal offenses prohibited are carrying a concealed weapon, extortion, receiving stolen property, fraud, forgery, and embezzlement.

135. *Id.*

136. Interview with a Seminole Indian at the Hollywood Indian Reservation in Broward County, Florida (Mar., 1989). For example, the Seminole Indians of Florida have such a system.

nonmember Indians will be subject to these ancient cultural standards.

Because the tribal codes used in tribal courts closely parallel state and federal codes, and because the ancient tribal laws are closely guarded and not imposed on non-Indians and nonmember Indians, there is little chance today that non-Indians and nonmember Indians will be subject to a cultural standard they are not accustomed to in tribal court.

*b) Nonparticipation in Tribal Government
Should Not Affect Criminal Jurisdiction*

The fact that non-Indians and nonmember Indians do not participate in tribal government and do not participate in the creation of tribal laws should not affect tribal criminal jurisdiction over non-Indians and nonmember Indians.

In *United States v. Mazurie*,¹³⁷ the Supreme Court said that "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" that the tribe has the power to regulate nonmembers on its reservation.¹³⁸ Similarly, lack of constituency does not limit criminal jurisdiction in the state and the federal courts. A person from New York who commits a crime in Florida cannot argue that Florida has no criminal jurisdiction over her because she can not vote in Florida's elections, hold office in Florida, or sit on a Florida jury. The simple fact that a person is not a member of the forum tribe is not a persuasive argument against holding that the tribes retain criminal jurisdiction over those who enter their reservations.

c) Indian Civil Rights Act Protection

The Supreme Court has held that the Indian tribes are not bound by the limitations of the Constitution, including the Bill of Rights, except to the extent that Congress imposes those standards on the tribes.¹³⁹ As a result of this ruling, some fear that cherished Bill of Rights' protections will not be extended to people tried in tribal courts. The Court in *Olipphant* saw this possibility, holding that since United States citizens are protected from unwarranted intrusions on personal liberty, the Indian tribes have given up their criminal jurisdiction over

137. 419 U.S. 544 (1974).

138. *Id.* at 557-58.

139. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Talton v. Mayes*, 163 U.S. 376 (1896) (Fifth Amendment's requirement of grand jury indictment did not limit the authority of the Cherokee Nation to prosecute a person under its jurisdiction).

non-Indians by submitting to the overriding sovereignty of the United States.¹⁴⁰

Congress responded to this fear by passing the Indian Civil Rights Act of 1968 (ICRA).¹⁴¹ The ICRA guarantees many constitutional rights, including the right to due process and equal protection, to all people charged in the tribal courts.¹⁴²

Since the ICRA is "a limited intrusion on tribal sovereignty" and "interpretation and application of the ICRA are largely matters for tribal institutions alone,"¹⁴³ some argue that the act has no teeth and the tribal courts can proceed as they wish without considering it. However, the federal courts have held that if a tribe has adopted Anglo-American procedures, and most, if not all of them have, the federal courts may apply a pure constitutional analysis when considering alleged violations of the ICRA.¹⁴⁴

In *Oliphant*, the Supreme Court noted that while the ICRA provided for "a trial by jury of not less than six persons,"¹⁴⁵ "the tribal court is not explicitly prohibited from excluding non-Indians from the jury even when a non-Indian is being tried."¹⁴⁶ However, since the Suquamish Tribe had adopted Anglo-American procedures in their tribal court,¹⁴⁷ a pure constitutional analysis could have been applied, instead of removing criminal jurisdiction over non-Indians outright. An example of how this analysis would work is presented in *Strauder v. West Virginia*.¹⁴⁸ In *Strauder*, a black criminal defendant was found guilty of murder by an all-white jury. The defendant complained that he had been denied his constitutional right to be tried by a jury of his peers, as blacks had been excluded from the jury. The Supreme Court held that the West Virginia court had violated the defendant's

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

141. COHEN (1982 ED.), *supra* note 17, at 666.

142. Gregory Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indians Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 DENV. U. L. REV. 761, 773-75 (1985); see also COHEN (1982 ED.), *supra* note 17, at 336.

143. COHEN (1982 ED.), *supra* note 17, at 669.

144. *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988); *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973). When it appears that constitutional standards will force an alien culture on the tribes, however, the federal courts have held that they will not apply constitutional standards as long as tribal laws are being applied uniformly by the tribal courts. See *Wounded Head v. Tribal Council*, 507 F.2d 1079, 1082-83 (8th Cir. 1975); *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973). In the case of a non-Indian tried in tribal court, this consideration would not apply because constitutional standards do not force an alien culture on non-Indians.

145. 25 U.S.C. § 1302(10) (1988).

146. *Oliphant*, 435 U.S. at 194 n.4.

147. *Id.* at 193-94.

148. 100 U.S. 303 (1880).

constitutional due process rights, and remanded the case to the state court for a new trial, with instructions that the defendant was to be tried by a jury of his peers. The Court did not remove the state's criminal jurisdiction over blacks.¹⁴⁹

If the tribal court in *Oliphant* had violated Oliphant's or Belgarde's constitutional rights by denying him trial by a jury of his peers, the tribal court should have been treated similarly to the state court in *Strauder*. The Supreme Court could have remanded the case to the tribal court with instructions to provide for non-Indians on the jury. While it is true that such a holding would infringe on tribal sovereignty, it would be less of an infringement than removing criminal jurisdiction over non-Indians completely.

Because the ICRA guarantees "certain procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians a few decades ago have disappeared."¹⁵⁰ Thus, removal of criminal jurisdiction over non-Indians and nonmember Indians in the tribal courts for fear of civil rights deprivations was an unnecessary response.

d) *Avoiding Tribal Jurisdiction*

The court in *Merrion v. Jacarilla Apache Tribe* noted that "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe."¹⁵¹ Thus the tribe has no jurisdiction over non-Indians or nonmember Indians until they enter the reservation. Non-Indians and nonmember Indians who choose to enter the reservation willingly submit to the jurisdiction of the home tribe. The *Merrion* Court held that "the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."¹⁵²

If non-Indians and nonmember Indians want to avoid some of the risks of tribal jurisdiction, they can stay off the Indian reservations. The reservations were created for the benefit and protection of the Indian tribes, as homes where they could reside in a traditional manner, unmolested by non-Indian society. This fact is forgotten by many non-Indians who have settled on Indian lands and by most non-Indians in general. While it is true that the United States government allowed non-Indians to settle in Indian Country and actually encour-

149. *Id.* at 312. This argument was originally introduced to the author by Lawrence R. Baca, an American Indian graduate of Harvard Law School and an expert in Indian law.

150. *Oliphant*, 435 U.S. at 212.

151. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

152. *Id.* at 147.

aged such settlement with legislation such as the Dawes Act,¹⁵³ this is no reason to reduce the tribal right to protect themselves against lawless non-Indian residents of Indian reservations.¹⁵⁴

3. *Criminal Jurisdiction over People with Significant Contacts*

If Congress does not wish to affirm the Indian tribes' criminal jurisdiction over all non-Indians and nonmember Indians who commit crimes in Indian Country, it could reduce the jurisdictional void and equal protection problems by recognizing the Indian tribes' criminal jurisdiction over those non-Indians and nonmember Indians who maintain significant contacts with the forum Indian reservation.

The definition of significant contacts would be an important question. Supporters of Indian sovereignty would argue that the definition should be left to the tribes. Others would argue that this gives the tribes too much discretion: if the tribes define significant contacts, the Court may as well recognize complete criminal jurisdiction over all who enter the reservation. A reasonable definition could be created by Congress. For example, significant contacts could be defined as purposeful availment of the benefits and protections of the forum tribe's law.¹⁵⁵ Residents and frequent visitors would easily fall into this category, while people who merely traverse the reservation would fall outside of the category.¹⁵⁶

With respect to equal protection, assuming the tribes lack criminal jurisdiction over non-Indians, the significant contacts standard would eliminate the chance that a nonmember Indian who has no contacts with the Indian reservation will be subject to the laws of the tribe solely because he or she is an Indian. People who live or work in the community and continuously benefit from the protections of the tribal laws could expect to be subject to the tribal laws. Indian people who have few or no contacts with the forum reservation could expect that

153. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-354 (1988)).

154. Allotted lands keep their Indian Country status. See COHEN (1942 ED.), *supra* note 1, at 8.

155. In *Merrion* the Court, in upholding a severance tax imposed by the tribe on non-Indian mining activities on the reservation, noted that non-Indian miners on the reservation "benefit from the provision of police protection and other governmental services." *Merrion*, 455 U.S. at 142.

156. To ensure that traffic laws are obeyed, some tribes have entered into agreements with the state highway patrol for concurrent arrest jurisdiction. People who violate the traffic laws on or off the reservation may be cited by either the state highway patrol or the Indian police. Non-Indians are heard in state court. Indians are heard in tribal court. The fines are paid to the Indian tribe if the violation occurred on the reservation and to the state if the violation occurred off the reservation. The Shoshone and Arapaho tribes of the Wind River Indian Reservation and the state of Wyoming have a concurrent arrest jurisdiction agreement for traffic violations.

they will be treated the same as non-Indians under *Oliphant*, as was decided in *Greywater v. Joshua*.¹⁵⁷

The jurisdictional void would similarly be reduced. Non-Indians and nonmember Indians who have significant contacts with the Indian reservation would know that because they have chosen to live or conduct business on the reservation they must follow the tribal laws. It is important to remember that the people who argued that the tribes lacked jurisdiction over them were all charged with breaking tribal laws. In no case was it alleged that the tribes were committing crimes against the criminal defendants in *Oliphant*, *Duro*, and *Greywater*. A request by the tribes that visitors obey their criminal codes while on the reservation is not a very tall order.

B. Solutions by the Indian Tribes

No matter what Congress and the federal courts do, the Indian tribes have several options available to them to protect their reservations from individuals, Indian and non-Indian alike, who choose to disobey tribal laws. There are at least three ways the tribes can protect themselves against the jurisdictional void. First, the tribes can expand their definition of "tribal member." Second, the tribes can decriminalize their tribal codes. Third, the tribes can exclude all nonmembers from their territory.

1. Tribal Expansion of the Definition of "Tribal Member" for Purposes of Criminal Jurisdiction

A decision that the tribes lack criminal jurisdiction over nonmember Indians will be difficult to enforce, because there are many standards used to determine who is and who is not a member of an Indian tribe. For enrollment purposes, an Indian can be racially a member of the tribe but not officially enrolled as a member. However, enrollment, or lack of enrollment, is not determinative of a person's status as Indian for purposes of federal criminal jurisdiction.¹⁵⁸ The modern test of Indian status for federal jurisdiction considers the degree of Indian blood and tribal or governmental recognition as an Indian.¹⁵⁹

Indian tribes have the power to determine their own tribal membership.¹⁶⁰ This is done by written law, custom, intertribal agreement,

157. 846 F.2d 486 (8th Cir. 1988).

158. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939).

159. *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846).

160. COHEN (1982 ED.), *supra* note 17, at 248; *see also* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Daniel Red Bird v. United States*, 203 U.S. 76 (1906) (*Cherokee Intermarriage Cases*); *Roff v. Burney*, 168 U.S. 218 (1897).

or treaty with the United States.¹⁶¹ Non-Indians have been adopted into tribes and have been considered Indians for purposes of criminal jurisdiction in Indian Country.¹⁶² The Indian tribes could expand their tribal rolls to include Indians and non-Indians who live in the community and participate in activities on the Indian reservation.

However, membership in an Indian tribe is a bilateral relationship. A member can terminate his or her membership at any time.¹⁶³ If the tribes did choose to expand their tribal rolls to include nonmembers who live in the community, the people affected would probably have to receive notice and have the opportunity to deny tribal membership. It is doubtful that a member who has accepted membership in the past could terminate his or her membership in response to being charged with a crime, however. It is within the power of the Indian tribes to treat members of the community as members of the tribe for purposes of criminal jurisdiction.¹⁶⁴

2. Decriminalization of Tribal Codes

The Indian tribes' civil jurisdiction is much broader and less restricted than tribal criminal jurisdiction.¹⁶⁵ It is settled law that Indian tribes have the authority to pass civil laws regulating non-Indians on the Indian reservation.¹⁶⁶ If the Court holds that the tribes lack criminal jurisdiction over nonmember Indians, the tribes can respond by decriminalizing their tribal codes and passing new laws defining numerous civil offenses. The tribes are not limited in civil remedies as they are in criminal remedies.¹⁶⁷ Thus civil laws imposing large fines on offenders could be implemented. The tribe has civil jurisdiction over nonmember Indians and non-Indians alike, so no one would

161. COHEN (1982 ED.), *supra* note 17, at 248; see *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904).

162. *Daniel Red Bird v. United States*, 203 U.S. 76 (1906).

163. COHEN (1982 ED.), *supra* note 17, at 22; see *Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879) (No. 14,891).

164. For some tribes, expanding the tribal roll would be quite unpopular. For tribes owning mineral and gas leases, for example, each member of the tribe is entitled to a per capita payment each month, representing his or her interest in the lease. The Shoshone and Arapaho tribes at Wind River have such an agreement. Adding tribal members means spreading the money from these oil and gas leases over a larger population. On Wind River this would be an unpopular decision. On the other hand, many tribal services, such as medical care, are distributed not by membership but by Indian status. Thus anyone who is Indian can go to the Indian Health Center and receive free treatment and care. These facts were observed by the author when he worked for Wind River Legal Services, Fort Washakie, Wyoming, during the summer of 1989.

165. COHEN (1942 ED.), *supra* note 1, at 382.

166. *Id.* at 253; see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

167. COHEN (1942 ED.), *supra* note 1, at 341-42.

escape these civil regulations. This would be a powerful and effective response to *Oliphant*.

3. *Exclusion of Nonmembers from Tribal Territory*

If all else fails, the tribes have the power and right to exclude all nonmembers from their territory.¹⁶⁸ This would be an extreme move, but if necessary the tribes could do it. Cohen, in his 1942 handbook, stated that "because the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect its integrity and order of its territory and the welfare of its members, it is an internal matter over which sovereignty is retained."¹⁶⁹

IV. *Conclusion*

Both Congress and the Indian tribes have remedies available to them that could be used to resolve the modern problems of criminal jurisdiction in Indian Country. The Court's ruling in *Duro* will clarify which path the Indian tribes or Congress should take in response to this difficult problem.

In taking remedial action, Congress should remember the following points: because tribal criminal jurisdiction over non-Indians has not been relinquished by treaty or removed by statute, that power remains with the tribes. The prevalence of non-Indian crime on the Indian reservations and the lack of prosecution on the part of the federal and state courts should be considered. Additionally, Congress should take into account the increasing availability of sophisticated tribal criminal justice systems now functioning on many reservations to deal with non-Indian criminal offenders. The ICRA provides many constitutional protections to non-Indians who would be tried in the tribal courts.

Finally, Congress should remember that the Indian reservations were originally set aside for use by the Indians. It is largely the United States government's fault that non-Indians have settled in Indian Country, and that Indian lands have been allotted and sold to non-Indians. Congress should remember that the non-Indians in *Oliphant* were people who had been charged with violations of the Indian tribal

168. *Id.* at 252. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Powers of Indian Tribes*, 55 Interior Dec. 14, 48-50 (1934); *Quecham Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976); *Otiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); 1 Op. Atty Gen. 465 (1821). There are two exceptions to this rule. The tribes cannot exclude nonmembers who hold federal patents in fee lands in the Indian Country. See also *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979), *rev'd on other grounds*, 450 U.S. 544 (1981). And the tribes must keep reservation roads constructed with federal funds open to the public. 25 C.F.R. § 162.8 (1980).

169. COHEN (1942 ED.), *supra* note 1, at 341-42.

codes. The tribes were not charged with any wrongdoing. The non-Indians in these cases were not strangers to the Indian reservation or its system of law enforcement; in fact, they lived there. However, these non-Indians knew that the Suquamish Tribe's jurisdiction over them was questionable, and took full advantage of this fact. Today, thanks to *Oliphant*, non-Indians know that practically no one has criminal jurisdiction over them on the Indian reservations. Therefore, Congress should take a close look at what the Supreme Court did in *Oliphant*, and take action on the Court's suggestions.

Addendum

Since the writing of this comment, the U.S. Supreme Court has ruled in *Duro v. Reina*.¹⁷⁰ Justice Brennan was joined by Justice Marshall in a respectable dissent which includes many of the arguments made in this comment. In this addendum, the practical results of *Reina* are discussed with some thoughts concerning possible solutions to the problems created by *Reina* and *Oliphant*.

The Supreme Court's decision in *Reina* is a further infringement upon Indian sovereignty. The decision in *Reina* is based upon *Oliphant*, which is heavily criticized above. This decision further extends the misguided logic found in *Oliphant*. The practical result of the *Reina* decision, as Justice Brennan explains in his dissent, is a legal jurisdictional void, in which Indian tribes, the federal government, and the states lack jurisdiction over nonmember Indians who commit criminal misdemeanors on Indian reservations.

The Indian tribes have several options with which to respond to *Reina*. One option is to request congressional acknowledgment, not delegation, of a tribes right to enforce criminal codes against nonmembers who enter Indian reservations. The legal jurisdictional void created by *Reina* adds to the already powerful argument for such congressional acknowledgment.

Another option is the decriminalization of the tribal codes. While decriminalization seems like a good option, such a move could open the door to a future Supreme Court decision, reminiscent of *Oliphant*, that such civil jurisdiction is inconsistent with the tribes' dependent status. Thus any move to decriminalize the tribal codes should be made with caution.

A third option available to the tribes is the option of exercising their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. While this could be somewhat complicated on reservations on which fee lands are held by nonmembers, exclusion of undesirable nonmembers could be very

170. 495 U.S. 676 (1990).

effective. Nonmembers of the tribe, upon action of the appropriate tribal authorities, could be banned from tribal lands forever. Such action would keep nonmember criminals off tribal lands, and would be an effective deterrent to crimes committed by nonmembers who wished to retain the privilege of visiting or residing upon tribal lands. A universal policy of excluding undesirable persons from tribal lands could be a powerful answer to the problems created by the *Reina* and *Oliphant* decisions.

Finally, in order to punish nonmember offenders, Indian tribes could enter into reciprocal agreements with the states and other tribal governments for prosecution of nonmembers who commit crimes on their reservations. Thus a non-Indian could be prosecuted for a crime committed on the forum reservation in state courts, and a nonmember Indian could be prosecuted for a crime by his or her own tribe. Each of these options is available to the Indian tribes as possible solutions to the jurisdictional void problems created *Oliphant* and *Reina*.