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DECRIMINALIZING TRIBAL CODES: A RESPONSE TO *OLIPHANT*

Catherine Baker Stetson*

Introduction

When the Supreme Court held that tribes do not have criminal jurisdiction over non-Indians on the reservation, chaos reigned in many Indian communities, and the ramifications for tribal sovereignty were tremendous. Several means for dealing with these issues have been suggested, some perhaps have been tried, but to date no solution has emerged as a completely satisfactory answer to the question, "What do we do now?" This is probably because there is no satisfactory response to such a dilemma.

This paper is offered to provide a background discussion and analysis of the Supreme Court decision and its ramifications; more important, it attempts to examine the available alternatives, specifically that of decriminalizing certain tribal code provisions in an effort to extend civil jurisdiction into areas that often need and invite tribal control. An analysis of the distinctions between civil and criminal offenses and penalties is necessary before any such revision of tribal codes can begin, and the application of such an analysis to the specific needs and powers of individual tribes must be made carefully and with concern for a variety of factors.

I. The Decision

For almost one hundred years, the federal courts have had jurisdiction over enumerated major crimes committed by Indians on the reservation,¹ as well as over certain federal crimes, unless

* B.A. 1970, Vassar; M.A. 1972, Brown; Ph.D. 1977, New Mexico; J.D. 1981, New Mexico.

1. 18 U.S.C. §§ 1151-53 (1976) defines federal criminal jurisdiction, including federal enclave law. Specifically, the General Crimes Act, § 1152, provided for certain exception:

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

The Major Crimes Act, §§ 1153, 3242, took jurisdiction over specified major offenses committed by Indians on the reservation.

specifically exempted by treaty.² Jurisdiction over minor offenses committed by Indians remains in the tribe unless it has given up such jurisdiction³ or has lost it through the force of Public Law 280.⁴ Tribal civil jurisdiction remains intact to date and may be exercised over non-Indians and Indians.⁵

Prior to *Oliphant v. Suquamish Indian Tribe*,⁶ tribal criminal jurisdiction over non-Indians on the reservation was thought by many to be a valid exercise of tribal sovereignty.⁷ Though certain tribal codes voluntarily relinquished such jurisdiction over non-Indians,⁸ other tribes quietly assumed their powers, arresting and fining violators of the tribal codes, whether the violators were tribal members or not.⁹ Case law on the validity of such assumption of jurisdiction was virtually nonexistent, as tribal courts and codes are comparatively recent products, and most tribes have not had the need, the desire, nor the ability to exercise their criminal jurisdiction over non-Indians until recently.¹⁰ Against this jurisdictional backdrop, a disturbance on the Port Madison Indian Reservation led to the infamous *Oliphant* decision, creating confusion and dangers more disturbing than even the uncertainty that had preceded them.

2. Exemptions from federal power, provided by treaties, apparently no longer exist. See F. COHEN, *FEDERAL INDIAN LAW* 365 (1942) [hereinafter cited as COHEN]. See generally 1978 Solicitor's Opinion quoted in 5 Indian L. Rptr. H-10.

3. See, e.g., Treaty with the Wiandot, 7 Stat. 16 (1785) and Treaty with the Cherokee, 7 Stat. 18 (1785).

4. 18 U.S.C. § 1162 (1976), 28 U.S.C. § 1360 (1976), and other scattered sections.

5. See text accompanying notes 84-116 *infra*.

6. 435 U.S. 191 (1978).

7. See, e.g., AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., *MANUAL OF INDIAN LAW* (1976) [hereinafter cited as MANUAL]; 1 FINAL REPORT OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION 114, 117, 152-54 (1977) [hereinafter cited as FINAL REPORT].

8. See, e.g., *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976); *Hearings on the Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., pt. 3, at 679 (1963) and pt. 2, at 385 (1963).

9. "Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978); H.R. REP. NO. 474, 23d Cong., 1st Sess. 91 (1834); Note, *Indian Law—Indian Tribes Have No Inherent Authority to Exercise Criminal Jurisdiction Over Non-Indians Violating Tribal Criminal Laws Within Reservation Boundaries*, 28 CATH. U.L. REV. 663, 664 n.4. (1978-1979); COHEN, *supra* note 2, at 6 n.45, 146 n.212; M. PRICE, *LAW AND THE AMERICAN INDIAN* 173 (1973).

10. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197, 201 (1978).

The Port Madison Reservation "is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County."¹¹ Furthermore, 63% of reservation land is owned by approximately 3,000 non-Indians, while the remaining lands are held in trust for approximately 50 Suquamish tribal members.¹² Both Oliphant and Belgarde are non-Indians and were arrested on the reservation.

In the fall of 1973, the Suquamish Tribe was celebrating the annual Chief Seattle Days on its reservation in Washington. During the festivities, Oliphant was arrested by the tribal police and was charged with resisting arrest and assaulting a tribal officer. He was jailed and then released on his own recognizance by the tribal court. Oliphant petitioned to the district court for a writ of habeas corpus, which the district court denied. On appeal, the Ninth Circuit affirmed the denial. At the same time, Belgarde was arrested by the tribal police following a high-speed chase through the reservation; the chase ended when Belgarde ran into a tribal vehicle. He was released after posting bail but was later charged with recklessly endangering another person and with damaging tribal property. Belgarde's petition for a writ of habeas corpus was also denied by the district court, and his appeal was pending in the Ninth Circuit when the Supreme Court granted certiorari to Oliphant.¹³

The issue raised by Belgarde and Oliphant was whether a tribal court had criminal jurisdiction over non-Indians on the reservation. The Supreme Court, in a 6-2 decision, held that it did not.¹⁴ An analysis of the decision clearly indicates that the Court's reasoning was poorly founded, even irrational, but the decision is nevertheless binding, and the impact on tribes has been, and will continue to be, enormous.

Following the decision, there has been a flurry of widespread criticism, both of the holding itself and of the reasoning behind it. The criticism has not been limited to the outrage of individual tribes, but has been the inspiration for numerous law review articles and casenotes whose titles alone indicate the tenor of reac-

11. *Id.* at 193.

12. *Id.* at 193 n.1.

13. *Id.* at 194-95.

14. *Id.* Rehnquist, J., delivered the opinion; Stewart, White, Blackmun, Powell, and Stevens, JJ., joined. Marshall, J., dissented and Burger, C.J., joined in the dissent. Brennan, J., took no part in the decision.

tions to Rehnquist's opinion.¹⁵ His misuse of precedent and other authority, his failure to apply traditional canons of construction, his false assumptions and poor arguments have served as fertile ground for criticism. Additionally, a look at international law and at the rules governing conflict of laws only serves further to buttress the convictions of many that *Oliphant* was shamefully decided.

As the Ninth Circuit accurately pointed out, "the proper approach to the question of tribal criminal jurisdiction is to ask 'first, what the original sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited.'"¹⁶ The court found that "the power to preserve order on the reservation . . . is a sine qua non of the sovereignty [which] the Suquamish originally possessed,"¹⁷ and that "no treaty has deprived the Suquamish of criminal jurisdiction" over non-Indians.¹⁸

The principle of "reserved powers" to the tribes is commonly accepted.¹⁹ In the absence of express congressional withdrawal of such powers, tribes are presumed to have retained them.²⁰ While it is interesting to note that the dissent in *Oliphant* based its argument exclusively on such principles,²¹ Rehnquist clearly did not feel compelled to acknowledge this well-established and significant body of case law and tradition. His finding that criminal jurisdiction over non-Indians was not reserved to the tribes "is a new interpretation of Indian law and is difficult to resolve with precedent."²² A new standard of analysis—"inconsistent with their status"—emerged in *Oliphant*;²³ "no established legal authority exists at the present time for such a position, and, significantly, the majority makes no attempt to cite any precedent for it."²⁴

15. Note, *Oliphant v. Suquamish Indian Tribe: A Jurisdictional Quagmire*, 24 S.D. L. REV. 217 (1979); Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1978-79).

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

17. *Id.*

18. *Id.* at 1010.

19. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). See generally COHEN, *supra* note 2, at 121-22.

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

21. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (dissent).

22. Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction Over Non-Indian Offenders*, 1979 WIS. L. REV. 537, 540.

23. *Id.* at 559.

24. West, *A Response*, 5 Indian L. Rptr. M-20, M-23 (1978).

Not only is such a premise unsupported by precedent, but it undermines the principle of Indian sovereignty, also previously well established.²⁵ In arriving at the new standard, Rehnquist miscites *United States v. Rogers*,²⁶ misinterprets judicial authority (apparently unaware that Indian lands cannot acquire new or different status by simple unilateral declaration of the Supreme Court),²⁷ uses case law erroneously and out of context,²⁸ ignores historical facts about federal dealings with tribes,²⁹ and relies on a misinterpreted dissenting opinion in *Fletcher v. Peck*³⁰ for his sole support of the new proposition.³¹ The end result is an opinion directly contradictory to many landmark Supreme Court decisions in the field of Indian law, from *Worcester v. Georgia*³² and *United States v. Winans*,³³ to *McClanahan v. Arizona Tax Commission*³⁴ and *Williams v. Lee*.³⁵ Rehnquist's decision in *Oliphant* is unable to be reconciled with an "evergrowing list of twentieth century Supreme Court decisions,"³⁶ including even his own opinion in *United States v. Mazurie*,³⁷ in which Rehnquist himself pointed out that the tribes have the power to regulate their own internal and social relations.³⁸ Clearly this is a power one might assume would adhere to a sovereign, as it does in fact adhere to both federal and state governments. A double standard vis-a-vis the tribes is illogical, though apparently viewed by the Supreme Court as politically necessary, perhaps as a result of its "egocentric predicament."³⁹ As Larson notes in his article on *Oliphant*, a "glaring defect in the reasoning is apparently due to Mr. Justice Rehnquist's confusion of the phrase 'forfeiture of full sovereignty' with the totally different concept of 'full forfeiture of sovereignty.'"⁴⁰

25. Note, *supra* note 9, at 676.

26. 45 U.S. (4 How.) 567 (1846).

27. Note, *supra* note 9, at 677.

28. *Id.*

29. *Id.* at 678.

30. 10 U.S. (6 Cranch) 87 (1810).

31. Note, *supra* note 9, at 678-79.

32. 31 U.S. 515 (1832).

33. 198 U.S. 371 (1905). See also Note, *supra* note 15, at 229-30.

34. 411 U.S. 165 (1973).

35. 358 U.S. 217 (1959) See also Note, *supra* note 15, at 228-31.

36. Note, *supra* note 15, at 224.

37. 419 U.S. 544 (1975).

38. *Id.* at 557.

39. Note, *supra* note 15, at 227-28.

40. *Id.*

Though there is a recent trend toward less reliance on the notion of inherent sovereignty and more reliance on statutory and treaty interpretation,⁴¹ the Supreme Court has noted that the doctrine of tribal sovereignty is nonetheless relevant, "not because it provides a definitive resolution of the issues in this suit but because it provides a backdrop against which the applicable treaties and federal statutes must be read."⁴² Since Rehnquist did not find inherent sovereignty to be present, he was not obliged to look to statutes or treaties to discover whether such sovereignty had been limited. He did, nonetheless, and perhaps it would have been better for the credibility of his opinion had he not.

Through the efforts of Rehnquist, *Oliphant* stands as a glaring example of misuse of statutory and treaty law. At best, Rehnquist's readings and applications are ambiguous; more frequently, however, his conclusions fly in the face of logic, precedent, and justice, apparently relying on the inevitable ensuing confusion to cover the tracks.

Rehnquist referred to the Western Territory Bill to support the idea that there is no tribal criminal jurisdiction over non-Indians, when in fact the Bill provided for just such jurisdiction in certain instances.⁴³ Even if this were not so, precedent, as exemplified in *Winans*, would require a clear congressional expression of intent to deprive tribes of their power. More persuasively, "[e]ven if the Court correctly interpreted legislative intent, the Western Territory Bill is nonetheless an unreliable indicator of Congressional policy because it was never enacted."⁴⁴

If Rehnquist were looking for congressional intent as an aid in determining the status of tribal criminal jurisdiction, he would have done well to refer to the reports of the American Indian Policy Review Commission which, in 1977, concluded that "there is an established legal basis for tribes to exercise jurisdiction over non-Indians."⁴⁵ This Report also found that there is a clear need for such jurisdiction on the reservations, and that, because of the varied natures and needs of tribes, a uniform rule is not desirable.⁴⁶ Rehnquist cited only to the lone dissent of the Report, however, as support for his contention that Congress intended no such

41. Note, *supra* note 9, at 671-72.

42. *Id.*

43. Note, *supra* note 22, at 546.

44. Note, *supra* note 9, at 680.

45. FINAL REPORT, *supra* note 7, at 154.

46. *Id.*

jurisdictional power.⁴⁷ A more perverse use of authority cannot readily be imagined.

Rehnquist's reliance on a 1960 Senate Report and a provision in the 1854 amendments to the Trade and Intercourse Act for support of his argument is equally questionable and far-fetched, as the Senate Report cites no authority for *its* proposition, and the amendments were in reaction to an isolated occurrence and should not have been viewed as a comprehensive solution to all tribal questions.⁴⁸

His use of case law was similarly flawed. *Ex parte Kenyon* dealt specifically with the issue of tribal criminal jurisdiction over non-Indians but was distinguishable in that the crime involved was committed off-reservation.⁴⁹ Rehnquist latched on to dictum in *Kenyon*, however, to prove his point that tribal jurisdiction over non-Indians on the reservation was also nonexistent, thus elevating dictum to the status of holding.⁵⁰

This poor, but only, authority was at first glance supported by a 1970 Solicitor's Opinion,⁵¹ though Rehnquist clearly knew that the Opinion had been withdrawn and had not been replaced, thus rendering its inclusion useless if not misleading. Interestingly enough, a 1934 Solicitor's Opinion had reached the opposite conclusion,⁵² and a memo from the Solicitor's Office, in 1975, indicated that the issue was far from settled, the majority of the persuasive arguments tending to support tribal criminal jurisdiction.⁵³

In analogizing the issue in *Oliphant* to the policies controlling the Major Crimes Act,⁵⁴ Rehnquist undercuts his own argument—that tribal court jurisdiction over non-Indians would result in non-Indians being tried by tribal courts for major crimes—by referring in a footnote to the Indian Civil Rights Act that places limitations on the punishments tribes are allowed to mete out.⁵⁵ Furthermore, it has never been conclusively established

47. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205 n.15 (1978), quoting FINAL REPORT, *supra* note 7, at 587.

48. Note, *supra* note 9, at 680-81.

49. 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7,720).

50. Note, *supra* note 9, at 682. See also Note, *supra* note 22, at 544.

51. 77 Int. Dec. 113 (1970).

52. 55 Int. Dec. 14, 57 (1934); Note, *supra* note 9, at 682.

53. Memo from Alan Palmer, Assistant Solicitor, to Lou Striegel, Special Assistant to the Solicitor (Jan. 14, 1975), reprinted in 8 AM. INDIAN L. NEWS 31 (1975).

54. See note 1, *supra*.

55. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 n.14 (1978). See also Note, *supra* note 15, at 231.

that the Major Crimes Act provides for *exclusive* federal jurisdiction over the specified acts, and good arguments can be made for the exercise of concurrent jurisdiction.⁵⁶ At any rate, the Indian Civil Rights Act explicitly protects Indians and non-Indians alike from tribal court excesses, a logical inference being that the tribal courts have jurisdiction over both.⁵⁷

Rehnquist's interpretation of treaties fared no better than his interpretation of statutes. An initial discussion of four irrelevant treaties (irrelevant because of the individual nature of all treaties and because of their failure to be in any way binding upon the Suquamish)⁵⁸ served effectively to distract from Rehnquist's consideration of the Treaty of Point Elliot. Ignoring evidence of the Suquamish's intent to retain criminal jurisdiction over non-Indians,⁵⁹ he proceeded with a lopsided construction of the treaty provisions in an effort to establish that tribal recognition of its dependence upon the federal government was tantamount to relinquishment of tribal jurisdiction. Such an assumption is not clearly, logically, or inevitably mandated by the treaty language, which may just as easily have contemplated concurrent federal-tribal jurisdiction in this area, recognizing only a trade dependence upon the United States.⁶⁰

In addition, the failure of the tribe to raise jurisdictional questions or to assert criminal jurisdiction over non-Indians does not necessarily lead to the conclusion that such jurisdiction did not and could not exist; rather, the failure is readily explainable in light of the fact that, at the time of the treaty-making, such jurisdiction was not being exercised and was not viewed as necessary.⁶¹ Congressional silence may merely indicate a lack of occasion to consider the question.⁶² Rehnquist's specific reference to one clause in the treaty (which he holds up as clear evidence of tribal relinquishment of its jurisdiction) depends on an unlikely interpretation of the clause that appears more obviously to be an extradition clause, in no way inconsistent with the exercise of tribal criminal jurisdiction over all persons on the reservation.⁶³

When the Ninth Circuit turned to the statutes and treaties for

56. Note, *supra* note 22, at 545-50.

57. *Id.* at 553; Note, *supra* note 9, at 681.

58. Note, *supra* note 9, at 684.

59. *Id.* at 682-83 n.113.

60. Note, *supra* note 22, at 542-43.

61. *Id.* at 542.

62. *Id.* at 547-48.

63. Note, *supra* note 9, at 683; Note, *supra* note 22, at 543.

analysis of the issue, it stated that its "approach is influenced by the long-standing rule that 'legislation affecting the Indians is to be construed in their interest.'"⁶⁴ Using such an approach, the court's consideration of the treaty, statutes, and case law resulted in an unwavering assertion of tribal criminal jurisdiction.⁶⁵ Rehnquist's analysis of the treaties clearly ignored the accepted canons of construction as applied to federal-tribal relations.

In addition to a negative analysis of Rehnquist's opinion in *Oliphant*, more positive approaches to the issues of tribal sovereignty and criminal jurisdiction are to be found in the precepts of international law and conflict of laws. International law upholds the Indians' right of self-determination and sovereignty, and federal law to the contrary is in violation of such international law.⁶⁶ There are numerous reasons for according tribal interests persuasive weight in resolving the inevitable jurisdictional conflicts that result from a forced coexistence of different sovereigns.⁶⁷ Decisions such as *Oliphant* not only are harmful in their undermining of their own authority and precedent and of the authority of tribal governments, but they also ignore established tenets of international law and conflict of laws, thus weakening the persuasiveness of arguments and traditions only tangentially related to tribal law.

The Ninth Circuit was perceptive enough to foresee some of the reasons why tribal criminal jurisdiction over non-Indians on the reservation was necessary, not the least of which was that exemplified by the *Oliphant* fact situation itself. Without criminal authority over all persons on the reservation, there would be no law enforcement or protection available.⁶⁸ This, in turn, the court supposed, would lead to increased migration of Indians off the reservation, in counteraction to expressed congressional policy.⁶⁹ Furthermore, the court noted, federal law is not designed to handle a wide range of conduct and minor offenses; surely someone

64. *Oliphant v. Schlie*, 544 F.2d 1007, 1010 (9th Cir. 1976) (citing *United States v. Nice*, 241 U.S. 591, 599 (1916)).

65. *Id.*

66. Clinebell, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669 (1978).

67. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.—C.L. L. REV. 375 (1978).

68. AMERICAN INDIAN LAWYERS TRAINING PROGRAM, INC., INVESTIGATIVE HEARINGS ON THE ADMINISTRATION OF JUSTICE IN INDIAN COUNTRY 74 (1980) [hereinafter cited as HEARINGS]; 5 Indian L. Rptr. M-26.

69. *Oliphant v. Schlie*, 544 F.2d 1007, 1013 (9th Cir. 1978).

has to, and states, their courts, and their laws are certainly not the appropriate answer.⁷⁰ Ill feelings and antagonism between tribes and surrounding states preclude any sincere expectations that justice could or would be done through assertion of state jurisdiction over criminal activity on reservations.⁷¹ The conclusion that came logically to the Ninth Circuit was to acknowledge tribal jurisdiction, thus allowing for continued dignity of the tribal governments while ensuring prosecution of lawless behavior.⁷²

Not only does the holding in *Oliphant* impede self-determination and express congressional policy,⁷³ it also raises serious questions about denial of equal protection rights to Indians.⁷⁴ It encourages racial ill-will and, potentially, violence;⁷⁵ it ensures inefficient prosecution and resultant lawlessness; and it poses innumerable difficulties in restructuring federal procedures.⁷⁶ Other areas of litigation, such as taxation, well settled and workable before *Oliphant*, are liable to be reexamined and relitigated, further complicating and upsetting federal-tribal relations.⁷⁷

One positive effect of *Oliphant*, according to some, is that it may spur Congress to effect curative legislation in the area of tribal criminal jurisdiction. Certainly such legislation would be able to offset *Oliphant* and is the most obvious and ultimate of solutions.⁷⁸ However, there are numerous difficulties involved in approaching Congress about the problem, and there is no assurance, even if Congress legislates, that it will restore tribal criminal jurisdiction over non-Indians. Restoration may be only partial, and there is always the possibility that Congress will instead provide statutory backup for *Oliphant*. At any rate, a congressional enactment will take a long time, and tribes are concerned about how to deal with their problems now, on a day-to-day basis.

Several solutions have been proposed as a means of dealing with *Oliphant*. One is to attempt to apply substantive tribal law (instead of state law) under the Assimilative Crimes Act through

70. *Id.* See also Solicitor's Opinion (Apr. 10, 1978), reprinted in 5 Indian L. Rptr. H-10.

71. HEARINGS, *supra* note 68, at 73-74; 5 Indian L. Rptr. H-11.

72. *Oliphant v. Schlie*, 544 F.2d 1007, 1014 (9th Cir. 1978).

73. Note, *supra* note 22, at 563.

74. *Id.* at 563-64.

75. *Id.* at 565.

76. *Id.* at 565-69; TASK FORCE FOUR, FINAL REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 124-29 (1976).

77. Note, *supra* note 15, at 241-42.

78. *Id.* at 242; Note, *supra* note 22, at 569.

the General Crimes Act. Such an attempt may meet with resistance, as it is not at all clear that the Assimilative Crimes Act can be construed to allow such an application. Furthermore, there are logistical, political, and emotional problems with exercising federal jurisdiction over misdemeanors and petty offenses.⁷⁹

Another alternative would be through the courts. To attempt to limit *Oliphant* to its facts is one option. Though the argument can rationally be made, given *Oliphant*'s extremely skewed fact situation, the breadth of the decision probably will prevent such an argument from prevailing.⁸⁰ Moreover, even though an argument to the effect that tribal criminal jurisdiction should be allowed where the reservation is predominantly Indian-inhabited and Indian-held may prevail, those tribes with a large amount of fee land and non-Indian inhabitants would not be any better off than before; the injustice and incongruity of selective jurisdictional powers would probably increase the Court's reluctance to limit *Oliphant* to its facts.

The better option available through the courts would be to send up a better fact situation and ask that *Oliphant* be expressly overruled. Aside from the ethical considerations involved with sending up an issue that has been so broadly, recently, and emphatically decided, the likelihood of success is small. A newer decision may be better analyzed and better supported, but the result, given the racial and political realities, would probably be the same, and we can do without a good opinion supporting *Oliphant*.

A solution that emerges as more practical is to work within the confines established by *Oliphant*; that is, to exercise those powers not removed by the Court. The tribal exclusionary powers, particularly against habitual offenders, may be used to remove those non-Indians whose presence or actions are particularly offensive to tribal life and well-being.⁸¹ Injunctive powers may be exercised, for example, in the areas of business and waste regulation, perhaps on a nuisance theory. And finally, civil penalties and even forfeitures may be imposed through regulation of such areas previously defined as criminal, e.g., trespass, traffic violations, illegal hunting and fishing, littering, and the like. For this final

79. Note, *supra* note 15, at 240.

80. West, *supra* note 24, at M-23.

81. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976); *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).

solution to be effective, tribal codes would have to be revised, and several factors would have to be considered in order to ensure that courts would uphold the restructured tribal jurisdiction. It must be clear from the start what powers still remain with the tribes, and also how they are to go about revising substantive and procedural law in order to stay within the purview of such powers.

II. *The Leftovers: Tribal Civil Jurisdiction*

It is relatively clear that tribes have exclusive jurisdiction over civil affairs and minor criminal offenses between members, and states have exclusive jurisdiction over crimes between non-Indians.⁸² What remains of tribal civil jurisdiction over non-Indians, in the wake of *Oliphant*, is less clear.

For some observers, the proposition that tribes retain civil jurisdiction over non-Indians is not a settled one. A question can be raised about the Court's dictum, which stated that the Indian Civil Rights Act would apply to non-Indians only "if and when they come under a tribe's criminal or civil jurisdiction either by treaty provision or by Act of Congress."⁸³ The inference is that the *Oliphant* rationale may be applicable to civil as well as to criminal jurisdiction. Still, the presumption should be that the tribes retain civil jurisdiction over non-Indians, and this authority has been frequently and repeatedly upheld.⁸⁴ Since *Oliphant* addressed itself specifically and only to the issue of criminal jurisdiction, no intimation, either express or implied, should be seen as curtailing civil jurisdiction. Especially given the aberrational nature of Rehnquist's opinion, the argument is that his holding cannot be extended beyond its clear and explicit holding.⁸⁵

That tribes are still considered independent sovereigns with powers of self-government was reaffirmed in *United States v. Wheeler*,⁸⁶ only two weeks after *Oliphant* was decided. In *Buster v. Wright*, the court held that the Creek Nation had the authority, as a sovereign, to regulate business transactions within its

82. See generally AMERICAN INDIAN LAWYERS TRAINING PROGRAM, INC., MANUAL OF INDIAN CRIMINAL JURISDICTION, §§ F, H.

83. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195-96 n.6 (1978).

84. See *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); text accompanying notes 87-117, *infra*.

85. West, *supra* note 24, at M-23.

86. 435 U.S. 313 (1978).

borders, even for nonmembers.⁸⁷ Such an authority was termed a "natural right," inherent, and independent of title.⁸⁸

In *Williams v. Lee*,⁸⁹ the Supreme Court disallowed the state of Arizona from exercising civil jurisdiction over actions arising between Indians and non-Indians on the reservation. *Williams* stated as rationale the reluctance to undermine tribal authority and to infringe upon a tribe's right to self-government. Since *Williams*, courts have frequently addressed the question of "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,"⁹⁰ in analyzing tribal-state conflicts or jurisdiction and legislation. Since 1959, it appears

[that] exclusive Indian jurisdiction exists when an action involves a proprietary interest in Indian land; or when an Indian sues another Indian on a claim for relief recognized only by tribal custom and law; or, subject to the Fourteenth Amendment argument, when an Indian is suing or being sued by another Indian or non-Indian over an occurrence or transaction arising in Indian country about which the Tribe does, or foreseeably will, in the exercise of its police power, assume sovereign control through tribal law, court, or executive action.⁹¹

Tribal civil authority has been upheld in a variety of areas, from taxation and regulation to domestic affairs and child custody. The *Williams* infringement test has frequently been the measure of who may exercise authority—tribe or state. Clearly it is in the tribal interest to be able to control such areas as use of peyote on the reservation,⁹² regulation of tribal elections,⁹³ exercise of extradition powers,⁹⁴ litigation of contract obligations,⁹⁵

87. 135 F. 947 (8th Cir. 1905).

88. *Id.* at 950.

89. 358 U.S. 217 (1959).

90. *Id.* at 220.

91. Ransom, *Indians—Civil Jurisdiction in New Mexico—State, Federal and Tribal Courts*, 1 N.M. L. REV. 196, 211 (1971).

92. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

93. *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968).

94. *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

95. *Williams v. Lee*, 358 U.S. 217 (1959).

and tort actions.⁹⁶ But in civil areas involving non-Indian litigants, the tribes also have an interest.

In *Fisher v. District Court*,⁹⁷ tribal laws governing adoption were held to be exclusive when litigation arose on the reservation. State courts have occasionally taken jurisdiction over child custody cases involving an Indian child,⁹⁸ but only when the domicile of the child was found to be off-reservation.⁹⁹ Tribal law governing domestic relations has also been held to be valid¹⁰⁰ if not exclusive,¹⁰¹ partly depending on whether the tribe in question has affirmatively undertaken to govern the area at issue, and whether individual members have voluntarily brought the action in a state court.

In holding that federal courts do not have jurisdiction to interfere with tribal regulation of membership, the Court in *Santa Clara Pueblo v. Martinez* noted that "tribal courts have repeatedly been recognized as appropriate forums for the exclusive jurisdiction of disputes affecting important personal and property interests of both Indians and non-Indians."¹⁰²

While the ability of tribes to tax non-Indians, their businesses, and their lands within reservation boundaries has not been conclusively defined, the tribes are allowed to tax non-Indian lessees,¹⁰³ cigarette sales,¹⁰⁴ and business activities,¹⁰⁵ though the authority to do so has not always been found to be exclusive.¹⁰⁶

Tribal exclusionary powers, for the most part reserved by tribes in individual treaties, was first held to be valid in *Morris v. Hitchcock*.¹⁰⁷ Subsequently, dictum in other cases has indicated that

96. *Schantz v. White Lightning*, 231 N.W.2d 812 (N.D. 1975) *Cf.* *Paiz v. Hughes*, 76 N.M. 562, 417 P.2d 51 (1966) (concurrent jurisdiction).

97. 424 U.S. 382 (1976).

98. *In re Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976).

99. *Cf. Wakefield v. Littlelight*, 276 Md. 333, 347 A.2d 228 (1975).

100. *Whyte v. District Court*, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960).

101. *Bad Horse v. Bad Horse*, 163 Mont. 445, 517 P.2d 893 (1974), *cert. denied*, 419 U.S. 847 (1974).

102. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

103. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976) (by implication), *cert. denied*, 430 U.S. 983 (1977).

104. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

105. *Maxey v. Wright*, 54 S.W. 807, *aff'd* 105 F. 1003 (8th Cir. 1900).

106. *See generally Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); MANUAL, *supra* note 7, at § 1.

107. 194 U.S. 384 (1904).

the power to expel violators of tribal codes and to deliver offenders to the appropriate authorities is still effective.¹⁰⁸ Though *Oliphant* raises a question as to the continuing validity of such authority, *Williams v. Lee*, federal treaties, and pure practicality would indicate that the exclusionary power is still operative.

The area of fishing and hunting regulation is currently in a state of flux. The general rule seems to be that even in the absence of a treaty provision on the subject of hunting, fishing, water, timber, and mineral rights, the tribe reserves such rights, absent a clear congressional statement to the contrary.¹⁰⁹ Even in Public Law 280 states, the courts have not allowed state jurisdiction over hunting and fishing, though this does not prevent states from attempting to assert it.¹¹⁰ Though some courts have held the Indians' rights to be exclusive,¹¹¹ and other courts have held the states' rights to be exclusive,¹¹² the American Indian Policy Review Commission indicates that congressional intent requires tribal consent for non-Indians to go on reservations to hunt and fish.¹¹³ The issue of tribal authority to regulate off-reservation is even more tenuous, though it has been held to exist.¹¹⁴

Tribes may be limited as to how far their fish and game ordinances apply because of provisions in their own constitutions which limit their jurisdiction to members or to Indians, and there may be treaties or legislation which limit their powers or allow the importation of state laws. But generally it appears that the trend, and the better view, is that tribal laws apply to Indians and non-Indians alike who are hunting and fishing within the boundaries of an Indian reservation. This application would lead to the exclusion of state laws except when the tribe itself requires that non-Indians comply with state regulations as they have in some situations.¹¹⁵

The United States Supreme Court has said that tribes may regulate hunting and fishing on the reservation and that such

108. *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976); *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).

109. *United States v. Winans*, 198 U.S. 371 (1905).

110. TASK FORCE FOUR, *supra* note 76, at 60.

111. *Id.* at 65-67.

112. *Id.*

113. *Id.* at 66, 243, 245.

114. *Id.* at 74. See also *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); MANUAL, *supra* note 7, at § G; PRICE, *supra* note 9, at 199-331.

115. TASK FORCE FOUR, *supra* note 76, at 246.

regulations apply equally to Indians and non-Indians. However, the Court noted the presence of limitations on such power with regard to fee lands within tribal boundaries.¹¹⁶

Though much of the controversy concerning the extent of tribal control and jurisdiction over non-Indians has yet to be settled, there is at least a solid body of law and treaty interpretation that indicates that in several civil areas tribes do have jurisdiction, whether concurrent with or exclusive of state jurisdiction. Though criminal jurisdiction over non-Indians is no longer functional for tribes, decriminalization of certain activities may be a viable solution for such tribes as wish to continue (or begin) control over certain areas of activity on the reservation. If hunting and fishing, minor offenses, business, waste, tribal ranges, and food service, for example, can be controlled by a civil code and can be seen to fall within *Williams's* infringement parameters, tribes may at least partially circumvent many of the problems posed by the *Oliphant* decision. Such a decriminalization process, however, will undoubtedly be closely scrutinized by both federal and state courts, and serious tribal efforts must be made to ensure that any new civil codes do not seek merely to substitute the word "civil" for the word "criminal" wherever it appears. Instead, a thorough revision of the codes is required in order to bring the new regulations within constitutional and practicable guidelines.

III. *The Fine Line*

Recently there have been numerous attempts to decriminalize certain behavior and to substitute civil penalties for criminal penalties in order to make legal enforcement proceedings more efficient.¹¹⁷ Though state and federal motivation in so doing is different from that of tribes that wish to decriminalize activities for purposes of retaining control over certain behavior on the reservation, the problems encountered are much the same. Certainly, nominal semantic change in laws is insufficient to make civil an erstwhile criminal offense; yet just what the distinction is between criminal and civil offenses is unclear.

The Supreme Court has been notoriously inconsistent, or at best enigmatic, in its analysis of the distinction. For purposes of selectively applying constitutional safeguards, the Court has

116. *Montana v. United States*, 450 U.S. 544 (1981).

117. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 482 n.29 (1974).

issued a series of opinions in which the same sanction was held to be punitive on one hand and remedial (or civil) on the other.¹¹⁸ Clearly, all laws that function primarily to punish are criminal,¹¹⁹ but just what constitutes a punitive sanction remains difficult to discern. In order to determine whether a law serves primarily to punish, it is necessary to determine what punishment is, as well as what the legislature intended when it imposed a particular sanction; both analyses have their drawbacks.

Professor Hart has defined punishment in terms of five, possibly six, elements: (1) it must involve pain; (2) it must be a response to an offense against the rules; (3) it must be imposed upon one who breaks the rules; (4) it must be intentionally administered by others; and (5) it must be imposed by a legal authority with jurisdiction over the offense.¹²⁰ In order to distinguish punishment from civil remedies (which have as their objectives compensation, regulation, or treatment), Hart suggests a sixth element, that the punishment must be imposed primarily as a means of prevention of rule breaking or of retribution after the fact.¹²¹

The sixth element is perhaps the most useful in distinguishing between criminal and civil sanctions, as, to some extent, the first five elements apply equally well to both. If punishment is viewed as having as its objective the "dominant purpose of retribution, meaning the desire to hurt a law violator for no reason but revenge, or deterrence, meaning the desire to influence his future conduct or that of others who fear similar hurt,"¹²² a workable distinction between criminal and civil penalties begins to emerge. Several tests have been developed in an attempt to elaborate on the distinction, the most commonly used set forth in *Kennedy v. Mendoza-Martinez*.¹²³ Various courts have applied the *Kennedy* test, adding to and subtracting from it, placing varying degrees of emphasis on each of the enumerated seven factors¹²⁴:

Whether the sanction involves an affirmative disability or restraint,

118. Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 382 (1976).

119. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

120. Clark, *supra* note 118, at 431.

121. *Id.* at 432.

122. *Id.* at 384.

123. 372 U.S. 144 (1963).

124. Ludwig, *Constitutional Law—The Oregon Supreme Court Reaches First Base in Defining a Crime*, 57 OR. L. REV. 602, 610 (1978).

whether it has historically been regarded as a punishment,
whether it comes into play only on a finding of *scienter*,
whether its operation will promote the traditional aims of
punishment—retribution and deterrence,
whether the behavior to which it applies is already a crime,
whether an alternative purpose to which it may rationally be
connected is assignable to it, and
whether it appears excessive in relation to the alternative
purpose assigned¹²⁵

Applying such a test is not without its problems, however, and the effort to clarify the fine line between criminal and civil sanctions frequently serves only to obscure it. For example, because all sanctions in effect impose an affirmative disability, the first test is virtually useless without a clearer definition of punishment and restraint.¹²⁶ Also, because many sanctions have traditionally served in both criminal and civil capacities, and because it is the borderline, quasi-criminal sanctions that are primarily the source of controversy, the second and fifth tests are not as useful as they could be, perhaps, if considered along with further evidence of its purposive objective.¹²⁷ The analysis leads quickly into circuitous reasoning because many activities that occur and need to be regulated or punished today did not exist at common law and therefore do not have a traditional definition or status. In addition, an act that is a tort in one jurisdiction may be a crime in another, the difference being only in the nature of the penalty imposed.¹²⁸ To attempt to distinguish whether a specific act is a crime or a civil wrong, based on the penalty attached, is a common test, yet presents a vicious circle when the question is whether the act is inherently a civil or criminal offense. Though historical status of an offense may be useful in analyzing the nature of the offense today, it is, in many ways, defeating contemporary efforts at change, reevaluation, and modification, and as such presumes the usefulness, validity, and universal nature of an often obsolete and inefficient status quo.

A purposive approach, based on test four, is useful for analyzing the obvious, but is much less useful in analyzing areas in which civil and criminal goals overlap. Though retribution is

125. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

126. *Clark*, *supra* note 118, at 455.

127. *Id.* at 456. See generally, Gausewitz, *Criminal Law—Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365 (1937).

128. Note, *Public Torts*, 35 HARV. L. REV. 462, 463 n.10 (1922).

more obviously founded in the quest for vengeance, and is thus more likely to be penal in nature, it is uniformly to be desired that any violator of *any* code cease and desist from his activity and that he refrain from recommencing it in the future. As such, the presence of a deterrent effect of a sanction would not necessarily mean much.¹²⁹ The test needs further elaboration, and many suggestions have been offered.

The distinction between general and specific deterrence determines when a sanction is criminal or civil. An injury inflicted on an individual or group of individuals as a result of previous actions of those individuals and aimed at preventing a recurrence of those actions by those individuals serves a specific deterrent function. A loss inflicted on a person or group of persons in order to control, by example, future conduct of all persons in the society regardless of past actions of the group serves as a general deterrent. If imposition of the loss is triggered by the undesired conduct, it is criminal in nature. However, when the loss is inflicted merely to mold future actions and the group suffering the loss is rationally classified, then the loss is not a criminal sanction.¹³⁰

The test of whether an offense requires *scienter* is proposed under the assumption that if *scienter* is required for conviction, the offense is criminal, but if it is not required, the offense is civil. Unfortunately, there are numerous criminal statutes that impose absolute and vicarious liability, even in the absence of *mens rea*,¹³¹ and further, there is nothing that says a civil penalty cannot be imposed even though *scienter* is required.¹³²

The final two tests address themselves to the appropriateness of the sanction and are primarily useful when applied in conjunction with other tests indicating legislative purpose. The Supreme Court has frequently supplemented its analysis of quasi-criminal statutes by inquiring into the legislative background materials. This approach involves a number of considerations; it has several drawbacks and seems to serve primarily to weigh constitutional protections against government interests.

“Finding a statute’s ‘purpose’ does not usually involve inquiry into legislator’s ‘motives.’” The courts determine “purpose”

129. Clark, *supra* note 118, at 456; Ludwig, *supra* note 124, at 608 n.38.

130. Charney, *supra* note 117, at 510.

131. *Id.* at 495.

132. Gausewitz, *supra* note 127, at 366.

by deciding first whether a law can be suspected more or less strongly of serving constitutionally improper goals, and then by requiring the government to rebut that evidence of impropriety with an adequate demonstration that the law is necessary to the achievement of some proper governmental purpose.¹³³

Much of the confusion in this area stems from the Court's methods of approach; sometimes it attempts to analyze legislative purpose (e.g., retribution? deterrence?) and considers whether a sanction has traditionally been labeled criminal or civil and whether it has traditionally served to punish or regulate; the fallacies inherent in this line of reasoning are clear. On other occasions, the Court resorts to an analysis of legislative history, an approach generally accepted to be unreliable,¹³⁴ especially as a basis for determining the constitutionality of any given rule,¹³⁵ and inappropriate.

This deference to legislative history in determining whether a sanction or a statute is criminal or civil is a gross abdication of the judicial role. Although such an approach appears to be an enlightened attempt to carry out congressional purpose through statutory interpretation, it avoids the substantive question of whether Congress has exceeded its constitutional authority. No amount of congressional labeling should determine that . . . question.¹³⁶

It should be clear that a purposive approach to analysis of civil and criminal offenses, though not without its uses, has limited persuasiveness. Apart from whether it is proper or accurate to second-guess the legislature, theoretical discussions on the nature of punishment are perhaps less coherent than is a discussion of the nature and scope of particular sanctions. An attempt to reconcile the contradictions in an effort to indicate guidelines for future legislation results, first, in a discovery of three categories of criminal punishment: "infamous" or severe sanctions have been held by the Supreme Court to be clearly punitive, thus criminal, whatever the label attached by the legislature. Less severe punishments are less likely to be the subject of judicial second-guessing;

133. Clark, *supra* note 118, at 445, quoting from *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091 (1969).

134. Clark, *supra* note 118, at 441-43.

135. *Id.* at 384, 436.

136. Charney, *supra* note 117, at 494.

they may be considered criminal by the Court if they have been labeled criminal by the legislature, but otherwise are felt to be civil. Very small penalties, such as fines, are presumed to be civil, even if the legislature has labeled them criminal.¹³⁷

The Court's concern with the severity of sanctions is integrally linked with its efforts to apply, or not to apply, constitutional safeguards in appropriate circumstances. The distinction between criminal punishment and civil remedy is an obvious focal point, and only by looking to specific sanctions and the circumstances in which they are applied can a fair and comprehensible set of guidelines be developed.

Severity alone, however, is not an adequate criterion for distinguishing between the natures of civil and penal sanctions, and the Court's refusal to draw such an inflexible bright line is partly historical and partly functional.¹³⁸ The notion of stigma, or community condemnation, combines with the degree of severity to determine where a particular sanction fits in the general legal scheme of things.¹³⁹ As a result, civil penalties are distinguishable from criminal penalties in that civil penalties, while frequently serving as deterrents, do not serve effectively to accomplish the goals of retribution and moral condemnation frequently associated with criminal punishment.¹⁴⁰

The problem with this theory is that it presents a totally unworkable analytical framework. It is unclear where the courts should look in order to determine whether the punishment embodies moral condemnation. For example, in some circles, the acts of persons who pollute the water or the air in violation of the Federal Water Pollution Control Act and the Clean Air Act are regarded as immoral, yet others believe that pollution is an inevitable byproduct of industrial and societal development—a necessary evil.¹⁴¹

And, of course, attitudes not only vary but change, and there are degrees even of moral condemnation. The interesting fact about all this is that, though none of the proposed frameworks for analysis—from legislative intent to degree of severity and condemnation—is satisfactory or workable, they have frequently

137. Clark, *supra* note 118, at 383.

138. *Id.* at 404-405.

139. *Id.* at 406-407.

140. Charney, *supra* note 117, at 512-13.

141. *Id.* at 496.

been used in conjunction with one another to provide a conglomerate foundation upon which to begin assessing individual sanctions. Though each of the proposed factors for consideration is flawed in one way or another, their combined use has been at least somewhat successful when brought to bear on the question of whether a specific penalty is, under specific circumstances, criminal or civil.

Though the death penalty is obviously a criminal sanction, most other penalties are not as easily categorized. Even imprisonment, commonly thought of as penal, may be a civil sanction in certain cases.¹⁴² Nor does the absence of imprisonment as a penalty necessarily indicate the civil nature of an offense; in several cases, laws that are labeled civil and do not provide for incarceration have been struck down by the courts as being penal in nature. These borderline quasi-criminal laws provide for a number of sanctions, from money penalties and forfeitures, to the imposition of various disabilities (e.g., deportation) or revocation of a license or other permission.¹⁴³ The Supreme Court in *Helvering v. Mitchell* noted that the revocation of a privilege voluntarily granted is not punitive.¹⁴⁴ Denial or divestiture of personal rights, however, is usually considered to be a criminal sanction, primarily because of the obvious intent to punish.¹⁴⁵ In *Kennedy*, removal of citizenship was considered to be a severe punishment amounting to "naked vengeance";¹⁴⁶ deportation of noncitizens, however, has been held not to be criminal because not primarily penal.¹⁴⁷ The rationale involved in allowing deportation turns on the distinction between rights and privileges, and it only available when a person commits an undesirable act; it cannot be used to punish constitutionally protected acts.¹⁴⁸

On the subject of forfeitures, the Supreme Court has variously held forfeitures to be criminal,¹⁴⁹ to be neither criminal nor

142. Clark, *supra* note 118, at 412, 488.

143. *Id.* at 381. See also Note, *Public Torts*, *supra* note 128, at 462.

144. 303 U.S. 391 (1938).

145. Clark, *supra* note 118, at 390.

146. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 189 (1963) (Brennan, J., concurring).

147. Clark, *supra* note 118, at 390, 487.

148. *Id.* at 487.

149. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

punitive,¹⁵⁰ and to be civil and remedial.¹⁵¹ One line of reasoning emphasizes the *in rem* nature of forfeitures and concludes that because the sanction is directed at property and not at persons, it is essentially remedial.¹⁵² The other approach emphasizes the punitive, deterrent function inherent in forfeiture.¹⁵³

The line between regulation and punishment is important and must be drawn before any given sanction can be classified confidently. If an imposed sanction represents a burden that serves a regulatory purpose and no alternative imposing a lesser burden exists, the sanction is more likely to be considered civil.¹⁵⁴ Regulation, which serves a preventive function, is viewed frequently as an element of civil law, and if forfeiture involves contraband or a dangerous item, it is possible to view it as a civil remedy, certainly more readily than would be a forfeiture of personal property in no way integral to the violation.¹⁵⁵ Forfeiture of contraband or inherently dangerous items can be justified on the theory that there has been no deprivation of legal property interests and that regulatory interests of the state are being served.¹⁵⁶ Forfeiture of goods used to commit illegal acts is another story; though the regulatory justification may apply, the property argument does not. If the goods are quite peculiarly suited to the illegal activity, like burglar's tools, perhaps an argument can be made that they are dangerous to possess and so should be forfeited. Otherwise, the preventive purpose of forfeiture could be just as easily accomplished by the less drastic alternative of deprivation of the right to use similar property within the jurisdiction.¹⁵⁷

Both money penalties and forfeitures are more likely to be upheld as civil if they are not disproportionate to the offense and if they are imposed as the result of clear fault on the part of the offender.¹⁵⁸ Generally, with a few minor exceptions, the Court

150. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972). See also Clark, *supra* note 118, at 386-88.

151. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

152. Clark, *supra* note 118, at 476 n.286; Edwards, *Forfeitures—Civil or Criminal?*, 43 TEMPLE L.Q. 191 (1970).

153. Clark, *supra* note 118, at 476 n.287.

154. *Id.* at 391 n.39, 449.

155. *Id.* at 475.

156. *Id.* at 478-79; Edwards, *supra* note 152, at 193.

157. Clark, *supra* note 118, at 480.

158. *Id.* at 409 n.94.

has uniformly declined to consider either forfeitures or money penalties to be criminal or infamous unless the proceeding in which they are assessed bears a criminal label imposed by the legislature.¹⁵⁹ In 1888 the Supreme Court held the imposition of a civil money penalty to be penal,¹⁶⁰ yet in *United States ex rel. Marcus v. Hess*,¹⁶¹ a civil money remedy was found to be remedial. The Court discussed the government's interest as a preserver of peace and a protector against fraud, and said that protective remedies were allowable, and civil, even if they involved multiple damages. Even though punishment may be the result, that alone was not enough to make the governing statute criminal, especially in cases where the main purpose of the statute was to provide restitution.¹⁶² This opinion reinforced *Helvering* dictum to the effect that payment of fixed or variable sums, even if severe, is not necessarily penal in nature.¹⁶³

Several years later, in *Rex Trailer Co. v. United States*,¹⁶⁴ the Court allowed the award of liquidated compensatory damages in a contract action, saying that as long as the damages were reasonable, even if actual damages were not proved, the award did not amount to a penalty. In *One Lot Stones v. United States*, both forfeiture and money penalties were upheld as providing a reasonable form of liquidated damages for a violation and as serving to reimburse the government for investigation and enforcement expenses. As such, the damages were characterized as remedial sanctions, though dictum noted that excessive penalties might change the nature of sanctions to punitive.¹⁶⁵ The contradictory analysis of forfeitures characterizes the Court's treatment of money sanctions as well.¹⁶⁶

Several jurisdictions have attempted to decriminalize certain of their laws, notably traffic laws.¹⁶⁷ The 1975 amendments to the Oregon Vehicle Code purportedly decriminalized the offense of driving while under the influence of intoxicants. In 1977 the Oregon

159. *Id.* at 392, 403, 411, 468.

160. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888).

161. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

162. *Id.* at 548.

163. *Id.*

164. 350 U.S. 148 (1956). See also Clark, *supra* note 118, at 469-70.

165. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (dictum).

166. Clark, *supra* note 118, at 388.

167. See, e.g., CAL. PENAL CODE § 19c (West 1977); FLA. STAT. ANN. § 318.13(3) (West 1979); N.Y. VEH. & TRAF. LAW § 155 (McKinney 1970) OR. REV STAT. §§ 161.515(1), 161.565 (1981).

Supreme Court held that such amendments violated article I, section 11 of the Oregon constitution, despite the legislature's good faith efforts and intents.¹⁶⁸ The court specifically considered the magnitude of the potential fine (\$1,000), secondary sanctions in the event of nonpayment (as much as thirty days in jail), the relationship of the offense to other major traffic offenses, the legislative emphasis on the continuing seriousness of the offense that was decriminalized,¹⁶⁹ and the retention of criminal enforcement procedures (arrest, detention, bail, arraignment).¹⁷⁰

In *State v. Knoles*,¹⁷¹ a Nebraska case decided in the same year, the Nebraska Supreme Court reviewed a state provision prohibiting U-turns. The infraction was labeled a civil offense, but the court held that it was in fact criminal and that constitutional safeguards thereby attached.¹⁷² The court looked behind the plain words of the relevant statute and concentrated upon the connotations of certain words that had a particular association with criminal law. Sections specifically considered were the arrest and custody provisions, references to guilt, and the potential for incarceration.¹⁷³

A New Jersey court, in rejecting the notion of civil sanctions for drunk driving violations, noted especially the potential thirty days to three months incarceration provision as distinguishing the offense from those punishable only by fine.¹⁷⁴ A subsequent New Jersey case found that motor vehicle violations were petty offenses and thus without certain rights that adhere to full-fledged criminal prosecutions.¹⁷⁵ Though a 1977 New Jersey case held that defendants in quasi-criminal proceedings were entitled to the basic rights of all criminal defendants, it is unclear whether this extends to *all* protections or only to a selected few.¹⁷⁶ And the difficulty in defining and treating quasi-criminal offenses continues.¹⁷⁷

168. *Brown v. Multnomah County District Court*, 280 Or. 95, 570 P.2d 52 (1977).

169. Ludwig, *supra* note 124, at 605 n.19.

170. *Id.* at 602-603.

171. 199 Neb. 211, 256 N.W.2d 873 (1977).

172. *Id.* at 876.

173. Krochmalny, *Criminal Law—Traffic Infractions—Criminal Prosecution for Civil Offenses? A Q-turn for the Nebraska Supreme Court*, 12 CREIGHTON L. REV. 173, 185 (1978).

174. *State v. McCarthy*, 30 N.J. Super. 6, 103 A.2d 169, 179 (App. Div. 1954).

175. Krochmalny, *supra* note 173, at 179.

176. *State v. Feintuch*, 150 N.J. Super. 414, 375 A.2d 1223 (App. Div. 1977).

177. Krochmalny, *supra* note 173, at 180-81.

It is interesting to note that most states have statutes that provide that all violations of the rules of the road are misdemeanors or felonies. About nine states have attempted to carve out less serious violations, often called infractions, to which the rules of civil procedure are frequently, but not always, applied.¹⁷⁸

The legislatures' failure to specify the application of civil procedure to litigation of quasi-criminal offenses presents obvious problems for the courts. In Oregon the new traffic code provided for numerous criminal procedures, including arrest, detention, and arraignment,¹⁷⁹ leading the court to comment wryly on the legislature's apparent "desire to decriminalize the procedure rather than the offense."¹⁸⁰ Furthermore, the code used criminal terminology, and the legislative history made it clear that the decriminalization was not to be seen as a deemphasis on the serious nature of the crime.¹⁸¹ In *Knoles*, "an enactment without the criminal terminology may have won the day."¹⁸² The lesson to be learned is clear: in decriminalizing laws, an effort should be made to specify civil procedures and to purge the statutes, as much as possible, of traditional criminal terms and procedures.

Another consideration is to keep in mind which constitutional protections are required in quasi-criminal proceedings. Certain protections are clearly not applicable, e.g., forfeiture proceedings or cases involving small crimes with minimum sentence potential¹⁸³ may call into play the self-incrimination protection,¹⁸⁴ but not the double jeopardy protection or the various safeguards of the sixth amendment (jury trial, right to counsel).¹⁸⁵ The threat of a severe or infamous punishment, however, may trigger all constitutional safeguards.¹⁸⁶

Applicable to all punitive sanctions are the ex post facto clause, the exception to the full faith and credit clause that concerns enforcement of foreign penal laws, and due process rule that tax penalties may not be assessed by summary adjudication, a

178. *Id.* at 174 nn.4, 5.

179. Ludwig, *supra* note 124, at 604 n.11, 609.

180. *Brown v. Multnomah County District Court*, 280 Or. 95, 108, 570 P.2d 52, 60 (1977).

181. Ludwig, *supra* note 124, at 609. *See also* *State v. Missouri Pac. Ry.*, 64 Neb. 679, 682, 90 N.W. 877, 878 (1902).

182. Krochmalny, *supra* note 173, at 182.

183. *Id.* at 184; Clark, *supra* note 118, at 398.

184. Charney, *supra* note 117, at 489.

185. *Id.* at 485; Clark, *supra* note 118, at 392-98.

186. Clark, *supra* note 118, at 401.

currently uncertain rule that the fourth and fifth amendments combined prevent compulsion of testimony in civil penalty cases, the doctrine that punitive takings do not fall within the scope of the fifth amendment's taking clause, and, finally, the cruel and unusual punishment clause itself.¹⁸⁷

Constitutional requirements of a grand jury indictment or of an information, and of *Miranda* warnings, might also be eliminated in quasi-criminal regulations, for, as the New Jersey Supreme Court explained, "the violations are not serious enough to warrant time-consuming interference which would result to effective law enforcement and the expeditious administration of justice in petty offense cases."¹⁸⁸ The Oregon statute, in attempting to decriminalize certain traffic offenses, tailored the sanctions to the conduct to be regulated. Thus, though the appeal of both state and defendant was permitted, the defendant was not permitted a jury trial, and the standard of proof required for "conviction" was lowered to a preponderance of the evidence. Violators of the code did not suffer a disability or legal disadvantage upon conviction; plea bargaining was prohibited, as was appointment of counsel at public expense. Finally, the statute disallowed the defenses of double jeopardy, *res judicata*, and collateral estoppel in the event that the defendant committed a crime and a traffic infraction at the same time.¹⁸⁹

Obviously, concerns about the protection of constitutional safeguards are well taken. The expansion of civil penalties and procedures has been justified on many grounds in the past. One is that the imposition of money penalties, even without the trappings of procedural safeguards, results only in the payment of money and not in any deprivation of liberties. Civil penalties do not subject the civil offender to any sort of disgrace or condemnation. Finally, a money penalty may often be a just and accurate compensation to the government for monies lost or damages sustained.¹⁹⁰

Courts, in applying the various tests to the issue of criminal-civil distinction, have often developed tangential balancing tests. The Supreme Court, in establishing a division between petty and serious offenses, reasoned that "where the accused cannot possibly face more than six months imprisonment, we have held

187. *Id.* at 383.

188. *State v. Macuk*, 57 N.J. 1, 9, 268 A.2d 1, 9 (1970).

189. Ludwig, *supra* note 124, at 604-605 n.11.

190. Charney, *supra* note 117, at 501 n.136.

that the disadvantages [to the individuals], onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications."¹⁹¹ There is no question but that decriminalization of certain offenses will contribute to greater administrative efficiency and even a better protection of due process in the absence of delay and forced settlements.¹⁹² In some cases, the new civil remedies will serve as compensation for actual loss or liquidated damages, or as a means of reimbursement of expenses incurred by governmental administration and enforcement.¹⁹³ Lost profits may be recovered as well.¹⁹⁴

Thus, while the purpose, severity, and stigma of a sanction are considerations in determining its nature and thus its status, the government's interest in efficiency, regulation (including taxation and treatment), and compensation is an additional concern.¹⁹⁵ The amorphous nature of many of the distinctions between criminal and civil penalties, as well as the always uncertain results inherent in balancing tests, combine to illustrate the extremely unsettled stage at which we currently find ourselves.

IV. *Application*

Though many states that have attempted to decriminalize various traffic violations have been unsuccessful, the tribe can profit from the guidelines suggested by the courts, and if the penalties and procedures adhere to such guidelines and can be seen to serve primarily a regulatory purpose, there is a good chance that certain traffic violations, as well as other offenses, can fall under the aegis of revised tribal codes.

Two initial determinations must be made, however, even before revision begins. The first is whether an individual tribe wishes to exercise its criminal jurisdiction over all Indians or only over its own members. *Oliphant* did not make the distinction; and there is no authority at the moment that makes it clear whether a tribe may or must do so. There are perhaps equal protection problems with asserting criminal jurisdiction over non-member Indians because the distinction in this instance can

191. *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

192. *Clark*, *supra* note 118, at 381 n.6.

193. *Id.* at 466 n.255.

194. *Id.* n.256.

195. *Charney*, *supra* note 117, at 408-84, 508 n.157.

arguably be termed racial and not merely political.¹⁹⁶ Nevertheless, individual tribes may wish to retain as much of their criminal jurisdictional power as possible and so may opt to extend it to nonmember Indians as well as members. This is a determination that must be made by each individual tribe.

The second initial question to be answered is, of course, whether the tribe really wishes to decriminalize any of its laws. There are numerous factors to be considered, not the least of which involve the current relationship of the tribe with neighboring off-reservation communities and law enforcement agencies, and the tribal agreements, if any, with the federal and state judicial systems. If a tribe is seriously considering revising its code to reclassify certain criminal acts as civil, it must also face the question of whether such a move will best serve its interests, for, in decriminalizing activities in an effort to retain jurisdiction over non-Indians, a tribe will necessarily have to apply the decriminalized procedures and penalties to Indians. It would be foolish, for example, to propose civil sanctions for a non-Indian while retaining criminal sanctions for an Indian committing the same offense. Once a law has been decriminalized, it will have to be applied uniformly to Indians and non-Indians alike. If a tribe is willing to do this and to forego the incarceration penalties in all instances, the revision can begin.

If a tribe has retained exclusionary powers, either by treaty or by tribal code, or both, it is reasonable to expect that such power can be used to remove any nonmember from tribal lands. Even if not specifically authorized, the exclusion power may still be valid under the reserved rights doctrine. Such a power can be justified not only on statutory grounds, and on the basis of the reserved rights doctrine, but also may be exercised according to federal policies that protect such an exercise of those powers necessary for a tribe to govern itself. An exclusionary power, like the power of deportation, may be validly exercised as a civil remedy for civil offenses against the tribe. Any offense for which a tribe wishes to invoke exclusion as the remedy should be defined in civil terms and according to the guidelines set out earlier. It is, however, an unsatisfactory remedy in many cases because it does not provide for compensation for injuries and because it is difficult to enforce, especially if removal is exercised frequently.

196. See text accompanying note 74, *supra*. Cf. *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Holliday*, 3 Wall. 407 (1865).

Regulation of such activities as hunting and fishing, business, waste disposal, and food service is certainly one of the likely areas in which to assert tribal civil jurisdiction. Injunctive relief, as well as civil money penalties, could be invoked to aid in the maintenance of peace and stability on the reservation, and could certainly be defended by asserting tribal interest in self-government and regulation.

It is possible that forfeiture provisions may be safely used to confiscate contraband or illegally taken or illegally possessed fish, game, wood, minerals, etc. But implements, vehicles, or other personal property, not per se dangerous or illegally possessed, even though used in furtherance of the offense, may be temporarily confiscated or removed from the reservation and should not be forfeited.

Fines for offenses committed against the tribe may be effectively used in regulating non-Indian as well as Indian activity on the reservation, especially when such behavior is clearly against the tribal interests in protecting its people and lands. Thus, hunting, fishing, and trapping regulations were violated. Because of tribal interest in conservation of its resources and in protection of statutory rights, money penalties could easily be justified as a means of reimbursement for the taking or damaging of tribal property. Similar reasoning can be used to impose civil sanctions on those who take or damage any tribal property, and the tribal government, as *parens patriae*, could thus enforce trespassing and littering regulations.

If the theory of damages is to be compensation, the compensatory purpose of a provision should appear on the face of it and should provide some reference to actual cost.¹⁹⁷ The tribe should seek to show the relationship between the loss suffered and the compensation sought.¹⁹⁸ In contract actions, while actual damages do not have to be accurately proved, liquidated damages must be a reasonable approximation of the actual loss. Damages in all other actions should be proved or provable as accurately as possible in order to support the recovery as a civil award.¹⁹⁹

Though a government normally is not allowed to recover damages on the basis of a police power interest, that is, as a result of harm to individuals or to personal property, the tribal status as such may allow a tribe to do so.²⁰⁰

197. Clark, *supra* note 117, at 468.

198. *Id.* at 471.

199. *Id.* at 473.

200. *Id.* at 472.

Applying this body of authority, we may say that where the government sues (1) on behalf of specific individuals, to collect as guardian specific damages suffered by them, or (2) as *parens patriae*, to collect damages to certain property interests that the government alone can own or protect on behalf of its citizens, or (3) in a proprietary capacity, for harm done to specific property that the government owns as a private party owns property, the suit can be regarded as compensatory.²⁰¹

Limitations on the standing to sue as *parens patriae* would arguably not apply to tribes because of the communal nature of reservation lands and properties; frequently private recoveries for the same injury are not available, and so there is no danger of increased liability amounting to punitive damages.²⁰²

From a practical standpoint, revision of parts of any tribal code must be the result of serious consideration, study, and effort. The alternative of decriminalization is not necessarily viable or desirable for all tribes. Initial determinations as to the scope of the revisions must be made by a tribal council or other governing body, and not be left to those doing the actual revising. Each tribe has unique powers and abilities that must be taken into account before the revision even begins so that the resulting code provisions do not extend beyond individual tribal authority. In addition, in the actual revising process, care should be taken to avoid all criminal and civil terminology and procedures, as well as all penal sanctions. Because of the unsettled nature of the decriminalization issues, there are no guarantees that any or all of the revisions will be upheld once subjected to scrutiny; however, the guidelines set forth in the various opinions and articles mentioned herein offer many ideas and suggestions for tribes wishing to pursue this alternative. In the final analysis, the revisions must stand on their own.

201. *Id.*

202. *Id.*