American Indian Law Review

Volume 17 | Number 1

1-1-1992

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DE NOVO REVIEW: AN ALTERNATIVE TO STATE AND FEDERAL COURT JURISDICTION OF NON-INDIAN MINOR CRIMES ON INDIAN LAND

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I. Introduction

In 1973, two non-Indians were arrested by Madison Reservation tribal police during the Chief Seattle Days celebration. Those arrestees later faced criminal charges in the Suquamish Indian Provisional Court.[1] In 1978, the United States Supreme Court on certiorari in *Oliphant v. Suquamish Indian Tribe*[2] held that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians."[3] Therefore, for minor crimes such as recklessly endangering another person or injuring tribal property, as in *Oliphant*,[4] jurisdiction will fall to the state or federal courts.[5] This note will show that the rule established in *Oliphant* — denying tribal courts jurisdiction over non-Indian minor crimes — is overbroad and should be replaced with a system of de novo review. De novo review allows Indian[6] courts to retain jurisdiction over minor criminal offenses without denying constitutional protection to non-Indian defendants. Additionally, at least in part, the historic pattern of subordination of the American Indian race will be reversed.

II. American Indian Criminal Jurisdiction Generally

A. A Preeminent Role for Congress

The United States Constitution's Indian Commerce Clause provides that Congress has the right to "regulate commerce . . . with the Indian

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1. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

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

3. *Id.* at 212.

4. *Id.* at 194.

5. State court jurisdiction of these minor crimes can be obtained through a special vote by Indians provided for in 25 U.S.C. § 1321(b) (1988). In the absence of the tribal election in § 1321(b), federal courts will maintain their jurisdiction over all non-Indian crimes. *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

6. I have used the traditional terms "American Indian" and "Indian" to be consistent with the majority of current literature. *See generally* ROBERT N. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN (1983). See also the July-August 1986 issue of the *American Indian Law Newsletter*, and volume 14 of the *American Indian Law Review*.

tribes."[7] In *Lone Wolf v. Hitchcock*,[8] the United States Supreme Court described the preeminent power of Congress in Indian matters in a land cessation case involving the Kiowa, Comanche, and Apache tribes. The Court held that Congress has "plenary authority" over tribal relations not subject to control by the judicial department.[9] This broad rule has been eroded in modern cases which give at least a limited role to the Court.[10] An example is *Santa Clara Pueblo v. Martinez*,[11] a case which involved a suit by an Indian against her own tribe in a dispute over a tribal ordinance. The Supreme Court established a modern balance of power when it held that Congress' authority over Indian issues is "extraordinarily broad," and the Court's role is "correspondingly restrained."[12]

With the dominant role held by Congress and increasing involvement by the Court, the authority of the federal government over Indian tribes has varied in manner from deferential to paternal. The deferential approach is illustrated in *United States v. Wheeler*,[13] a collateral estoppel case involving a tribal court criminal judgment and a subsequent federal district court indictment arising out of the same incident. The Supreme Court held that "until Congress acts, the tribes retain their existing sovereign powers."[14] In other cases, however, the deferential attitude shifts to a more restrictive, prejudicial approach. The Court in *Oliphant*[15] defined tribal power negatively and more narrowly when it held that Indian tribes "are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with [Indian tribe] status.'*"[16]

B. Major and Minor Crimes

The legal authority of American Indian tribes described in *Wheeler* often is referred to as "quasi sovereign."[17] That concept is illustrated in the area of tribal criminal jurisdiction on reservation land. For the

7. U.S. CONST. art. I, § 8, cl. 3.

8. 187 U.S. 553 (1903).

9. *Id.* at 565.

10. *See generally* Robert N. Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434 (1981). The author maintains that the Burger Court replaced established Supreme Court Indian doctrine when it allowed increased state court jurisdiction over tribal matters.

11. 436 U.S. 49 (1978).

12. *Id.* at 72.

13. 435 U.S. 313 (1978).

14. *Id.* at 323.

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

16. *Id.* at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)) (emphasis supplied).

17. *See generally id.*; Brendale v. Confederated Tribes, 492 U.S. 408, 425 (1989); Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890 (1986).

purposes of this note, jurisdiction can be divided into two categories: major crimes and minor crimes. Within these two categories, there are policies that grant jurisdiction depending on whether the alleged criminal is Indian or non-Indian. Legislation by Congress and a series of Supreme Court cases have defined the authority of tribal courts in these areas.

For major crimes committed by Indians, Congress gave the federal courts jurisdiction in the Indian Appropriations Act of 1885.[18] The amended version of the Act gives the federal courts jurisdiction over crimes such as murder, manslaughter, kidnaping, rape, assault, arson, burglary, robbery, and larceny when committed by Indians on reservations.[19] The Supreme Court declared this statute constitutional in *United States v. Kagama*,[20] where a member of the Hoopa Valley Indian Reservation was accused of killing another Indian.[21] The Court held that because of Indian "weakness and helplessness . . . there arises the duty of protection, and with it the power" for Congress to give jurisdiction over major crimes to the federal courts.[22]

In contrast, for major crimes committed by non-Indians against non-Indians on Indian land, jurisdiction rests with state courts, not federal. In *United States v. McBratney*,[23] a non-Indian murdered another non-Indian on a Utah reservation. The Court held that the state of Colorado had jurisdiction over its "own citizens and other white persons" even with crimes committed on the Ute Reservation.[24] Therefore, the tribe was denied jurisdiction and the accused was tried in the state court.[25]

For minor crimes committed on Indian land, jurisdiction also depends on whether the alleged criminal is Indian or non-Indian. For those crimes committed by Indians, tribal courts have jurisdiction over the accused. The federal Crime and Criminal Procedure Act provides that courts of the United States do not have jurisdiction over "any offense in the Indian Country [which] has been punished by the local

18. Indians Appropriations Act, chs. 341, 362, § 9, 23 Stat. 385 (current version at 18 U.S.C. § 1153 (1988)). For a more complete discussion of the complexities of criminal jurisdiction, see generally Paul S. Volk, Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction over Crimes by and Against Reservation Indians*, 20 NEW ENG. L. REV. 247, 250-54 (1985).

19. *Id.*

20. 118 U.S. 375 (1886).

21. *Id.*

22. *Id.* at 384.

23. 104 U.S. 621 (1881).

24. *Id.* at 624. This case was followed in Ray v. Martin, 326 U.S. 496 (1946), where the Court stated that there is nothing that "requires a holding that offenses by non-Indians against non-Indians [in] Salamanca [a city in Allegheny Reservation] are beyond New York's power to punish." *Id.* at 501.

25. *McBratney*, 104 U.S. at 624.

law of the tribe."[26] For example, when a tribe member grazes her sheep on land leased by another member, the tribe, not the federal court, will have jurisdiction over the dispute.[27] In addition, section 1321(b) of the Indian Civil Rights Act provides that states have criminal jurisdiction over Indian crimes only with the "consent of the Indian tribe occupying the particular Indian Country" in which the crime was committed.[28] Therefore, with jurisdiction of major crimes in federal and state courts — absent tribal consent to state court adjudication — minor crimes by Indians default to tribal jurisdiction.

Minor crimes by non-Indians, however, are not within tribal jurisdiction. In *Oliphant*, the United States Supreme Court heard the case of a non-Indian charged with assaulting a tribal officer and resisting arrest.[29] The issue for the Court was whether Indian tribal courts had criminal jurisdiction over non-Indians.[30] The Court held that they do not.[31]

The majority in *Oliphant*, in an opinion written by Justice Rehnquist, cited three justifications for denying tribal jurisdiction over non-Indian crimes: implied congressional intent, the Treaty of Point Elliot, and the Court's view that jurisdiction was inconsistent with the status of Indian tribes. On the issue of intent, the Court acknowledged that Congress never expressly forbade Indian tribes criminal jurisdiction over non-Indians;[32] rather, Congress "expressly confirmed" that unspoken assumption in House and Senate committee reports.[33] By way of illustration, the Court cited the unpassed Western Territory Bill in which Congress attempted to establish United States laws and protection for persons traveling through and residing in Indian Country. In that bill, Congress' concern was that there were no "fixed laws" or "competent tribunals of justice" that would provide peace in Indian Country without United States protection.[34] The Court also noted a 1960 Senate report concerning trespasses by non-Indians on Indian land. That report asserted that state law was needed to prosecute non-Indian trespassers on Indian land because "*Indian tribal law is enforceable against Indians only; not against non-Indians.*"[35]

26. 18 U.S.C. § 1152 (1988).
27. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).
28. 25 U.S.C. § 1321(b) (1988).
29. *Oliphant* 435 U.S. at 194.
30. *Id.* at 195.
31. *Id.*
32. *Id.* at 204.
33. *Id.* at 204-05.
34. H.R. REP. No. 474, 23d Cong., 1st Sess. 18 (1834). The Western Territory Bill was submitted to Congress several times but was never passed. *See Oliphant*, 435 U.S. at 202 n.13.
35. *Id.* (quoting S. REP. No. 1686, 86th Cong., 2d Sess. 2-3 (1960)) (emphasis supplied).

The Court in *Oliphant* also cited the Treaty of Point Elliot[36] as evidence that Congress did not intend for Indians to have jurisdiction over minor crimes committed by non-Indians on Indian land.[37] In the original draft of the treaty was a clause providing that "[i]njuries committed by whites towards [Indians] [are] . . . to be tried by the Laws of the United States."[38] However, that clause was deleted in the final text. The Court stated, nonetheless, that the provision in which the Indians promised to be "friendly" with all United States citizens, "could well have been understood as acknowledging exclusive federal criminal jurisdiction over non-Indians."[39]

The Court's final justification was that tribal jurisdiction was "'*inconsistent with their status.*'"[40] As evidence of the Indians' subordinate status, the Court noted that tribes were under the territorial sovereignty of the United States and had lost the power to sell their property to foreign nations.[41] Therefore, the Indian tribes had given up their power to try non-Indian citizens of the United States. According to the majority, a principle obvious a century ago "should be no less obvious today."[42]

III. The Competing Forces of Indian Jurisdiction of Non-Indian Minor Crimes on Indian Land

A. Indian Subordination

The conquest and subsequent subordination of American Indians, the uneven development of the tribal judicial system, and problems of non-Indian crime on reservations are three competing forces that shape the issue of tribal courts' criminal jurisdiction. The first of these forces is the historic racial subordination and the peculiar legal status of American Indian tribes. The Supreme Court speaks of the Indian tribes as "distinct independent political communities"[43] and "quasi sovereigns."[44] However, this elevated language fails to accurately characterize the American Indian-United States relationship. An attitude of dominance and superiority marks much of the United States' associations with the Indian tribes. Moreover, that prejudice has reached the force of law in Supreme Court decisions in Indian cases.

36. Treaty of Point Elliott, Jan. 22, 1855, U.S.-Dwamish et al., 12 Stat. 927 (1855).
37. *Oliphant*, 435 U.S. at 207.
38. *Id.* at 207 n.16.
39. *Id.*
40. *Id.* at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)) (emphasis supplied).
41. *Id.*
42. *Id.* at 210.
43. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
44. *See supra* note 16 and accompanying text.

The principal Indian doctrine of the United States was outlined in a trilogy of early nineteenth-century cases written by Justice Marshall. In the first of these, *Johnson v. McIntosh*,[45] a case that denied the right of Indian tribes to sell their tribal lands to foreign nations, Marshall articulated the doctrine of discovery and conquest. Noting that most European nations approved of the discovery doctrine, Marshall held that ultimate title to United States territory was acquired by conquest subject only to the "Indian title of occupancy."[46] Consequently, as a colonial power the United States, not Indian tribes, had the exclusive right as the discoverer to transfer title to reservation lands.[47]

Not only did the conquerors have exclusive power by discovery but the only limit to that control was self-imposed.[48] In order to ensure that the conquering nation would exercise self-control, Marshall held that Indians should not be "wantonly oppressed."[49] An example of the Supreme Court's attempt to avoid oppressing the conquered tribes was in *Worcester v. Georgia*.[50] In this case, Marshall spoke of the quasi-sovereignty of Indian tribes, a notion that tribes retained their "original natural rights, as undisputed possessors of the soil."[51] Therefore, the state of Georgia had no authority to prevent missionaries from entering Cherokee land because only the federal government, not the state, could limit the rights of the tribe. The result of *Worcester* is that tribes have the power of sovereigns free of state control subject only to the federal government.

The final concept of the Marshall trilogy is the resulting guardian-ward relationship between the United States and the American Indian. In *Cherokee Nation v. Georgia*,[52] where the state of Georgia enacted statutes nullifying all laws, ordinances, and regulations of the Cherokee tribe, Marshall again spoke for the Supreme Court. The Court held that since the tribes "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father," the relationship of the federal government to the Indians was that of a "ward to his guardian."[53] This role of steward created a "trust relationship"[54] with the federal government as the conqueror and subsequent protector of the Indian tribes.

45. 21 U.S. (8 Wheat.) 583 (1823).
46. *Id.* at 592.
47. *Id.* at 584.
48. *Id.* at 589.
49. *Id.*
50. 31 U.S. (6 Pet.) 515 (1832).
51. *Id.*
52. 30 U.S. (5 Pet.) 1 (1831).
53. *Id.* at 17.
54. *See generally* PRICE & CLINTON, *supra* note 6, at 168-69.

The Marshall trilogy set the foundation for United States-American Indian relations, and the policy of quasi-sovereignty has survived in the most recent Supreme Court cases.[55] That policy has led at least one commentator to contend that, on the issue of tribal jurisdiction over non-Indians, "[r]acism is not present here — Indian tribes are political, not race-based, entities."[56] Indeed, in the abstract, the Supreme Court can be viewed as a judicial "great father" protecting the wants of its ward. The Marshall theories, however, cannot be understood fully without looking at the attitudes of the conquering country toward the race of the conquered tribes.

Examples of racial categorization coupled with manipulative and heavy-handed control fill the writings of the early nineteenth century. For example, in 1803 President Jefferson, one of the great fathers of the United States, detailed a plan to acquire land from American Indians. In order to quickly purchase territory for white expansion, the government was to set up trading houses to sell goods to Indians.[57] Jefferson noted that "influential individuals among [the Indians] run in debt, [and] we observe that when the debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands."[58] Jefferson acknowledged that this would eventually lead to the termination of the Indians' history, but "they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only."[59]

In 1848, William Medill, Commissioner of Indian Affairs, expressed an even more conscious attitude of supremacy when he compared Indians to the white "superior race."[60] He reported that Indians were inveterately wedded to "savage habits."[61] Moreover, it was Medill's opinion that, except in rare instances, an Indian could be brought no "farther within the pale of civilization than to adopt its vices[,] under the corrupting influences of which, too indolent to labor, and too weak to resist, he soon sinks into misery and despair."[62]

In the late nineteenth century, white superiority and Indian subordination were still official public policy. In 1883, Secretary of the

55. *See supra* note 16 and accompanying text.

56. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 112 (1987). The author, former staff attorney for the Native American Rights Fund, presents an insightful and progressive analysis of American Indians in the United States constitutional system.

57. Letter from President Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 22 (Francis P. Prucha ed., 1990).

58. *Id.*

59. *Id.* at 23.

60. *Id.* at 77.

61. *Id.*

62. *Id.*

Interior Henry Teller spoke of the "savage rites and heathenish customs" of the tribes.[63] The Secretary condemned the Indians' sun dance, scalp dance, marriage laws, medicine men, and tribal burial rites.[64] His recommendations for abolition of the Indian practices subsequently became law when Congress created the Court of Indian Offenses.[65]

Not only was Indian culture denigrated, but Indians were not allowed to vote. In *Elk v. Wilkins*,[66] the Supreme Court denied an Indian who had disassociated himself from his tribe the right to vote in federal elections. The Court noted that the Fifteenth Amendment guaranteed suffrage should not be denied "on account of race, color, or previous condition of servitude."[67] However, the Court did not enfranchise John Elk because he had not in any way been "recognized or treated as a citizen" for the purposes of the Fifteenth Amendment.[68]

To see the doctrine of discovery and the corollary principle of semi-sovereign status for Indian tribes absent a historic context is to miss the reality of United States' subordination of its native people. Indeed, the abstract principles of conquest and dependent nation status preserve in United States law "the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples."[69] Despite Marshall's vision for the American Indian, it was the Supreme Court in 1901 that spoke most realistically of the sovereignty of Indian tribes. Justice Brown held that "the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."[70]

B. An Undeveloped Indian Criminal Justice System

Another of the competing forces in determining American Indian criminal jurisdiction is the wide variation in quality of tribal courts. As the Court in *Oliphant* noted, there is a dearth of settled Indian law and competent courts.[71] Indeed, tribal courts vary from dispute resolvers enforcing "unwritten tribal rules and customs" to modern tribal courts governed by the Indian Civil Rights Act[72] and federal regulations concerning the appointment and qualifications of tribal court judges.[73] The Court acknowledged that "some Indian tribal court

63. *Id.* at 160.
64. *Id.* at 160-61.
65. *See generally* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES (1966).
66. 112 U.S. 94 (1884).
67. U.S CONST. amend. XV.
68. *Elk*, 112 U.S. at 99. The Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973bb-2 (1988), gave the right of suffrage to Indians.
69. WILLIAMS, *supra* note 6, at 317.
70. Montoya v. United States, 180 U.S. 261, 265 (1901).
71. Oliphant v. Suquamish Tribe, 435 U.S. 191, 202 (1978).
72. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1988).
73. Volk, *supra* note 18, at 256.

systems have become increasingly sophisticated and resemble in many respects their state counterparts."[74] However, even with these improvements the most sympathetic writers admit that some Indian courts administer little more that rural justice.[75]

The undeveloped nature of many Indian courts has been noted by commentators on the American Indian tribal judiciary. For example, Indian judges are often held in relatively low status, and very few have legal training.[76] In most cases, tribal appellate systems are generally poor; in some courts, no appeal is available.[77] Further, a recent survey of attorneys in states with large Indian populations found that a majority of attorneys had a low opinion of tribal courts.[78]

In 1967, a Senate subcommittee reached a similar conclusion in a report submitted to the *Congressional Record*. The subcommittee cited a survey of 2000 questionnaires given to a broadly representative group of persons familiar with Indian affairs. The questions dealt with the lack of constitutional protections for defendants in tribal courts.[79] The results of the investigation showed that substantive and political rights were denied "not from malice or ill will . . . but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system."[80]

In contrast to some Indian courts that may offer little more than self-help solutions to disputes,[81] other Indian tribes have highly developed legal systems. Perhaps the most notable is the Navajo Nation. The Judicial Branch of the Navajo Nation is organized at the trial level into five family courts and seven district courts with three circuit judges. All of these courts have the right of appeal to a three-member Navajo Supreme Court.[82] In the 1990 fiscal year, the district courts handled 43,422 civil cases, 39,872 criminal cases, 245 juvenile probation

74. *Oliphant*, 435 U.S. at 211-12.

75. Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401 (1985).

76. *Id.* at 1407.

77. *Id.*

78. Jesse C. Trentadue, *Tribal Court Jurisdiction Over Collection Suits by Local Merchants and Lenders: An Obstacle to Credit for Reservation Indians?*, 13 AM. INDIAN L. REV. 1, 47 (1985).

79. 113 CONG. REC. 13,473 (1967).

80. *Id.*

81. *See generally* Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). *Dry Creek* was a land access dispute between the owner of a hunting lodge and the Arapahoe and Shoshone Indians. The Tribal Council advised the Indians to shut down the hunting lodge. The Court of Appeals held that self-help was not a legitimate method of determining constitutional questions.

82. JUDICIAL BRANCH OF THE NAVAJO NATION, ANNUAL REPORT: OCTOBER 1989-MARCH 1990 (1990) (organizational chart).

cases, 899 family court cases, and a total of 721 children cases.[83] The actual expenditures of the Navajo judiciary for the 1990 fiscal year were over $700,000. The expenses varied from salaries to office supplies, jury and witness fees, and education and training programs.[84]

The policies that control the Navajo justice system are at once historical and progressive. As stated by Chief Justice Tom Tso, "We have confronted different peoples and ways, and have endured by adapting the new in such a way that it becomes Navajo."[85] Evidence of the dynamic and powerful role of the Navajo judiciary is the recent decision by the Navajo Tribal Council to grant the Navajo Supreme Court full authority to rule on the legitimacy of Navajo legislative and executive acts.[86] Judicial review was the final result of an eleven-year struggle between the branches of the Navajo tribe. The Council decided that if the Navajo Nation "is to move forward toward the reality of a three-branch form of government[,] the Navajo Supreme Court must be the final law on Indian land."[87]

C. *Non-Indian Minor Crime on Indian Land*

The competing forces of constitutional theory and the irregular development of Indian tribal judicial systems must also be viewed in the context of minor crimes on Indian land. The Court in *Oliphant* noted the "prevalence of non-Indian crime on today's reservations."[88] Similarly, the problem of non-Indian crime has been noted in congressional testimony, court opinions, and newspaper accounts, and is illustrated by the facts of *Oliphant* itself.

In congressional hearings on reform of the Federal Criminal Laws, Colville and Makah Indian tribal representatives from the state of Washington testified concerning the problem on non-Indian crime. The Indians spoke of "the willful disobedience of tribal hunting and fishing laws,"[89] and noted that "speeding, reckless driving, and automobile accidents [were] increasing at an alarming rate."[90] The chairman of the Makah Tribe testified that law enforcement had ceased on the reservation because the county sheriff was based seventy miles from

83. *Id.* at 6-8.

84. *Id.* at 36.

85. Tom Tsó, *The Tribal Court Survives in America*, 25 JUDGES' J. 22, 55 (1986).

86. Judicial Reform Act of 1985, Navajo Tribal Council Resolution CD-94-85 (Dec. 4, 1985) (codified at NAVAJO TRIB. CODE tit. 7 (Supp. 1984-1985); Tom Tso, *Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231 (1989).

87. Judicial Reform Act of 1985, Navajo Tribal Council Resolution CD-94-85 (Dec. 4, 1985) (codified at NAVAJO TRIB. CODE tit. 7, at 104 (Supp. 1984-1985)) (note in subchapter 6).

88. Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978).

89. *Hearings on S. 1 and S. 1400 Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 5888, 5890 (1973).

90. *Id.* at 5898.

the reservation and did not have sufficient means to enforce the law on Indian land.[91]

Courts familiar with the problems of non-Indian crime on reservations also note the difficulties of enforcing Indian law. For example, the Ninth Circuit Court of Appeals in *Oliphant v. Schlie*[92] observed that federal enforcement is difficult because "prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses."[93] The federal prosecutors' hesitation is attributed to crowded dockets, the long distances that witnesses and officers must travel, and cases that likely will result in a small fines or suspended sentences.[94] In a newspaper interview, the United States Attorney of Butte, Montana, agreed with that opinion. He said that denying tribal jurisdiction created a "vacuum" of law enforcement on the reservation[95] because neither the Federal Bureau of Investigation nor his office could handle the caseload of non-Indian crimes committed on Indian reservations.[96]

The facts of *Oliphant* are an additional illustration of the problem of non-Indian crime on tribal land. In August 1973, on the Madison Indian Reservation, thousands of people were expected for the Chief Seattle Days celebration. To control the expected influx, tribal authorities requested law enforcement assistance from the local county and the Bureau of Indian Affairs (BIA).[97] For the entire weekend, the county provided one deputy for eight hours of service.[98] The BIA declined all help and responded that the Indians "would have to provide their own law enforcement out of tribal funds and with tribal personnel."[99] Subsequently, tribal police arrested Oliphant at 4:30 a.m. on August 19 and later charged him with "assaulting a tribal officer and resisting arrest."[100] The same night, Belgarde, after a high-speed race that ended only when he collided with a tribal police vehicle, was arrested and charged with tribal criminal violations.[101]

The dilemma of tribes with no criminal jurisdiction over non-Indian minor crimes is summarized in the Ninth Circuit decision, which was overturned by the Supreme Court in *Oliphant*. The Ninth Circuit noted

91. *Id.*

92. 544 F.2d 1007, 1014 (9th Cir. 1976).

93. Volk, *supra* note 18, at 274 n.221 (quoting Steven M. Johnson, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291, 293 (1978)).

94. *Id.*

95. *Id.* at 296.

96. *Id.* (quoting the BILLINGS GAZETTE (Billings, Mont.), Mar. 7, 1978, at 8A).

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

98. *Id.*

99. *Id.*

100. Oliphant v. Suquamish Tribe, 435 U.S. 191, 194 (1978).

101. Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976) (citing tribal Code).

that federal law is not designed to cover minor offenses.[102] Furthermore, local courts are reluctant to prosecute non-Indians for minor offenses[103] because of difficulties with state process on reservations, unclear jurisdictional divisions, and the fact that the crimes do not affect the non-Indians' society but that of the Indian tribe.[104] As a result, the "dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows."[105]

IV. De Novo Review Balances the Competing Forces in Criminal Jurisdiction of Non-Indians on Indian Land

A. De Novo Review — Generally

De novo review has been defined as "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered."[106] In England, new trials were granted as part of the common law as early as 1665.[107] Since then, courts have used new trials "as a measure of correcting the mistakes and relieving against the misconduct of juries."[108] In the United States, de novo review was found constitutional in *Ludwig v. Massachusetts*.[109] The Supreme Court held that it is not unconstitutional for a state to give "a defendant two opportunities to avoid conviction and secure an acquittal."[110]

B. De Novo Review Applied in Other Systems

1. Arbitration with De Novo Review

Compulsory arbitration with an option for de novo review has been used as an alternative form of dispute resolution. The success of some of these systems point to the advantage of de novo review as a collateral check on forums outside the state and federal judicial system. In the United States District Court for the Eastern District of Pennsylvania, a compulsory system of arbitration for civil money damage disputes under $50,000 handled 4010 cases from February 1, 1978, through

102. *Id.* at 1013.
103. *Id.*
104. *Id.*
105. *Id.* at 1014 (citing Brief For Respondent).
106. BLACK'S LAW DICTIONARY 435 (6th ed. 1990) (citing Farmingdale Supermarket, Inc. v. United States, 336 F. Supp. 534, 536 (D.N.J. 1971)).
107. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2801 (1973).
108. Aetna Casualty & Sur. Co. v. Yeatts, 122 F.2d 350, 353 (4th Cir. 1941).
109. 427 U.S. 618 (1976).
110. *Id.* at 632.

June 30, 1982.[111] Either party had the option of requesting de novo review in the federal district court. However, during those fifty-three months, only sixty of the 4010 cases required a court trial.[112]

A similar result was found in Cincinnati, where a local court rule directs that all cases in which the amount in controversy is less than $10,000 be referred to a panel for compulsory arbitration."[113] The litigants have the option of a de novo review if dissatisfied with the results. However, in 85% of the cases, the arbitration decision was accepted and the case was never tried.[114] Even though only 1.5% to 15% of the cases in these two systems required a formal trial, de novo review allowed a complete alternative to a dissatisfied defendant. If either party "demands a trial de novo . . . the case is treated as if it had not been arbitrated."[115]

2. Municipal Two-Tier Systems

The two-tier bench court system which was declared constitutional in *Ludwig* is another practical application of de novo review. In Massachusetts, a system of municipal courts have original jurisdiction of criminal offenses with potential sentences of not more than five years.[116] As with compulsory nonbinding arbitration, if the defendant is dissatisfied with the outcome of the first proceeding, he can invoke his constitutional right to a jury trial by "appealing" for a trial de novo.[117] The Massachusetts Supreme Court, in *Lyden v. Commonwealth*,[118] noted with approval a study of the system showing that in a six-month period over 1751 complaints were received and only 158, or about 9%, were tried before a jury.[119] Moreover, although infrequently used, the state court system provided full constitutional protection with no prejudice to either party. At the same time, the municipal court was allowed to deal directly and efficiently with local crime.

C. De Novo Review Helps Reverse the Historic Subordination of the American Indian Tribes

In *McIntosh*, *Worcester*, and *Cherokee Nation*, Justice Marshall established the doctrines of discovery and quasi-sovereignty.[120] The

111. Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, A.B.A. J., Jan. 1983, at 64, 64.

112. *Id.* at 64-65.

113. Justin A. Stanley, *Minor Dispute Resolution*, A.B.A. J., Jan. 1982, at 62, 64.

114. *Id.*

115. Broderick, *supra* note 111, at 64.

116. Peter J. Ennis, Note, *Lyndon v. Commonwealth: Double Jeopardy and the De Novo System—Challenging the Sufficiency of the Evidence Presented at the Original Trial*, 16 NEW ENG. L. REV. 303, 308 (1981) (citations omitted).

117. *Id.*

118. 409 N.E.2d 745 (Mass. 1980).

119. *Id.* at 748 n.5.

120. *See supra* text accompanying notes 45-54.

history of subordination toward the American Indian, however, is inextricably mixed with these principles. Allowing tribal court jurisdiction with de novo review for minor crimes on Indian land would, in part, reverse the history of subordination of American Indians. At the same time, there would be no compromise of United States constitutional protection and no additional burden on tribes that do not choose to assert jurisdiction over non-Indian minor crime. As noted by the Ninth Circuit in *Oliphant*,[121] without tribal control of non-Indian minor crimes, traffic offenses, trespasses, hunting and fishing violations, larcenies, and simple assaults often go unpunished. If Indian justice systems have the power to prosecute these offenses, the only limit on the prosecutors and courts will be the tribe's political and judicial resources.

A corollary to allowing de novo review is that tribes will not be required to prosecute non-Indian minor crimes if they do not so choose to do so. Some tribes are concerned that de novo review would "impose unmanageable financial burdens on tribal governments."[122] However, with de novo review Indian tribes would be able to deal with this problem in the way that is best suited to their needs and resources. Tribes could consent to state jurisdiction pursuant to section 1321(b) of the Indian Civil Rights Act [123] and be free of all responsibility for non-Indian crime. Alternatively, the tribes could assume jurisdiction and seek to control minor crimes on Indian land subject to a second trial in state or federal court.

Because a non-Indian defendant will have the right to a second trial in a state or federal court with no prejudice to either party,[124] the protections of the federal constitution will not be sacrificed. As suggested by Senator Ervin, the second trial would determine if "the appellant was deprived of any right or privilege conferred on him by the Constitution."[125] In addition to that protection, a non-Indian would have the opportunity in every case to have his guilt determined by the courts and the laws of the United States.

If we believe that justice cannot be served on minor crimes in American Indian courts with a system of de novo review, we are irrationally continuing the historic subordination and racial categorization of Indian tribes. With de novo review, Indian tribes can be given the opportunity to deal directly and efficiently with minor crime on Indian land, and non-Indian defendants will receive all the protections of federal and state constitutions.

121. Oliphant v. Schlie, 544 F.2d 1007, 1014 (9th Cir. 1976).
122. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978).
123. *See supra* note 4 and accompanying text.
124. *See supra* notes 111-14 and accompanying text.
125. 113 CONG. REC. 13,475 (1967).

D. De Novo Review: A Solution to Undeveloped Tribal Justice Systems

The problems often noted with the Indian justice systems, such as disregard for written court rules and tribal politics influencing judicial decisions,[126] may at least partially be alleviated by a system of de novo review. The curative effect of de novo review was noted by the Supreme Court in *Ludwig*. It reasoned that it is possible for the first proceeding to be unfair. However, the defendant may protect himself by insisting on a new trial.[127] In a similar proposal for de novo review made during hearings concerning Legislation to Protect the Constitutional Rights of the American Indian,[128] Senator Ervin noted during hearings that a new trial would be in the same manner and under the same rules as if the criminal action had been in the United States district court.[129] As a consequence, the non-Indian defendant would receive all the protections offered by the state or federal constitutions.

Even though the defendant would be protected by state and federal constitutions, Indian courts would be allowed either to retain their tribal form of justice or adapt to more rigorous judicial standards. In *Ludwig v. Massachusetts*, the court discussed the indirect effect of a second jury trial on the initial proceeding. Justice Blackmun stated that "the right to a [new] jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely."[130] This ancillary effect of de novo review was noted by Senator Ervin, who claimed that "[s]uch an appeal would not only protect the rights of those convicted by tribal courts, but would improve the quality of justice rendered by tribal courts."[131]

E. Decreased Problems of Non-Indian Minor Crimes

In addition to encouraging improvements in tribal courts, de novo review will help relieve the unmanageable burdens placed on federal or state authorities in controlling non-Indian minor crime on Indian land. For example, if a non-Indian defendant is tried in a tribal court, the possibility of a new trial at the state or federal level may be unnecessary or unattractive. If the accused is found not guilty, the issue will be closed and there will be no need for a federal or state proceeding. In the alternative, if the defendant is convicted, the possibility of a new trial may be an unattractive option for two reasons.

126. Trentadue, *supra* note 78, at 36, 40.

127. Ludwig v. Massachusetts, 427 U.S. 618, 626 (1976).

128. 113 CONG. REC. 13,473 (1967).

129. *Id.* at 13,474.

130. *Ludwig*, 427 U.S. at 626 (citing Duncan v. Louisiana, 391 U.S. 145, 158, *reh'g denied*, 392 U.S. 947 (1968)).

131. 113 CONG. REC. 13,475 (1967).

First, if the crime is relatively minor, the penalty light, and the evidence against the defendant strong, he may decide to forego the second trial rather than risk an additional prosecution and a fairly certain second conviction. In a situation involving a more serious offense, a defendant may also choose to avoid state or federal court because of the possibility of a harsher sentence.[132] The combination of these checks on the use of a de novo trial will relieve the overburdened state and federal criminal systems.[133]

De novo review is more economical for state and federal systems, and will help answer the Indians' concerns with minor crimes on reservation land. Tribes such as the Navajo, the Red Lake of Minnesota, Warm Springs of Oregon, Menominees of Wisconsin, and the Metlakatlas of Alaska, which have "legal systems and organizations 'functioning in a reasonably satisfactory manner,'"[134] may chose to assume responsibility for non-Indian crime. With jurisdiction over minor non-Indian crimes, tribes can enforce laws with their own police and judicial systems. This tribal control will give Indians the opportunity to prosecute minor crimes as efficiently as their systems will allow.

V. Conclusion

By denying Indian tribes the power to try and to punish non-Indian minor crimes, the Supreme Court has further restricted the Indians' "quasi-sovereign" authority over their own land. The Court reasoned that minor crime jurisdiction was "inconsistent with their status." The result is the abuse of vehicle, hunting, and other tribal laws. Even though many tribes are ill-equipped to handle criminal prosecution, a system of de novo review would encourage Indians to develop more sophisticated judicial structures without denying non-Indian defendants any of the protections of the federal and state courts. Consequently, the historic subordination of the Indian race would, to a certain extent, be reversed. In addition, the more efficient Indian police forces would then have the opportunity to better control non-Indian minor crime on reservation land.

132. A harsher penalty on a second trial was held not to be unconstitutional in *Ludwig*. There, the Court held that "[d]ue process is violated only by the vindictive imposition of an increased sentence." *Ludwig*, 427 U.S. at 627.

133. *See supra* notes 76-83 and accompanying text.

134. Goldberg, *supra* note 5, at 542 n.34 (citing S. REP. No. 699, 83d Cong., 1st Sess. 5 (1953)); *see also* notes 76-79 and accompanying text.