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Addie C. Rolnick[*]

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Introduction

American Indian tribes, unlike other sovereigns, have a uniquely limited ability to enforce their criminal laws. Criminal jurisdiction is one of the most important incidents of sovereignty.[1] Criminal laws are a primary means through which a society protects people and goods, expresses norms and values, and holds wrongdoers accountable. A crime, although it usually involves a specific victim, is an offense against the laws of the sovereign; this is why the state, not the victim, is the complaining party in a criminal case.

Sovereigns are generally understood to have jurisdiction over anyone who commits a crime within that sovereign's territory,[2] regardless of

1. *See, e.g.*, ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT 56 (2010) ("The territorial scope of a state's criminal law is commonly regarded as a manifestation of its sovereignty."); Markus D. Dubber, *Criminal Jurisdiction and Conceptions of Penality in Comparative Perspective*, 63 U. TORONTO L.J. 247, 263 (2013) ("Criminal jurisdiction is just there, unquestioned, as the obvious manifestation of the state's penal power, itself the obvious manifestation of the state's stateless, its very sovereignty. . . . There is no theory of the so-called territoriality principle which determines jurisdiction based on the location of the crime within some sovereign's territory (or within some sovereignty, for short). Territorial jurisdiction just is.").

2. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OREGON L. REV. 725, 730 (2012). The doctrine of territoriality—according to which criminal jurisdiction is determined by the territorial location of the crime—seems to answer most questions about which criminal justice system has jurisdiction over which crimes."). In common law countries, the "territoriality principle" is so central that even extra-territorial extensions of criminal jurisdiction are often framed in terms of territory. Lindsay Farmer, *Territorial Jurisdiction and Criminalization*, 63 UNIV. OF TORONTO L.J. 225, 241-43 (2013) (describing territorial jurisdiction as "the central case and organizing idea" into which other cases were "either fitted . . . or treated as exceptions" and recounting fictions employed by courts to conclude that an act took place within a particular territory when in fact it did not); Dubber, *supra* note 1, at 265-66 (giving example of Canadian statute in which acts occurring in space

nationality, plus jurisdiction over the sovereign's nationals and others whose actions affect its community for crimes committed outside its territory.[3] When a person travels to another jurisdiction, nationality normally does not operate as a shield protecting him or her from prosecution, because jurisdiction in those cases is based on the local sovereign's control over its territory.[4] Citizenship status, consent, and

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are legislatively "deemed" to have taken place in Canada for purposes of jurisdiction). Diplomatic immunity is an exception to the territoriality principle, but the exception is limited to those who represent the government and does not generally bar one sovereign from prosecuting the citizens of another. *See* Mitchell S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U.J. INT'L L. & POL'Y 173, 177-78 (1989) (describing how diplomatic immunity is based on the idea that the diplomat represents the foreign sovereign, the fiction that the diplomat resides on territory that is under the jurisdiction of the home country, and the need to permit diplomats to carry out their work without interference).

3. Extraterritorial jurisdiction exists concurrently with, but does not replace, the territorial jurisdiction of the local sovereign. Extraterritorial jurisdiction is justified by the relationship between the sovereign and either the defendant or the victim of a crime, or on the impact of the crime on the sovereign's integrity. Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* 3 INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 108, 116 (M. Cherif Bassiouni ed., 3d ed. 2008) In addition to the subjective territorial principle (jurisdiction because an element of the crime took place within the nation's territory) and the nationality principle (jurisdiction over nationals who commit crimes abroad ("the second most important of the five theories [of criminal jurisdiction] worldwide")), Blakesley describes four other principles that provide a basis for the assertion of criminal jurisdiction: objective territoriality (jurisdiction over crimes that impact the prosecuting nation), the protective principle (jurisdiction over an "offense [that] poses a danger of causing an adverse effect on a state's security, integrity, sovereignty, or an important governmental function"), the passive personality theory (jurisdiction over crimes that harms the nationals of the prosecuting state), and universal jurisdiction (jurisdiction over universally condemned offenses, such as piracy and terrorism, that any nation claiming personal jurisdiction over the offender may prosecute). *Id.* at 104-15, 121-36. The relationship between sovereign and individual matters in this context is understood broadly. Extraterritorial jurisdiction extends to citizens as well as to nationals and foreigners who commit an offense that affects the sovereign or its people. *Id.* (describing various bases for extraterritorial jurisdiction, including the nationality principle, protective principle, and the passive personality principle).

4. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 8-20 (2009) (describing the link between territorial concepts of jurisdiction and the European concept of sovereign control over territory, enshrined in the Treaty of Westphalia). As Raustiala explains, territorial sovereignty was the basis for the era of European and American empire-building, in which Western powers extended their territorial reach over lands occupied by non-Western nations, which were not recognized as having territorial authority because they were not regarded as having "met the prevailing 'standard of civilization.'" *Id.* at 14.

political participation rights generally have little bearing on the question of whether a sovereign can prosecute a particular offender.

Unlike most sovereigns, however, American Indian tribes cannot exercise full territorial criminal jurisdiction. They lack jurisdiction over certain classes of people within their territory, but the precise contours of this jurisdiction have never been expressed as a coherent standard. Instead, the scope of tribal criminal jurisdiction is governed by a patchwork of rules. These rules do not issue from a single source, but from multiple federal statutes and Supreme Court decisions.

Tribes generally lack jurisdiction over non-Indians,[5] while they retain jurisdiction over "all Indians,"[6] including their own citizens[7] as well as "nonmember Indians,"[8] but neither Congress nor the federal courts have carefully considered who is included in this category. Most recently, Congress restored tribal jurisdiction over some non-Indian domestic abusers, as long as the non-Indian has sufficient "ties to the Indian tribe."[9] While these rules may initially seem clear, they become muddier the closer one looks. More importantly, they are not linked to a unifying principle that explains *why* tribes lack criminal jurisdiction in certain situations, which could guide tribes in determining the scope of their jurisdiction in future cases. Without such a considered analysis, tribal and federal courts risk relying on assumptions and misunderstandings when determining a tribe's jurisdictional reach, and may interpret tribal jurisdiction too narrowly as a result.

For example, some federal and tribal courts appear to assume that a tribe's jurisdiction over nonmember Indians includes only citizens of other Indian tribes.[10] Most of these cases have focused on the question of whether the federal law permitting tribal court jurisdiction over nonmember Indians violates equal protection because it distinguishes between Indians and non-

5. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

6. 25 U.S.C. § 1301(2) (2012).

7. Courts have long agreed that Indian tribes retain inherent criminal jurisdiction over members of their tribes who commit crimes in their territory. *See generally* Talton v. Mayes, 163 U.S. 376 (1896); United States v. Wheeler, 254 U.S. 281 (1978). While tribal jurisdiction has historically existed to the exclusion of state jurisdiction, *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 540 (1832), the federal government has long exercised some concurrent criminal jurisdiction in Indian country. *See infra* notes 41-42 and accompanying text.

8. *See* United States v. Lara, 541 U.S. 193, 198 (2004).

9. 25 U.S.C. § 1304(b)(4)(B) (2012).

10. *See infra* Parts I.C.1-2.

Indians.[11] Courts have answered that question by holding that Congress can legislate with respect to Indians without violating equal protection. Most defendants who have challenged tribal jurisdiction in federal court are citizens of some tribe (though not the tribe prosecuting them), so courts have relied on their citizenship to justify their inclusion in the Indian category, and thus their prosecution by a tribe other than their own. These courts are correct that Congress has the power to so legislate, but a focus on congressional power has obscured the more difficult theoretical question of why a defendant's citizenship in one tribe should have any bearing on whether that defendant may be prosecuted by another tribe. Even though the statute affirming tribal jurisdiction over nonmember Indians[12] defines the "Indian" category to include more than just enrolled tribal citizens, federal courts rarely have occasion consider its effect on the many members of Indian communities who are not citizens of any tribe.[13]

Because of courts' emphasis on tribal citizenship, the exercise of tribal jurisdiction over these noncitizen members may seem to present an even more difficult equal protection problem. If a person is not a citizen of any tribe, categorizing that person as an Indian may seem to some to be nothing more than a bald racial classification. Indeed, the first federal court to review tribal prosecution of an Indian who was not a citizen of any tribe suggested—citing no authority—that the extension of tribal criminal jurisdiction over non-citizen members of the community "appears to present an equal protection problem" because it subjects the defendant to

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11. *See* Means v. Navajo Nation, 432 F.3d 924, 927 (9th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006); Morris v. Tanner, 288 F. Supp. 2d 1133, 1134-35 (D. Mont. 2003), *aff'd*, 160 Fed. Appx. 600 (9th Cir. 2005), *cert. denied*, 549 U.S. 970 (2006); *see also Lara*, 541 U.S. at 200, 209 (holding that Congress properly exercised its authority to restore inherent tribal jurisdiction in this area, but reserving due process and equal protection challenges).

12. Title 25 U.S.C. § 1301 affirms that tribes have inherent authority to prosecute "all Indians" and defines "Indian" by reference to 18 U.S.C. § 1153, the law that authorizes federal prosecution of Indians. The scope of the Indian category under § 1153 has been interpreted by federal courts to include anyone who is descended from a tribal group indigenous to the United States and who is affiliated with an Indian tribe that is presently recognized by the federal government. See *infra* Part I.C.3 for a detailed discussion of these statutes and the case law interpreting each of them, including minor variations among circuits.

13. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1025 (2011) ("Many . . . nonmember Indians are fully integrated into their communities, live on the reservation, and participate fully in tribal religious, cultural, and social life. The Supreme Court's equation of Indianness with tribal membership-narrowly understood to mean enrollment and voluntary political participation-writes these people out of existence.").

tribal jurisdiction "due purely to his blood quantum or particular lineage."[14] Similar questions may eventually animate challenges to the most recent restoration of tribal jurisdiction over non-Indian domestic violence offenders. That law subjects some non-Indians to tribal jurisdiction, based in part on their connection to the tribal community, but requires tribes to provide heightened due process protections to these non-Indian community members that are not required in prosecutions of similarly situated Indian community members.[15]

The shadow of equal protection would be much less pronounced if the rules governing tribal jurisdiction were supported by a rationale rooted in a thorough understanding of tribal criminal power, but those rules are not usually so presented. After centuries of legislative and judicial silence on the matter of tribal criminal jurisdiction, the rules that currently govern its scope are instead the result of a back-and-forth between Congress and the Supreme Court, in which the Court has limited tribal jurisdiction over certain categories of people and Congress has responded by restoring it over some—but not all—of those categories. While anyone who has taken a course in federal Indian law can no doubt recite the rules, little attention has been paid to basic theoretical questions about the reasons for the scope of tribal criminal jurisdiction today. Because the federal government has long exercised criminal jurisdiction within Indian country, tribal jurisdiction is most often treated as only one part of the "jurisdictional maze" that governs

14. Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221, 1231 (D. Nev. 2014) ("[Tribal prosecution of a disenrolled member] appears to present an equal protection problem. That is, under such a regime a person may, due purely to his blood quantum or particular lineage, be subject to criminal prosecution in Indian courts yet be ineligible for membership in the prosecuting tribe or *any* Indian tribe, *the latter consideration being the only distinction traditionally held to insulate the blood/lineage nexus from equal protection infirmity*." (second emphasis added)). The *Phebus* court may have been referring to a Supreme Court case in which federal prosecution of an Indian person was upheld against an equal protection challenge. United States v. Antelope, 430 U.S. 641, 647 (1977). The defendant in *Antelope* was a tribal citizen, and the Court specifically cited his citizenship status as a reason for its holding. *Id.* at 646 ("[R]espondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe."). The *Antelope* Court acknowledged, however, that federal law does not actually require that a defendant be an enrolled tribal citizen in order to be prosecuted as an Indian. *See infra* note 159 and accompanying text.

15. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in relevant part at 25 U.S.C. § 1304(a)(4) and (b)(4)(B)). See *infra* Part I.D for further discussion of the law.

criminal justice there.[16] In this maze, tribal jurisdiction functions primarily as a gap-filler, with tribes exercising criminal jurisdiction only over the people and the offenses that no other sovereign can prosecute.[17]

Despite a substantial body of scholarship on tribal civil jurisdiction,[18] questions about the purpose, guiding principles, and proper scope of tribal

16. Robert Clinton coined the term "jurisdictional maze" in a seminal article. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) [hereinafter Clinton, *Jurisdictional Maze*]. Clinton described tribal jurisdiction at the time as limited in practice, but potentially much broader in scope, and highlighted several grey areas in which tribes sometimes asserted jurisdiction but federal law neither expressly affirmed nor prohibited. *Id.* at 557-60. Indian country criminal jurisdiction is now commonly described as a "maze." *See, e.g.*, INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 9 (2013) [hereinafter INDIAN LAW & ORDER COMM'N, A ROADMAP], *available at* http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf; Richard W. Garnett, *Once More into the Maze:* United States v. Lopez*, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country,* 72 N.D.L. REV. 433, 441-42 n.57-60 (citing articles that use the maze analogy or similar terms); *see also* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007) [hereinafter AMNESTY INT'L, MAZE OF INJUSTICE], *available at* http://www.amnestyusa.org/pdfs/MazeOf Injustice.pdf. Several scholars have developed careful critiques of federal and state criminal jurisdiction in Indian country, *see, e.g.*, Kevin K. Washburn, *Federal Criminal Law and Tribal Self- Determination*, 84 N.C. L. REV. 779, 832-53 (2006) (describing problems with the application of federal criminal law in Indian country and suggesting ways to minimize or repeal federal laws); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 707-29 (2006) (presenting data highlighting the shortcomings of state criminal jurisdiction in Indian country and proposing options for minimizing or repealing such jurisdiction), but these critiques simply identify the reasons that tribal jurisdiction would be better without engaging thorny questions about its scope.

17. Clinton, *Jurisdictional Maze*, *supra* note 16, at 560 ("[W]hile the present scope of tribal criminal jurisdiction is generally limited to relatively minor crimes committed by Indians on the reservation [over which no other court has jurisdiction], the potential reach of such jurisdiction may be substantially broader.")

18. *See generally, e.g.*, Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. STATE L.J. 779 (2015); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Civil Jurisdiction*, 101 CAL. L. REV. 1449 (2013) [hereinafter Florey, *Beyond Uniqueness*]; Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010) [hereinafter Fletcher, *Resisting Federal Courts*]; Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003 (2008); Geoffrey D. Strommer & Stephen D. Osbourne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1 (2005).

criminal power have remained unexplored.[19] No considered analysis has investigated why tribes need criminal jurisdiction, why that jurisdiction has been limited at all, and what underlying principles might explain its current scope. For example, one popular idea is that tribes can exercise jurisdiction over people who consent to their jurisdiction.[20] Consent is a significant part of the academic literature on civil jurisdiction, but it is rarely invoked to justify criminal jurisdiction outside the tribal context.[21]

This article seeks to explain *why* current rules limit tribal criminal jurisdiction, and brings together ideas from criminal law, federal Indian law, and tribal law to suggest a single unifying standard to clarify who should (and should not) be subject to a tribe's criminal jurisdiction: tribal criminal jurisdiction should extend to anyone who is recognized by the tribe as a member of the community. Though strong policy arguments support restoring to tribes full criminal jurisdiction over all people who commit crimes within their territory,[22] this article begins by recognizing the current reality that Congress and the Court have both decided to limit modern tribal criminal jurisdiction. The two branches have been locked in a give-and-take over where to draw this line, but they seem to agree that it is potentially unfair to subject complete strangers to tribal jurisdiction. Part I describes the cases and statutes that govern this area of law and how they relate to

19. *Accord* Florey, *Beyond Uniqueness*, *supra* note 18 (reconsidering the limits on tribal court civil jurisdiction according to settled doctrinal principles of personal jurisdiction, but noting that criminal jurisdiction presents different questions).

20. *Compare* Duro v. Reina, 495 U.S. 676, 694 (1990) (premising tribal criminal jurisdiction on consent), *with* Paul Spruhan, Case Note, Means v. District Court of the Chinle Judicial District *and, the* Hadane *Doctrine in Navajo Criminal Law*, 1 TRIBAL L.J. at pt. IV (2000-2001), http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/spruhan/index.php [hereinafter Spruhan, Case Note] (noting differences between the *Duro* Court's consent framework and the notion of consent articulated by Navajo courts); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 112-21 (2012) (noting differences between the understanding of consent expressed in *Duro* and that used in civil jurisdiction cases).

21. *See infra* Part II.D.

22. I share the view of most Indian law experts that tribes ought to have full territorial jurisdiction, *see, e.g.*, INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 23 (recommending that tribes be permitted to opt out of federal jurisdiction in favor of restoring jurisdiction over all people who commit crimes in the tribe's territory), and principles of criminal jurisdiction generally support this view, *see infra* Part II.D. However, all three branches of the federal government have so far declined to endorse that view. The purpose of this article is to consider the existing limits on tribal criminal jurisdiction, which leave tribes with something short of full territorial jurisdiction.

each other, and highlights the resulting confusion and unanswered questions.

Part II presents and describes the community recognition standard, and argues that this standard is the best way to implement the principles that underlie the current rules governing tribal criminal jurisdiction. It considers the interests served by criminal jurisdiction, the scope of that jurisdiction in other contexts, and the particular concerns expressed by federal actors about Indian tribal jurisdiction, and argues that the current rules seek to make tribal jurisdiction broad enough to provide for public safety, express cultural norms, and make individuals accountable to society, but narrow enough to prevent relative strangers from being prosecuted by tribes' potentially different and unfamiliar legal systems.

The community recognition standard is drawn from an examination of the two categories of people who are currently subject to tribal criminal jurisdiction, but whose status is somewhere between citizens and non-Indians: nonmember Indians and non-Indians with sufficient ties to the tribe. For nonmember Indians, this model follows the jurisdictional laws of some tribal courts, which define "Indian" for criminal jurisdiction as a person who is recognized as such by the community. For non-Indians, this model follows the recent amendments to the Violence Against Women Act (VAWA), which confirms inherent tribal jurisdiction over non-Indian offenders who commit acts of domestic violence against an Indian victim, and who have sufficient "ties to the tribe"—meaning they live or work on the reservation, or are in an intimate relationship with an Indian who resides there.[23] Part III contrasts the community recognition standard with a citizenship-based one and explores how this relates to the larger questions of how to define legal Indianness in the shadow of equal protection, what it means to be a member of a political community, and the appropriate reach of a sovereign's criminal power.

Community recognition is a flexible standard that can accommodate the many different ways an individual may be connected to a community, including but not limited to formal citizenship. It demonstrates that relying on formal citizenship is not the only way to measure the connection between an individual and a tribal community, and is therefore not the only way to ensure that Indian remains a political (as opposed to simply racial) designation. It empowers the tribal community to define who is included, but instead of focusing narrowly on consent and political participation, this

23. Violence Against Women Reauthorization Act of 2013, tit. IX, sec. 904, § 204(b), 127 Stat. at 121-22 (codified at 25 U.S.C. § 1304).

standard considers an individual's responsibility to the community, and thus better reflects the functions of criminal law. While many tribes that employ a community recognition standard limit this category to people of Indian descent, as required by the federal law that prohibits tribes from enforcing criminal laws against non-Indians,[24] this new standard that could theoretically permit jurisdiction over people not of Indian descent as long as they are members of the tribal community. In this way, this standard would harmonize tribes' historical practices with the concerns expressed by the Supreme Court, Congress' confirmation of jurisdiction over nonmember Indians, and the most recent reinstatement of tribal jurisdiction over non-Indian domestic violence offenders.

In addition, unlike the strong calls for congressional action to restore full territorial criminal jurisdiction,[25] this community recognition standard has the advantage that it does not require a change in federal law, so courts may begin using it immediately. Under current law, tribal courts exercise criminal jurisdiction over all Indians.[26] Following this law, tribal legislatures and courts should develop their own definitions of "Indian" for purposes of criminal jurisdiction that emphasize recognition by, and obligation to, the tribal community—which is a broad and flexible standard that reflects the functions of criminal law. It is based on a defendant's connection to the prosecuting community, rather than on citizenship in another tribal nation or status under federal law. In most cases, it will encompass more people than a rule that limits jurisdiction to citizens.[27] Federal courts reviewing tribal assertions of criminal jurisdiction should defer to tribal law standards for determining whether and how a person is affiliated with the community, and review cases only to determine whether the defendant satisfies the federal requirement that he or she be of Indian descent and be affiliated with a tribe. The community recognition standard could also permit tribal criminal jurisdiction over community members who are not of Indian descent, though this would require congressional

24. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978); *see also* United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846) (noting some degree of Indian descent required for Indianness under federal law); 25 U.S.C. § 1301(4) (2012) (defining Indian in the tribal jurisdiction context by reference to the law governing federal criminal jurisdiction over Indians, in which context the *Rogers* rule applies, as described in Parts I.B.2 and I.C).

25. *See, e.g.*, INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 23.

26. 25 U.S.C. 1301(2).

27. *But see infra* Part III.C (discussing one way that a community recognition standard could be narrower than a citizenship standard).

clarification or significant judicial reinterpretation of the "Indian" legal category.

Tribal criminal courts today are much more than gap-fillers. Federal Indian policy recognizes the importance of local tribal self-governance, which Congress has affirmed forcefully in recent years by restoring and expanding tribal criminal jurisdiction.[28] Many tribal criminal justice systems, once ignored or overridden because they relied on traditional dispute resolution mechanisms that were not recognized by American courts as "real" legal systems, now have complex infrastructures that include police, courts, lawyers, judges, and jails, just like the criminal justice systems in other American jurisdictions.[29] Because tribal justice systems can (and often do) incorporate culturally-specific legal norms and rely on non-adversarial processes, such as peacemaking, commentators have suggested expanding their jurisdiction and increasing the resources available to them in order to solve problems like high crime and over-incarceration among Native people.[30] Tribal courts have a critical, leading role to play in shaping criminal justice in Indian country, and federal

28. In less than a decade, Congress has passed two major pieces of legislation that affirm expanded tribal criminal jurisdiction. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of U.S.C.); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 18, 22, 25, 42 U.S.C.). In general, all legislation affecting tribal criminal justice passed during the modern era has affirmed the primary importance of tribal justice systems in Indian country. *See* Indian Tribal Justice Act, Pub. L. No. 103-176, § 2, 107 Stat. 2004, 2004 (codified at 25 U.S.C. §§ 3601-3631) (resources for tribal justice systems); Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651-3682) (same); Federal Death Penalty Act of 1994, Pub. L. No. 103-322, tit. VI, 108 Stat. 1959 (codified at 18 U.S.C. § 3591-3599) (providing that the federal death penalty would not be imposed on Indian country defendants unless the local tribal government requests); Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)) (the *Duro* fix) (affirming inherent tribal criminal jurisdiction over "all Indians").

29. *See generally* INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16 (describing the complex institutional and financial infrastructure of modern tribal criminal justice systems).

30. *See, e.g.*, INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 131 (noting in chapter on alternatives to incarceration that "tribes are longtime advocates for alternative approaches"). *See generally* Ryan Seelau, *The Kids Aren't Alright: An Argument to Use the Nation Building Model in the Development of Native Juvenile Justice Systems to Combat the Effect of Failed Assimilative Policies*, 17 BERKELEY J. CRIM. L. 97 (2012) (identifying over-incarceration as one aspect of the problem faced by Native youth in juvenile court and proposing tribal control as a solution).

policymakers are increasingly willing to follow their lead. Questions about the proper scope of their criminal deserve sustained and careful attention, which this article seeks to provide.

I. A Patchwork of Rules

Understanding the legal boundaries of modern tribal criminal jurisdiction[31] requires interpreting Supreme Court cases and federal statutes together. Tribes today possess all sovereign powers, including criminal jurisdiction, unless those powers have been explicitly taken away by Congress or held by the Supreme Court to have been implicitly divested.[32] Congress has never expressly limited tribal criminal jurisdiction,[33] but the Supreme Court has twice held that tribes lost their jurisdiction to prosecute specific categories of people.[34] Congress subsequently passed legislation to "affirm" and "restore" tribes' inherent power to prosecute some—but not all—of those categories of people.[35] Taken together, statutory and common

31. This article is concerned with crimes that occur within tribal territory. It considers the extent to which tribes' territorial jurisdiction has been limited over certain categories of people. It does not answer the related but separate question of whether, with respect to the people over whom tribes still have jurisdiction, tribal territory marks the outer bounds of tribal power. *See* Kelsey v. Pope, No. 14-1537 (6th Cir. Jan. 5, 2016) (upholding a tribe's extraterritorial exercise of criminal jurisdiction over a citizen for a crime committed in the course of his duties as a tribal official); *see also* Settler v. Lameer, 507 F.2d 231, 240 (9th Cir. 1974) (affirming extraterritorial criminal jurisdiction over citizens for offenses related to treaty rights occurring in treaty-defined territory). Many tribal codes assert extraterritorial criminal jurisdiction. *E.g.,* NAVAJO NATION CODE tit. 7, § 253(a)(1) (2010), *available at* http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0020.pdf; *id.* tit. 17, § 203 (extraterritorial criminal jurisdiction over members); ABSENTEE SHAWNEE TRIBE CRIM. CODE § 2 (2010) (extraterritorial jurisdiction over members and residents who commit certain crimes), *available at* http://www.narf.org/nill/codes/absentee-shawnee/criminal_ offenses.html; CHEYENNE & ARAPAHO TRIBES LAW & ORDER CODE tit. II, subpart D, § 2(a) (1988) (same), *available at* http://www.narf.org/nill/codes/cheyaracode/ offenses.html. Whether the scope of that jurisdiction precisely matches the scope of intraterritorial jurisdiction described here is a matter for another article.

32. United States v. Wheeler, 435 U.S. 313, 323 (1978).

33. It has, however, legislated to limit the manner in which tribal courts may conduct criminal proceedings and the length of sentence they may impose. *See* 25 U.S.C. § 1302 (2012).

34. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 495 U.S. 676 (1990).

35. *See* Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)) (jurisdiction over "all Indians"); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, § 904, 127 Stat. 120 (jurisdiction over certain non-Indians). A later statute

law rules provide that tribes retain criminal jurisdiction as an aspect of their inherent sovereignty over "all Indians,"[36] including tribal citizens and nonmember Indians. They lack jurisdiction over non-Indians in most cases,[37] except certain non-Indian domestic violence offenders with sufficient ties to the tribe.[38]

These rules, instead of adhering to a unifying rationale, have been created by judicial divestments and congressional restorations of tribal jurisdiction which appear to be hasty reactions to each other, with Congress partially undermining each of the Court's limitations, but never fully rejecting them. The practical reasons are sometimes apparent,[39] but the theoretical justifications are difficult to discern. The result is a patchwork of rules from different sources, no clear explanation as to why those rules exist, and unanswered questions about the precise reach of tribal jurisdiction in areas that have not been specifically addressed by Congress or the Court.

This article's focus is tribal jurisdiction, but to form a complete picture of criminal justice in Indian country, it is necessary to understand the related rules for federal and state jurisdiction as well. Within Indian country,[40] the federal government exercises jurisdiction over crimes

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amended the *Duro* fix to remove the year-long limit, making it permanent. *See* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646.

36. 25 U.S.C. § 1301(2) (2012).

37. *Oliphant*, 435 U.S. at 210. This is at least true for non-Indians who are U.S. citizens. At least one tribal court has asserted criminal jurisdiction over non-Indians who are not U.S. citizens, holding that the reasoning of *Oliphant* refers only to the rights of citizens. Eastern Band of Cherokee Indians v. Torres, 4 Cherokee Rep. 9, 2005 WL 6437828 (2005).

38. 25 U.S.C. § 1304(b)(4)(B) (2012); *see infra* Part I.D (describing the scope of special domestic violence jurisdiction over non-Indians).

39. For example, Congress has twice restored tribal jurisdiction over a "jurisdictional gap." *See, e.g.*, Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After* Duro v. Reina, 41 CONN. L. REV. 267, 268 (2008) (describing how restored tribal jurisdiction over nonmember Indians addressed a jurisdictional gap created by the *Duro* decision because neither federal nor state courts have jurisdiction to prosecute non-major crimes involving only Indians); M. Brent Leonhard, *Closing a Gap in Indian Country Justice: Oliphant, Lara, and DOJ's Proposed Fix*, 28 HARVARD J. ON RACIAL & ETHNIC JUST. 117, 121-22 (2011) (describing how restoration of tribal jurisdiction over non-Indian domestic violence offenders was necessary to close a similar enforcement gap, in which U.S. attorneys, despite having jurisdiction, frequently declined to prosecute non-Indian domestic violence offenders in Indian country).

40. "Indian country" is a legal term denoting the categories of land subject to *federal* criminal jurisdiction because of its status as Indian land. Most of this land is classified as a reservation or is held in trust by the federal government for the benefit of tribes or Indian people. 18 U.S.C. § 1151 (2012). Indian country includes "all land within the limits of any

between Indians and non-Indians[41] and certain enumerated major crimes involving only Indians.[42] In some areas, states exercise Indian country criminal jurisdiction in place of the federal government pursuant to Public Law 280 or a similar law.[43] Absent such a specific law giving the state more expansive jurisdiction, state jurisdiction is limited to reservation crimes involving only non-Indians.[44] Because the federal statutes and cases affecting tribal jurisdiction are structured around the default federal/tribal jurisdictional arrangement, this article likewise focuses on the interplay between tribal and federal jurisdiction.[45] It is important to remember that

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Indian reservation" and tribal and individual trust allotments. *Id.* § 1151(a). It also includes certain lands held in fee by tribes. *Id.* § 1151(b). Indian country also includes "dependent Indian communities." *See also* United States v. Candelaria 271 U.S. 432, 443 (1926) (finding Pueblo fee land subject to the same restrictions as Indian trust land); United States v. Sandoval, 231 U.S. 28 (1913) (same). *But see* Alaska v. Native Village of Venetie, 522 U.S. 520, 532 (1998) (finding fee land owned by Alaska Native corporations is not Indian country). In this article, I use the terms "tribal land," and "tribal territory" interchangeably to describe land over which *tribes* have jurisdiction. Although largely coterminous, these categories may not always be identical. I therefore use "Indian country" only when referring to the federally-defined legal category. For ease of reference, I sometimes use the term "reservation" as shorthand when referring to tribal territory; it should be understood to include other types of tribal land as well.

41. 18 U.S.C. § 1152. By its terms, the statute does not extend to crimes committed by one Indian against another Indian, to Indian offenders who have already been punished by the tribe, or where a treaty has reserved exclusive jurisdiction to the tribe. *Id.* While federal jurisdiction over some Indian-on-Indian crimes was created by a later law, the federal government may not prosecute an Indian defendant under § 1152 if the tribe has already prosecuted and punished that defendant.

42. *Id.* § 1153.

43. Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections of 18 U.S.C. and 25 U.S.C.), unilaterally transferred federal criminal jurisdiction to six states and authorized other states to assume the same. Although Public Law 280 transferred federal jurisdiction to the states, it did so by extending state criminal law into Indian country, so the reach of state jurisdiction is actually broader than federal jurisdiction would be. For example, states can prosecute Indian defendants for any crime against another Indian, not just a major crime defined by 18 U.S.C. § 1153. Other states were granted this jurisdiction by specific statutes, such as land claim settlements.

44. *See* United States v. McBratney, 104 U.S. 621, 624 (1881); Draper v. United States, 164 U.S. 240, 247 (1896); *see also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL tit. 9, § 678 (2014).

45. State jurisdiction under Public Law 280 is concurrent with tribal jurisdiction, *see infra* note 48 (describing the modern scholarly consensus that tribes retain concurrent criminal jurisdiction under Public Law 280), so any general rule about the scope of tribal jurisdiction would also affect tribes subject to Public Law 280, and the practical effect may be different for those tribes.

the existence or non-existence of federal or state jurisdiction as a concurrent overlay has no direct bearing on the scope of tribal jurisdiction.[46] Just because another government has concurrent jurisdiction does not mean that tribes lack it.Any question about the appropriate scope of tribal criminal jurisdiction must be answered first by looking to tribal law. Although federal law limits tribal jurisdiction in significant ways, federal courts have recognized that the question of a tribe's jurisdiction should first be answered by the tribe itself.[47] Tribal law defines the scope of tribal jurisdiction in the first instance, and the question of whether it complies with the limits imposed by federal law comes later. A major shortcoming in scholarly and judicial discussions of tribal criminal jurisdiction is the tendency to focus primarily on federal jurisdiction, treating tribal jurisdiction as a gap-filler: an approach that can lead tribes to unnecessarily limit their own jurisdiction.[48]

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46. The scope of federal and state criminal jurisdiction in Indian country certainly has practical implications that inform Congress' policy choices or the Court's view of history, which in turn may affect tribal jurisdiction. *See infra* Part II.A. A statute or case recognizing federal or state jurisdiction over a specific type of case, however, does not determine whether tribal jurisdiction exists.

47. *See* Nat'l Farmer's Union Ins. v. Crow Tribe, 471 U.S. 845, 856-57 (1984) (finding scope of tribal civil jurisdiction should be answered first by the tribal court).

48. For example, the existence of federal jurisdiction over major crimes in Indian country, and the relative absence of tribal courts exercising jurisdiction over those same crimes, has led the Court to suggest that tribes may not have jurisdiction over major crimes. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978) (assuming that tribal jurisdiction over major crimes was extinguished by federal law and citing pre-1978 circuit court authority to the same effect, but acknowledging some "confusion" over the question of exclusive jurisdiction and declining to decide the question directly). *But see* United States v. John, 437 U.S. 634, 651 n.21 (1978) (referring to the question as "disputed" and declining to resolve); United States v. Wheeler, 435 U.S. 313, 325 n.22 (declining to resolve the question). Indeed, Congress seemed to assume that tribes lacked jurisdiction over major crimes during when it passed the *Duro* fix law. *See, e.g.*, H.R. REP. 101-938, at 132 (1990) (Conf. Rep.) (report on first *Duro* fix bill) (referring to tribal jurisdiction as "criminal misdemeanor jurisdiction"). Today, courts and scholars agree that the authorization of federal jurisdiction did not divest tribes of their jurisdiction. Wetsit v. Stafne, 44 F.3d 823, 825-26 (9th Cir. 1995) (holding that tribes retain jurisdiction to over offenses covered by the Major Crimes Act, and noting that this was "the conclusion already reached by distinguished authorities on the subject"); *accord* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.04, at 758-60 (Nell Jessup Newton et al. eds, Lexis Nexis 2005) [hereinafter COHEN] (noting earlier judicial and regulatory opinions to the contrary but concluding that the *Wetsit* court's conclusion is "the correct one"); PHILIP FRICKEY ET AL., AMERICAN INDIAN LAW 326 (2d ed. 2008); ROBERT A. WILLIAMS JR., ET AL., FEDERAL INDIAN LAW 377-81 (5th ed. 2005); CAROLE GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 528-37 (6th ed. 2010). Similarly, tribes subject to state jurisdiction under Public

Looking to tribal law is also important to avoid confusing questions of tribal jurisdiction with questions of federal jurisdiction. The courts' tendency to conflate federal and tribal standards shows why it is so important for tribes to define the limits of their own jurisdiction under tribal law and to clarify whether they intend to adopt or diverge from federal standards. Federal court review of a tribe's exercise of criminal jurisdiction should start with whether it comports with tribal law; only if it does should the court then consider whether it runs afoul of federal limitations placed on tribal court jurisdiction (which may be different from the limitations placed on federal courts' jurisdiction). Tribes do not legislate in a vacuum, though; federal law imposes certain limits on tribes' jurisdiction. This article begins with a careful review of federal limits, because a thorough understanding of these limits provides the context necessary to understand how and why tribes articulate the scope of their own jurisdiction.

A. Jurisdiction Ends at the "Indian"

Before 1978, it remained a legal possibility that tribes had retained their sovereign power to prosecute all people who committed crimes in tribal territory.[49] But in that year the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*, a case involving a white man who lived on the

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Law 280 sometimes have been treated as if they lack criminal jurisdiction. *See* B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-state and Tribal-federal Court Relations*, 24 WM. MITCHELL L. REV. 472 (1998). Today, it is clear that tribes retain concurrent jurisdiction even if subject to Public Law 280. Walker v. Rushing, 898 F. 2d 672, 675 (8th Cir. 1990); Booth v. State, 903 P.2d 1079, 1084 (Alaska Ct. App. 1995); GOLDBERG ET AL., *supra*, at 535-38; Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law* 280, 47 AM. UNIV. L. REV. 1627, 1667-91 (1998) (demonstrating that Public Law 280 did not divest tribes of criminal jurisdiction); CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 157-63 (1997); COHEN, *supra*, § 6.04[3][c] (describing the "nearly unanimous view" but noting that this "consensus . . . has developed relatively recently") .

49. Congress and the Court agree that whatever the scope of tribes' criminal jurisdiction, it exists because it is an aspect of inherent sovereignty that tribes have retained despite the imposition of federal plenary power. Federal law provides that tribes, which have been recognized by the United States government as separate sovereigns since before the country was formed, retain all aspects of sovereignty that have not been clearly taken away via treaty or statute or "withdrawn by . . . implication as necessary result of their dependent status." *Wheeler*, 435 U.S. at 323. Congress and the federal courts agree that tribes retain some criminal jurisdiction, but not the full scope of territorial jurisdiction enjoyed by most sovereigns. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 685 (1990) ("A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense.").

Suquamish Reservation, and declared that tribes lack criminal jurisdiction over non-Indians.[50]

Early treaties reflected the understanding that tribes were sovereign nations with "complete territorial sovereignty over their lands."[51] Such retained jurisdiction would have included the power to prosecute non-Indian defendants.[52] Before the 1900s, however, the geographical separation between Indian and non-Indian communities likely afforded few opportunities for tribes to exercise that power, or document it if they did. Moreover, when white settlers committed crimes in Indian country, the federal government often stepped in to prosecute them, relying on its power to manage relations between its citizens and the Indian tribes by keeping the peace, and on its obligation to protect tribes and their lands from incursions by settlers.[53] In the late 1800s and early 1900s federal policies changed, which brought many more non-Indians within the boundaries of reservations[54] and at the same time crippled tribal justice systems.[55] Over

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50. 435 U.S. 191, 208.

51. Robert N. Clinton, *There Is No Supremacy Clause for Indian Tribes*, 34 ARIZ. L. REV. 113, 118-23 (2002) [hereinafter Clinton, *No Supremacy Clause*] (analyzing treaty provisions).

52. *Id.* at 123 (territorial sovereignty, as recognized by treaties, included "complete jurisdiction over any non-Indian intruders"); *see also supra* notes 2-4 and accompanying text (explaining that sovereigns are normally understood to have jurisdiction over all who commit crimes within their territory, plus extraterritorial jurisdiction over their nationals and others who commit certain crimes).

53. Beginning in 1790, federal laws known as Indian trade and intercourse acts provided for federal criminal jurisdiction over U.S. citizens (in other words, whites) who committed a crime or trespass on Indian land. *See* Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 958-59 (1975) (describing these laws) [hereinafter Clinton, *Development of Criminal Jurisdiction*].

54. *See* General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.). The Act authorized a policy of allotting tribal lands, conveying parcels to individual Indians, and opening up the "surplus" land for white settlement. *See generally* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 144 (2012) (describing how the federal government's allotment and sale of tribal lands encouraged and facilitated white settlement on reservations and disputing the common assumption that these white settlers expected tribes disappear and therefore did not expect to be subjected to tribal government jurisdiction).

55. The Major Crimes Act, 18 U.S.C. § 1153 (2012), undermined tribal criminal justice systems by extending for the first time federal jurisdiction to crimes committed by Indians against other Indians on reservations, an extension justified by the belief that tribal justice systems were not capable of addressing serious crimes. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN

the next century, as non-Indian crime became more common on reservations, most tribes lacked the judicial and financial resources to prosecute these offenders. By the 1970s, however, tribes began to exercise this long dormant aspect of their sovereignty by prosecuting non-Indians who committed crimes in their territory, which finally prompted the Court to address the question of whether they still possessed such jurisdiction.[56] The *Oliphant* Court ended this practice by holding that tribes, while retaining criminal jurisdiction generally, were divested of the power to exercise it over non-Indians.[57]

The Court's primary rationale was historical. It first reviewed the historical record and noted that tribes rarely exercised criminal jurisdiction over non-Indians.[58] Then it looked for congressional or executive confirmation of such jurisdiction and found none.[59] In the absence of historical examples and external confirmation, the Court decided that the power of tribes to prosecute non-Indians who committed crimes in their territory no longer existed. As others have convincingly argued, the Court's "use it or lose it" approach to history and doctrine here is inconsistent with its previous cases on tribal jurisdiction, in which it assumed tribes retained all sovereign powers unless a power had been explicitly divested by treaty or statute.[60] The Court also created a circular trap for tribes. Previous

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THE NINETEENTH CENTURY 136-39 (1994). The federal Code of Indian Offenses employed a criminal justice model to forcibly assimilate Indian people by criminalizing tribal cultural and religious activities. *See generally* GOLDBERG ET AL., *supra* note 48. Congress further undermined tribal justice systems in 1953 by extending state criminal jurisdiction over many reservations. *See supra* note 43.

56. *See* Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 261, 263 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2010).

57. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

58. *Id.* at 197-98.

59. *Id.*

60. *Oliphant* has been the subject of devastating critique by Indian law experts because it reversed the logic of previous cases about tribal powers. *See, e.g.*, Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmember*, 109 YALE L.J. 1, 34-36 (1999); Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 60 (2003) (describing how the Court "[a]bandon[ed] the Indian law canons of construction"); Melanie Beth Oliviero & A.T. Skibine, *The Supreme Court Decision That Jolted Tribal Jurisdiction*, AM. INDIAN J., May 1980, at 2, 6 ("[The Court did not explain] how [it] can find jurisdiction of nonmembers inconsistent with tribal status or in conflict with the sovereignty of the United States. The crucial mistake in *Oliphant* is that the denial of tribal jurisdiction over non-Indians is a

federal policies had the intended effect of undermining tribal government institutions.[61] Those policies were later rejected in favor of federal support for tribal sovereignty,[62] but the Court used the resulting lack of strong tribal government infrastructure as a reason to hold that tribes no longer enjoyed the full scope of their governmental powers.[63] Because of its reverse logic, the damaging impact of *Oliphant* eventually extended far beyond criminal

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political question which the Court decided in violation of the United States Constitution.") The general rule in prior case law was that tribes possess any power inherent in sovereignty unless that power has been limited by treaty, statute, or it was necessarily inconsistent with the tribe's "domestic dependent" status. *See* Frickey, *supra*, at 8-13 (describing the foundational premise that "tribes possess all authority not lost as a result of original European contact, explicit treaty cessions, or unambiguous statutory language to the contrary"). Before *Oliphant*, the Court had only relied on the "necessarily inconsistent" reasoning twice to hold that tribes lost the "power to dispose of the soil at their own will, to whomsoever they pleased," Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823), and that tribes lost the power of independent external relations with foreign nations, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831). Besides those powers, the exercise of which could potentially threaten the existence of the United States as a nation, tribes were thought to possess any power that had not been affirmatively taken away. *See* Frickey, *supra*, at 13-14, 36 (describing the limited category of implicit divestiture prior to *Oliphant* and noting that the Court "reopened a category of diminished tribal authority that had been thought closed forever since the Marshall Court"). In *Oliphant*, the Court turned this approach inside out, asking instead whether the Congress had ever affirmed the existence of tribal criminal jurisdiction over non-Indians and whether tribes had historically exercised such jurisdiction. Finding little evidence of historical exercise or congressional or executive confirmation of the power, the Court held that it had been "implicitly divested." *Id.* at 197-209.

61. *See supra* notes 48, 54-55.

62. Since the late 1960s, the federal government has followed a policy of supporting tribal self-determination and dealing with tribes on a government-to-government basis. This policy was first set forth in President Nixon's message to Congress on Indian affairs. Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970). President Nixon's statement rejected the policies pursued in the past where an "Indian community is almost entirely run by outsiders" and directed Congress to "create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." *Id.* at 565-66. Every subsequent President has reaffirmed the policy. Memorandum No. 215, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (President Obama); Proclamation No. 7500, 66 Fed. Reg. 57,641 (Nov. 12, 2001) (President G.W. Bush); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (President Clinton); Memorandum No. 85, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (President Clinton); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) (President Clinton); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662 (June 14, 1991) (President G.H.W. Bush); Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) (President Reagan).

63. *Oliphant*, 435 U.S. at 196-205.

jurisdiction. For example, the Court has relied on this backward approach in subsequent cases to divest tribes of civil jurisdiction over nonmembers of the tribe in many situations.[64]

The *Oliphant* Court's historical analysis has also been criticized as inaccurate.[65] For example, the Court cited treaty language that affirmed exclusive tribal criminal jurisdiction within tribal territory and also provided that the United States would punish its own citizens who committed offenses against the tribe or its members.[66] Such language was probably not understood by the signatory tribes as a blanket prohibition against criminally punishing any non-Indians. There is evidence that non-Indians who were married or adopted into tribes, or who otherwise settled in tribal territory, were treated as members of the community, and were subjected to tribal criminal jurisdiction.[67] The treaties can be read instead as

64. *See, e.g.*, Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court's Decisions in* Oliphant, Wheeler, *and* Martinez, 55 FED. LAW., Mar./Apr. 2008, at 36, 38; Royster, *supra* note 60, at 60, 63-66 (describing how the novel logic of Oliphant has been used to divest tribes of civil jurisdiction).

65. *See* Royster, *supra* note 60, at 60 ("The [Court reasoned] that all three branches of the federal government shared a common historical understanding that tribes could not exercise criminal jurisdiction over non-Indians. This was arguably the most indecent piece of 'reasoning' that the Court has ever produced. It is a textbook model of how to obscure unfavorable law, relegate contrary facts and precedent to footnotes, and argue using only highly selective snippets that support the preferred position. As a lawyer's brief, this is probably ethical. As a decision by the nation's highest court, it is an embarrassment."); Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole Is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 403-40 (1993) (reviewing precedent and historical sources relied upon by the Court and finding that "the history recounted by the Court certainly does not support" its conclusion).

66. Oliphant v. Squamish Indian Tribe, 435 U.S 191, 197 n.8 (1978).

67. *See, e.g.*, Clinton, *Development of Criminal Jurisdiction*, *supra* note 53, at 953-54 (describing how early treaties did not prohibit tribes from exercising jurisdiction over non-Indians, but provided for mutual cooperation between a tribe and the U.S. in the case of crimes between tribal and U.S. citizens and recognized tribal authority to deal criminally with non-Indians who settled in tribal territory and committed crimes there); *see also* Clinton, *No Supremacy Clause*, *supra* note 51, at 122 (interpreting prosecution agreements in treaties as extradition agreements between sovereigns with complete territorial jurisdiction); Clinton, *Development of Criminal Jurisdiction*, *supra* note 53, at 954-55 (describing treaty language); *see also* United States v. Rogers, 45 U.S. (4 How.) 567, 567-68 (1846) (federal criminal case involving inter-married white man who was prosecuted by the tribe); *see also* Bethany R. Berger, *"Power over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004) [hereinafter Berger, *Power*] (describing other cases of whites prosecuted by tribal courts); Paul Spruhan, *"Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79, 85-91 (2012); *Oliphant*, 435

intending to limit tribal jurisdiction over non-Indians who were relative strangers to the community, or as extradition agreements between sovereigns that did not limit either sovereign's jurisdiction.

Although most of *Oliphant* is dedicated to historical analysis, the Court acknowledged that historical practice alone was not enough to establish that tribes had been divested of criminal jurisdiction.[68] The opinion's final pages supplied the missing reasoning, explaining *why* the Court believed the exercise of criminal jurisdiction over non-Indians to be inconsistent with tribes' status as domestic dependent nations.[69] First, the Court explained that any jurisdiction "beyond what is necessary to control internal relations" of tribes would be inconsistent with their semi-sovereign status.[70] This distinction between internal and external matters appears in other cases decided at the same time as well,[71] and it highlights the Court's concern with tribal jurisdiction over outsiders, as opposed to insiders.

Second, tribal prosecution of non-Indians, in the Court's view, is incompatible with the United States' interest in protecting the due process rights of its citizens:

> Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[72]

U.S. at 197 n.8 (acknowledging that the treaties also provided that whites who settled in Indian country could be punished by the tribe); Maxfield, *supra* note 65, at 415 (critiquing the Court's interpretation of these treaty provisions).

68. *Oliphant*, 435 U.S. at 206.
69. *Id.* at 208-11.
70. *Id.* at 210.
71. *E.g.,* United States v. Wheeler, 435 U.S. 313, 326 (1978).
72. *Oliphant*, 435 U.S. at 209-10.

Although the Court emphasized the United States' interest in protecting the due process rights of its citizens, a group that in 1978 included Indian people,[73] it viewed this incompatibility as meaning that tribes lost jurisdiction over only "non-Indian" citizens.[74] *Oliphant* thus carved out a category of "Indian" people who, although also United States citizens, could fairly be prosecuted in tribal courts.[75]

However, the Court offered little support for its conclusion regarding the due process rights of citizens. U.S. citizens are regularly subject to prosecution by foreign governments for crimes committed abroad without significant concerns being raised about whether the substantive or procedural criminal law of the requesting country differs from American law.[76] The Court did not explain in detail why Indian tribal prosecution presented more of a threat to the liberty of U.S. citizens than prosecution by a foreign court. It expressed concern about the fairness of subjecting non-

73. Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401). The Act collectively naturalized all American Indian people. Prior to the Act, Indians as a group were considered to be citizens of tribal nations, but not of the United States, although individual Indian people were sometimes naturalized. *See generally* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. (forthcoming 2016).

74. *Oliphant*, 435 U.S. at 209-11.

75. This was consistent with an earlier case about federal criminal prosecution, *United States v. Antelope*, which held that it did not violate the constitutional rights of Indian people to be prosecuted federally when a non-Indian charged with the same crime could only be prosecuted in state court. 430 U.S. 641, 669-70 (1977) (subjecting Indians to prosecution under federal law, which carried stiffer penalties than prosecution under state law, for crimes committed in Indian country is not an illegal racial classification); *see also* Fisher v. Dist. Court, 424 U.S. 382, 390 (1976) (denying Indians access to state courts for adoptions arising on the reservation not a violation of equal protection).

76. When a U.S. citizen is subject to prosecution abroad, the decision whether to extradite provides the main opportunity for U.S. courts to intervene should concerns about the foreign system exist, but foreign courts are not subject to the same level of scrutiny as tribal courts. *See* MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV. NO. 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 23 (2010), *available at* https://www.fas.org/sgp/crs/misc/98-958.pdf (explaining that U.S. courts follow a "non-inquiry rule" based on the idea that "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people") (quoting *In re* Extradition of Cheung, 986 F. Supp. 791, 789-99 (D. Conn. 1997) and collecting cases that demonstrate how rare it is for the U.S. to refuse to extradite because of procedural fairness concerns); *accord id.* at 8 (explaining that, while extradition usually applies only to offenses that are criminalized in both countries, "the United States favors the view that treaties should be construed to honor an extradition request if possible" and so this requirement is construed loosely).

Indians to tribal justice systems, which it characterized as culturally foreign, incompetent, and not sufficiently protective of the basic guarantees of due process protected by the Constitution.[77] In reaching its conclusion, the Court looked for guidance to an 1883 decision about whether an Indian[78] could be tried in the federal system.[79] Invalidating that prosecution, the Court had reasoned that the exercise of federal criminal jurisdiction over Indians absent express congressional authorization would amount to an unfair extension of law

> over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .[80]

The *Oliphant* Court reasoned that "[t]hese considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure."[81]

Yet, the Court did not hold that tribes were divested of their criminal jurisdiction altogether.[82] In fact, it affirmed that tribes retained jurisdiction over their own citizens that same year in a case called *United States v. Wheeler*, in which the Court held that the Navajo Nation retained its inherent power to prosecute an enrolled tribal citizen.[83] In *Wheeler* and

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77. *Oliphant*, 435 U.S. at 210 ("This principle [that tribes gave up the power to prosecute non-Indians] would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents." (internal citations omitted)).

78. Indians were not United States citizens at the time.

79. *Oliphant*, 435 U.S. at 210 (citing *Ex parte* Kan-gi-Shun-ca (Crow Dog), 109 U.S. 556 (1883)).

80. *Id*. at 210-11 (quoting *Crow Dog*, 109 U.S. at 571).

81. *Id*. at 211.

82. *Id.* at 210.

83. 435 U.S. 313, 323-24 (1978). Because the tribal prosecution was an exercise of inherent power, the subsequent federal prosecution of Wheeler for the same crime did not violate double jeopardy. *See also* Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that

Oliphant, the Court thus drew a clear line between tribal citizens, over whom the exercise of tribal criminal jurisdiction presented no conflict with U.S. sovereignty, and "non-Indians," over whom the extension of "alien" jurisdiction was so unfair as to be incompatible with due process rights. In other words, the Court viewed tribal jurisdiction as fair in some cases and unfair in others—but limited its concerns about fairness to non-Indian people, to whom it believed the tribe's justice system would be "alien."[84] The Court in *Oliphant* did not explain why it chose to draw this line between "Indians" and "non-Indians," nor did it explain whom it meant to include in each category, but instead left those difficult questions to be resolved in later cases.

B. Jurisdiction Extends to "Nonmember Indians"

Oliphant prohibited tribal courts from prosecuting non-Indians, while *Wheeler* confirmed those courts' power to prosecute their own tribal citizens.[85] In the gray area between those two categories remained a group usually described as "nonmember Indians"—people who might be considered Indians in the Court's view (and are thus not outside tribal court jurisdiction under *Oliphant*), but who are not citizens of the prosecuting tribe.[86] This category includes both people who are enrolled citizens of one tribe but commit crimes in the territory of another, and also people considered to be legally Indian by some measures, but who are not formally enrolled in any tribe. This begs the question of what it means to be legally Indian when one is not an enrolled tribal citizen.

In 1990, the Supreme Court and Congress reached opposite conclusions regarding tribal criminal jurisdiction over this group. First, the Court extended its *Oliphant* ruling and held that tribes lacked jurisdiction over nonmember Indians as well.[87] Then Congress immediately responded by

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tribal criminal jurisdiction over a tribal citizen is an aspect of inherent tribal sovereignty not governed by the federal Bill of Rights). Wheeler is described in the Court's opinion as "a member of the Navajo Tribe." *Wheeler*, 435 U.S. at 314. The Court in *Talton* described the defendant and the victim as "both Cherokee Indians." *Talton*, 163 U.S. at 379. Although neither Court specifically discussed the idea of formal citizenship, no questions were raised as to the status of either defendant as a member of the tribe.

84. *See Oliphant*, 435 U.S. at 211.

85. *Wheeler*, 435 U.S. at 328; *Oliphant*, 435 U.S. at 194.

86. *Impact of the Supreme Court's Ruling in* Duro v. Reina*: Hearing on S. 962, S. 963 Before the S. Select Comm. on Indian Affairs*, 102d Cong. 137 (1991) [hereinafter *Hearing on S. 962, S. 963*] (statement of Wayne Ducheneaux, President, National Congress of American Indians).

87. Duro v. Reina, 495 U.S. 676, 688 (1990).

passing legislation to confirm that tribes do retain criminal jurisdiction over nonmember Indians.[88] Unfortunately, this legislation did little to clarify the scope of this category or Congress' reasons for differentiating between nonmember Indians and non-Indians, over whom it did not restore tribal criminal jurisdiction.

1. Duro v. Reina

The Court, by failing to clarify its reasons for distinguishing between Indians and non-Indians in *Oliphant,* opened the door for its holding in 1990 that tribes were also divested of their criminal jurisdiction over "nonmember Indians."[89] *Duro* involved an Indian defendant who was an enrolled citizen of the Torres-Martinez Band of Cahuilla Indians, but was living on the Salt River Pima-Maricopa Reservation,[90] where he was accused of killing a fourteen year old Indian boy.[91] Duro was initially charged with murder in federal court, but the indictment was dismissed in response to a motion by the Attorney General.[92] The Salt River Tribe then charged Duro with the crime of illegally firing a weapon, and Duro challenged the tribal court's jurisdiction.[93] The facts presented an issue that was obscured in *Oliphant*: is tribal prosecution of a person who is "Indian" but not enrolled in the prosecuting tribe similarly inconsistent with U.S. sovereignty?

The *Duro* Court reasoned that nonmember Indians are on the same footing as non-Indians in terms of the issues implicated by tribal criminal jurisdiction: they have not consented to be governed by the tribe,[94] they

88. *See* Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)); H.R. REP. NO. 101-938 (1990) (Conf. Rep.); *see infra* Part I.B.2 (discussing this legislation).

89. *Duro*, 495 U.S. at 679. The *Duro* court categorized people into "members" and nonmembers" of a specific tribe. It did not explicitly define "membership," but the opinion clearly equates the idea of membership with formal citizenship in the tribe. *See id.* at 694 ("Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in tribal government, the authority of which rests on consent."). For a discussion of others ways to conceive of "membership" in a tribal community, see Part II.

90. *Id.* at 679.

91. The victim was a citizen of a third tribe. The case thus involved two Indians, neither of whom was a citizen member of the prosecuting tribe, but both of whom lived and worked in that tribe's community.

92. *Duro*, 495 U.S. at 680.

93. *Id.* at 681.

94. *Id.* at 693-94.

have no voice in the government,[95] and the tribe's legal system and culture might be unfamiliar to them.[96] Like the Court in *Oliphant*, the *Duro* Court expressed concerns about subjecting outsiders to the cultural and procedural differentness of tribal courts:

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer.[97]

The Court reasoned that criminal jurisdiction over nonmember Indians presented many of the same concerns that the Court had identified in *Oliphant*, but it framed the issue as one of lack of consent, a theme absent from *Oliphant*:

> The retained sovereignty of a tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. . . . A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority."[98]

The Court noted that as a nonmember ineligible for citizenship in the Salt River Tribe, Duro was prohibited from voting, holding political office, or serving on a jury convened by the tribal court.[99] The Court noted lack of consent and political participation rights as the determining factors, and found no reason to treat non-Indians and nonmember Indians differently for

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95. *Id*. at 679. Although concerns about lack of due process protections and cultural foreignness drove the Court's decision in *Oliphant* regarding non-Indians, that opinion did not discuss its frame the Court's concerns in terms of consent or civic participation.

96. *Id.* at 693-94.

97. *Id*. at 693 (citations omitted).

98. *Id*.

99. *Id.* at 679.

jurisdictional purposes.[100] By using this consent/political participation rationale, the Court also relied less on the historical record, which it characterized as "somewhat less illuminating" than the record regarding jurisdiction over non-Indians.[101]

The *Duro* decision left an immediate practical gap in Indian country law enforcement for tribes not subject to Public Law 280. Although the federal government has concurrent jurisdiction to prosecute many crimes committed by Indian people, no federal law authorizes prosecution of an Indian person who commits a minor crime against another Indian person,[102] and states only have jurisdiction over matters in which no Indian is involved.[103] Minor crimes between Indians fall under the exclusive jurisdiction of tribal courts.[104] Federal courts determining jurisdiction do not distinguish between Indians who are enrolled in the prosecuting tribe and those who are not, so a federal court would have jurisdiction over an Indian who committed a major crime, regardless of citizenship status. Likewise, that same court would lack jurisdiction over an Indian who committed a minor crime against another Indian, regardless of whether the defendant or the victim were enrolled citizens.

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100. *Id.* at 684-88.

101. *Id*. at 688-92. *But see* H.R. REP. NO. 101-938, at 132-33 (1990) (Conf. Rep.) (report accompanying the law passed to reverse the *Duro* holding) (finding tribes had been exercising jurisdiction over nonmember Indians for over two hundred years, and that the existence of such jurisdiction had never been questioned).

102. The term "major crime" is used in this article to denote crimes than are listed in the Major Crimes Act, which established federal jurisdiction only over certain enumerated crimes. 18 U.S.C. § 1153 (2012). The term "minor crime" is used to denote crimes not listed. The Act originally included only seven offenses, but now includes fourteen: murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, felony assault (including assault with intent to commit a felony, assault with a dangerous weapon, assault by striking or beating, and assault resulting in substantial injury, and strangling or choking an intimate partner), assault on a child younger than sixteen, felony child abuse or neglect, arson, burglary, robbery, and theft of property valued over $1000. 18 U.S.C. § 1153(a). Use of the terms "major" and "minor" is not intended as a commentary on the seriousness of any particular offense. Some offenses listed in the Major Crimes Act could be considered non-serious offenses (e.g., taking property valued at $1000 or more), while some crimes not listed (e.g., torture or treason) could be considered quite serious.

103. *See supra* note 44.

104. COHEN, *supra* note 48, § 9.04.

Table 1 – Jurisdiction After Duro – Which Courts May Prosecute?

Defendant	Crime type	Indian victim	Non-Indian victim
Tribal citizen	**Major**	Tribal & Federal	Tribal & Federal
	Minor	Tribal	Tribal or Federal
Nonmember Indian	**Major**	Federal	Federal
	Minor	X	Federal
Non-Indian	**All crimes**	Federal	State

After *Duro*, a person who qualified as Indian under federal law but was not enrolled in prosecuting tribe could not be prosecuted by any government. This even applied to Duro himself because, after the murder charge was dismissed, the federal court lacked jurisdiction to prosecute him for the minor crime of illegally firing a weapon, while the tribal court lacked jurisdiction to prosecute him as nonmember Indian.

*2. The "*Duro *Fix"*

Congress responded swiftly to the *Duro* decision by passing legislation the same year that affirmed tribes' inherent power to prosecute nonmember Indians, which closed the gap the Court created.[105] It did so by amending the definitions section of the Indian Civil Rights Act to clarify that a tribe's "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[106] The amendment also added a definition of the term "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian . . . if that person were to commit an offense listed in that section in Indian country to which that section applies."[107] Although originally

105. Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)).

106. *Id.* The statute was passed in response to the *Duro* decision holding that tribes also lack criminal jurisdiction over nonmember Indians, so it is clear that it was intended to cover more than enrolled citizens of the prosecuting tribe. *See* Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 767-70 (1993).

107. 25 U.S.C. § 1301(4) (2012). The law refers directly to a provision of federal law called the Major Crimes Act, which authorizes the federal jurisdiction over certain crimes between Indians. That statute does not define the term "Indian," but the term has been judicially defined. *See infra* Part I.C.3. After circuit courts split on the question of whether

passed as a year-long temporary fix,[108] Congress later amended the provision by removing the sunset date,[109] permanently rejecting the *Duro* holding.

Table 2 – Criminal Jurisdiction After the Duro Fix – Which Courts May Prosecute?

Defendant	Crime type	Indian victim	Non-Indian victim
Tribal citizen	**Major**	Tribal & Federal	Tribal & Federal
	Minor	Tribal	Tribal or Federal
Nonmember Indian	**Major**	Tribal* & Federal	Tribal* & Federal
	Minor	Tribal*	Tribal* or Federal
Non-Indian	**All crimes**	Federal	State

*** Jurisdiction restored by the *Duro* fix.**

Why did Congress affirm jurisdiction over nonmember Indians, but not non-Indians? A primary rationale for the legislation was the law enforcement vacuum left by *Duro*. The congressional record reveals concern about Indians from other tribes,[110] and advocates for the bill also cited this problem.[111] Commentators observed the magnitude of the

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the amendment affirmed tribes' inherent authority to prosecute all Indians or delegated a federal power to tribes, the Supreme Court addressed the question, holding that the statute was an affirmation of inherent tribal power. United States v. Lara, 541 U.S. 193 (2004). *Lara* is discussed further in Part I.C.1.

108. The original law was temporary, Department of Defense Appropriations Act of 1991, § 8077(d), 104 Stat. at 1892 (providing that the provisions restoring jurisdiction would be ineffective after September 30, 1991), and Congress expressed its intent to work with tribes, federal agencies, and states "to develop more comprehensive legislation within the coming year to clarify the intent of the Congress on the issue," H.R. REP. NO. 101-938, at 133 (1990) (Conf. Rep.), but the promised clarification never materialized.

109. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646.

110. *E.g.,* 102 CONG. REC. 10,712 (1991) (statement of Rep. George Miller) ("[V]irtually all tribes support it. That means tribes want the jurisdiction but also support letting other tribes have jurisdiction over their people.").

111. *E.g., The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on H.R. 972 Before the Committee on Interior and Insular Affairs*, 102d Cong. 33 (1991) (Resolution of the International Association of Chiefs of Police on Expansion of Criminal Jurisdiction for Indian Tribes) (referring to visits and marriages "between members of different tribes"); *id.* at 23 (statement of Rep. Bill Richardson) (referring to the jurisdictional void over Indians from one tribe who "reside on, work at, or visit other tribal reservations" and to "member Indians [who] have spouses from a different tribe"). *But see*

problem, given the large number of nonmember Indians living and working on reservations[112] and the even larger influx of nonmember Indians present at tribally hosted public cultural events, such as powwows and Pueblo feast days.[113] Congress' focus on patching a jurisdictional gap is underscored by references in the record to tribes' loss of "misdemeanor jurisdiction" over nonmember Indians.[114] The revised law fully restored jurisdiction over all Indian people to the same extent as it exists over tribal citizens, which includes jurisdiction over major crimes,[115] but the legislators envisioned tribal jurisdiction only in terms of misdemeanors—the one category of crimes over which the federal courts lack jurisdiction in cases where both the defendant and victim are Indians.[116]

Hearing on S. 962, S. 963, *supra* note 86, at 137 (statement of Wayne Ducheneaux) (describing nonmember Indian category as including Indians enrolled in other tribes and Indians not enrolled anywhere); *Hearing on H.R. 972*, *supra*, at 153-58 (oral and written testimony of Professor Richard Collins) (explaining that formal enrollment does not necessarily reflect the traditional view about who is part of a tribal community); *Hearing on S. 962, S. 963, supra* note 86, at 218 (statement of Professor Nell Jessup Newton) (advocating elimination of language defining Indian in terms of member and referring to Indians who are not enrolled anywhere, a group she described as "much larger than many people realize").

112. *See* Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 109 n.7 (1992) (describing various factors that have led to the presence of significant numbers of nonmember Indians on most reservation, including the presence of Bureau of Indian Affairs and Indian Health Service employees, inter-marriage between tribes, and the presence of people who are ineligible for citizenship in their home communities, making them nonmembers if membership is defined in terms of citizenship); *see also* H.R. REP. NO. 101-938, at 133 ("Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics.")

113. *See Hearing on S. 962, S. 963, supra* note 86, at 146 (testimony of Donald Dupuis, Chief Judge of the Tribal Court of the Confederated Salish and Kootenai Tribes) ("thousands of non-member Indians gather on the Reservation each summer for annual pow-wows"); *id.* at 181 ("This number of non-member Indians and others increase tremendously on occasions of special events such as Shalako (the Zuni New Year's celebration).").

114. H.R. REP. NO. 101-938, at 132-33.

115. *See supra* note 48 (describing common assumption that tribes do not have jurisdiction over major crimes and recent case law holding to the contrary).

116. *E.g.*, H.R. REP. NO. 101-938, at 133 (referring to "the power of tribal courts to exercise misdemeanor jurisdiction"); *Hearing on S. 962, S. 963*, *supra* note 86, at 25 (statement of Sen. Pete Domenici) (discussing jurisdiction "in misdemeanor cases—and remember, that's all there is here"). The reference to misdemeanor jurisdiction probably also reflected an acknowledgement that tribes could not sentence offenders to more than one year in jail. *See infra* note 221 (describing sentence limits).

Beyond this practical problem, Congress did not elaborate on its reasons for restoring jurisdiction over nonmember Indians, but not non-Indians. The enforcement-gap explanation also does not explain why Congress chose to affirm only tribal jurisdiction over nonmember Indians, rather than clarifying federal or state jurisdiction over these people. A second possible rationale is that tribes have a long history of embracing members of other tribes through intermarriage, education, removal, and relocation.[117] However, tribes have a long history of embracing non-Indians as well,[118] so this rationale does not fully explain why Congress would distinguish between nonmember Indians and non-Indians.[119] A third possible explanation is the idea that Indian tribes, whether as a matter of history or as a result of modern inter-tribal cooperation, share certain basic values that might render a tribal justice system in one tribe less unfamiliar to another Indian (even one from another tribe) than it would be to a non-Indian. This explanation, however, ignores the vast diversity among tribes.[120]

A less satisfying but perhaps more likely explanation for restoring jurisdiction over nonmember Indians, but not non-Indians, is that it reflects a politically possible compromise between those who would limit tribal

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117. *Accord* Means v. Chinle Judicial Dist., 2 Am. Tribal Law 439, 444 (Navajo 1999) ("Given the United States Indian education policy of sending Indian children to boarding schools, Indians in the armed services, modern population mobility, and other factors, there are high rates of intertribal intermarriage among American Indians."); *id*. at 447-51 (discussing history of Indians from other tribes living in Navajo territory and of individuals integrating into Navajo society through its clan system).

118. *See supra* note 67 and *infra* notes 435-436. For the reasons described in notes 112 and 117, the number of non-Indians incorporated into tribes is likely much smaller, and it is likely that tribes sometimes embraced Indian outsiders more readily and completely.

119. The frequency with which tribes exercised jurisdiction over nonmember Indians, and the degree to which federal officials recognized it, differs from their history with regard to non-Indians. H.R. REP. NO. 101-938, at 133 ("Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members."). This difference in historical practice accounts for greater emphasis on history in *Oliphant*. As described at *supra* text accompanying notes 68-84, though, historical practice does not fully answer the question, and each court therefore offered a fairness-related justification for its holding as well.

120. *See, e.g.*, Greywater v. Joshua, 846 F.2d 486, 493 (1988) (pointing to "significant racial, cultural, and legal differences" between tribes, along with the lack of nonmember consent, to justify holding that tribes lack inherent criminal jurisdiction over nonmember Indians); Duro v. Reina, 860 F.2d 1463, 1468-69 (1988) (Kozinski, J., dissenting from order denying rehearing en banc) (quoting *Greywater* and noting possibility of "hostility or mistrust" between tribes); Duro v. Reina, 495 U.S. 676, 678 (1990) (discussing diversity among tribes).

jurisdiction to enrolled citizens of that tribe and those who would extend it to anyone who commits a crime within the tribe's territory. When Congress restored jurisdiction over non-Indian domestic violence offenders twenty years later, tribes sought restoration of full territorial jurisdiction: draft versions of the Tribal Law and Order Act of 2010 would have completely overturned *Oliphant*, and advocates urged the same during hearings on the VAWA of 2013.[121]

The possibility that tribal courts might obtain jurisdiction over white defendants has generated significant concern, especially in potential cases where those defendants do not live in the tribe's territory or are viewed as living "involuntarily" in Indian country.[122] This is one reason why the *Duro* fix may have encountered less resistance than an *Oliphant* fix would have encountered.[123] Because its limited affirmation of tribal jurisdiction focused

121. *See* Tribal Law and Order Act (Draft) (Feb. 25, 2009), *available at* http://www.indian.senate.gov/sites/default/files/upload/files/DraftTribalLawandOrderActof2009.pdf; *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 75 (2011), *available at* http://www.indian.senate.gov/sites/default/files/upload/files/071411CHRG-112shrg71182.pdf (testimony of Sarah Deer) (urging restoration of criminal jurisdiction over all offenders for all crimes).

122. Many whites settled in Indian country as a result of the federal policy allotting reservations and encouraging whites to settle on those parcels on the assumption that Indian country would vanish. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7-15 (1995) (describing how allotment and surplus land policies resulted in nearly ninety million acres of formerly tribal lands passing to white settlers); Tweedy, *supra* note 54, at 133-34 (same); Frickey, *supra* note 60, at 15 (describing allotment policy). When the United States later reversed this policy and reaffirmed tribal sovereignty, most of these white landowners remained on the land. *Id.* (allotment resulted in a "significant non-Indian population" on many reservations today); Royster, *supra*, at 60 ("In the allotment-based cases, the Court has consistently invoked the interests of non-Indian landowners in the Indian country."); Tweedy, *supra* note 54, at 137-39 (discussing the Court's concern with whether these settlers and their descendants would have expected to be subject to the jurisdiction of a tribal court and questioning its historical accuracy).

123. *See, e.g.,* Stephen Fee, *Transcript: Above the Law: Responding to Domestic Violence on Indian Reservations*, PBS NEWSHOUR (Nov. 22, 2014, 12:20 PM EDT), http://www.pbs.org/newshour/bb/law-uneven-justice-seen-reservations-victims-domestic-violence/ (quoting Senator Tom Coburn, who opposed passage of the Violence Against Women Act amendments restoring tribal jurisdiction over non-Indian domestic abusers on the grounds that they are not tribal citizens, with no mention of the twenty-year-old law providing for tribal jurisdiction over nonmember Indians) ("You cannot cast tribal sovereignty on me. I'm not a member of the tribe. . . . There's no way you can assure and guarantee constitutional provisions under what passed. So it –this provision will eventually be thrown out, be challenged, and on appeal they'll lose, because you cannot guarantee American citizens their constitutional rights if they're non-tribal members in a tribal court.").

on less of a politically charged issue than a reversal of *Oliphant* would have, it has also generated less focused inquiry into the reasons supporting such an extension of tribal jurisdiction, and has left important questions about the rationale for affirming tribal jurisdiction over only nonmember Indians unanswered.

As a result, the law seems problematic to some critics: it treats Indians and non-Indians differently and rejects using tribal citizenship as the definitive way to determine who counts as an Indian. If a person's Indian status does not in this context hinge on his or her formal citizenship in a tribe, some may wonder, what is left besides a purely descent-based classification? The next section discusses how various courts have answered the definitional questions raised by *Duro*.[124]

C. Who Is an Indian?

The *Duro* fix left open the question of who is included in the category "nonmember Indians." Does the designation simply refer to enrolled citizens of tribes other than the ones seeking to prosecute them? In other words, did Congress intend to affirm inter-tribal jurisdiction, but not to disturb the Court's emphasis on enrolled citizenship as a defining characteristic of Indianness? Or does the category also include the many people who live as members of tribal communities, but are not citizens? Most of the legislative history and case law concerning tribal jurisdiction has focused on citizens of other tribes,[125] suggesting that Congress meant at least to include those people, but beyond that the congressional record is ambiguous. For example, the National Congress of American Indians submitted a statement in support of the legislation that defined the nonmember Indian category as including Indians enrolled in other tribes and "those Indians not enrolled in any tribe."[126] More importantly, the law

124. *See infra* Part II (presenting a jurisdictional standard that relies on community membership, rather than citizenship or race). A fuller discussion of related equal protection issues appears *infra* Part III.A.2.

125. *E.g.*, H.R. REP. NO. 101-938, at 133 (1990) (Conf. Rep.) (describing the availability of federal services to Indians "without regard to whether their tribal membership is the same as their reservation residence"); S. 963, 102d Cong. § 2(10) (1991) (finding that law enforcement needs "require that inherent tribal jurisdiction over all Indians, including members of other tribes must be recognized and reaffirmed").

126. *Hearing on S. 962, S. 963*, *supra* note 86, at 137 (statement of Wayne Ducheneaux); *see also id.* at 25 (statement of Sen. Pete Domenici) ("[D]ay by day, if you limit jurisdiction to membership and then put a little parenthesis next to it and say '(enrolled),' which is what the Supreme Court seemed to say, you are leaving large numbers of Indians who are living right there day by day over whom no one has jurisdiction because there are scores of Indian

itself—which refers to the federal common law test for Indianness—actually applies to non-citizen community members as well.[127]

The law affirming tribal jurisdiction over all Indians defines "Indian" by referencing 18 U.S.C. § 1153.[128] Known as the Major Crimes Act, § 1153 grants federal courts criminal jurisdiction over major crimes between "Indians" occurring in Indian country.[129] Neither § 1153 nor Supreme Court case law provide a comprehensive definition of Indian for federal jurisdiction purposes.[130] Courts have *not*, however, interpreted the category

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living on reservations who are not official members of the reservation and/or tribe or pueblo they live on for a myriad of reasons. Some think it is intermarriage. That isn't half the reason. Some are just not enrolled. This enrollment process is a very technical kind of thing. In fact, it would be interesting . . . to find out how many Indians are not enrolled at all anywhere and are Indians living on Indian reservations. I believe there are literally thousands—perhaps hundreds of thousands.").

127. *See infra* Part I.C.3 (discussing how the common law standard for federal criminal jurisdiction has developed and been applied by various circuits). The congressional record also refers to the federal common law test. *E.g.*, H.R. REP. NO. 101-938, at 132 (referring to a "jurisdictional void" over "those who identify themselves as Indian and are recognized under Federal law (18 U.S.C. 1153) as Indian").

128. 25 U.S.C. § 1301(4) (2012). This definition was added to the Indian Civil Rights Act by the *Duro* fix legislation. H.R. 972, 102d Cong. (1991); *see also supra* Part I.B.2.

129. 18 U.S.C. § 1153.

130. The network of statutes creating federal jurisdiction over crimes occurring in Indian country distinguishes between Indians and non-Indians, but does not define either term further. Federal Indian country jurisdiction is rooted in either the General Crimes Act, 18 U.S.C. § 1152 (2012), which extends federal enclave law to Indian country for prosecutions of interracial crimes (Indian on non-Indian, and vice versa), or the Major Crimes Act, 18 U.S.C. § 1153 (2012), which authorizes federal prosecutions of certain intra-Indian crimes. Indianness is a jurisdictional prerequisite for prosecutions under the Major Crimes Act, which provides for federal jurisdiction over "[a]ny Indian" who commits certain enumerated crimes within Indian country. *Id.; see* United States v. Indian Boy X, 565 F.2d 585, 594 (9th Cir. 1977). The prosecution bears the burden of proving Indianness, *United States v. Juvenile Male*, 666 F.3d 1212, 1214 (9th Cir. 2012), but is not required to offer proof if the defendant stipulates that he is an Indian, Ward v. United States, No. 1:13cv01003, 2013 WL 664087, at *2 (D.S.D. 2013) (finding no proof necessary where defendant stipulated Indian blood and tribal enrollment), *appeal docketed*, No. 13-01513 (8th Cir. Feb. 6, 2013). For the General Crimes Act to apply, either the defendant or the victim must be Indian (but not both). 18 U.S.C. § 1152. The Act establishes jurisdiction over crimes occurring within Indian country without regard to identity of the defendant by extending "the general laws of the United States as to the punishment of offenses" (federal enclave laws) to Indian country. *Id.; see also* 18 U.S.C. § 1151 (defining "Indian country"). The second paragraph of the statute sets forth exceptions, specifying that federal jurisdiction "shall not extend" to crimes where both the defendant and the victim are Indian, or to an Indian defendant who has already been punished by the local law of the tribe. *Id.* § 1152. In a crime involving an Indian victim, a defendant may assert evidence of Indianness as an affirmative defense to

to apply only to enrolled tribal citizens. The test used by courts is drawn from a case that involved a different law, which provided for federal jurisdiction in Indian country but had an exception for crimes committed by one Indian against another.[131] In a case involving whether a white man, married to a Cherokee citizen and naturalized under Cherokee law, could avoid prosecution under this exception, the Supreme Court held that legal Indianness requires both some degree of Indian descent and some sort of political recognition as Indian.[132] Applying that test today in federal prosecutions under § 1153, which requires a showing of Indian status in order to permit prosecution, lower federal courts have held that tribal citizenship is sufficient to demonstrate political recognition, but it is not necessary.[133] Instead, citizenship is one factor to be considered, along with other factors such as receipt of tribal or federal services, social recognition, community participation, and even self-presentation.[134] While enrollment alone is enough to demonstrate political recognition,[135] an unenrolled person may still be considered an Indian under federal law if one or more of the other factors are satisfied.[136]

What, then, does political recognition look like for a nonmember Indian? Does this category include members of the resident tribal community who lack citizenship documents? Does it include those who are ineligible for citizenship under tribal law? For example, if a tribe requires that its members possess one-quarter Indian blood in order to enroll, what is the status of a descendant whose blood quantum is one-eighth? Does the category include all people of Indian descent?

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prosecution under § 1152. *See* United States v. Bruce, 394 F.3d 1215, 1222-23 (9th Cir. 2005) (holding that the government need not allege non-Indian status, but if defendant properly raises the issue and produces sufficient evidence, the burden shifts to the government to prove that the victim is not Indian). Indianness matters for different reasons under the two statutes, but courts use the same standard to determine it. *See id.* at 1229-30 (explaining that Indianness is an element of the crime under § 1153 and may be a defense to prosecution under § 1152, but relying on cases arising under both statutes to determine the substantive standard in a § 1152 case).

131. Act of June 30, 1834, Pub. L. No. 23-161, § 25, 4 Stat. 729, 730. That law was the predecessor to 18 U.S.C. § 1152.

132. United States v. Rogers, 45 U.S. (4 How.) 567, 567-68, 572-73 (1846). This case is discussed more fully *infra* Part I.C.3.

133. *See, e.g.*, *Bruce*, 394 F.3d at 1224; United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979); *Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938); St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

134. *See infra* notes 199-208 and accompanying text.

135. *See infra* note 209.

136. *E.g., Bruce*, 394 F.3d at 1224; *Pero*, 99 F.2d at 31; *St. Cloud*, 702 F. Supp. at 1461.

The circuit courts that have addressed the question of whether someone is politically recognized as Indian for purposes of federal prosecution all consider multiple factors, but different courts have selected different factors to consider and assigned different relative weights to them.[137] All agree, however, that enrollment is not required.[138] These cases are instructive, but do not directly answer the question of the appropriate boundary of *tribal* court jurisdiction; in fact, several cases suggest that Indianness might be governed by different standards for purposes of tribal and federal court jurisdiction.[139]

1. Challenges to the Duro *Fix*

One way that the question about the proper scope of tribal criminal jurisdiction has arisen is in cases that challenge the law restoring tribal jurisdiction over nonmember Indians. The only such case to reach the Supreme Court was *United States v. Lara*.[140] Lara, who was an enrolled citizen of the Turtle Mountain Chippewa Tribe but lived on the Spirit Lake reservation, was arrested after he assaulted an officer seeking to enforce an order excluding him from the reservation.[141] He pled guilty to several counts of misconduct in tribal court and was also prosecuted in federal court for assault on a federal officer.[142] Lara challenged his federal prosecution.[143] He argued that tribes' power to prosecute nonmember Indians was a delegation of federal power, so his subsequent federal prosecution violated the Fifth Amendment's prohibition against double jeopardy.[144] The Court rejected this challenge, holding that Congress restored an inherent tribal power instead of delegating a new one.[145] However, it reserved other potential bases for challenge, including the

137. *See infra* notes 199-206.

138. *See infra* note 207.

139. *See infra* notes 213-216 and accompanying text.

140. 541 U.S. 193 (2004).

141. *Id.* at 196.

142. *Id*.; *see also* United States v. Lara, 324 F.3d 635, 636-37 (8th Cir. 2003).

143. *Lara*, 541 U.S. at 197.

144. *Id.* at 197-98. The Eighth Circuit Court of Appeals agreed with Lara that the *Duro* fix law amounted to a delegation of federal power. *Lara*, 324 F.3d at 640.

145. *Id.* at 198-99, 210. In so holding, the Court resolved a circuit conflict, agreeing with the Ninth Circuit's pronouncement in *United States v. Enas*, 255 F.3d 662, 682 (9th Cir. 2001) (reh'g en banc), that the *Duro* fix was a restoration of inherent power, not a delegation of federal power. Enas was an enrolled member of the San Carlos Apache Tribe who was prosecuted after he stabbed a member of the White Mountain Apache Tribe while on that tribe's reservation. *Id*. at 665.

argument that a statute classifying by Indianness, but not tribal citizenship, was an illegal racial classification.[146]

In *Means v. Navajo Nation*[147] and *Morris v. Tanner*,[148] nonmember Indian defendants directly challenged tribes' assertions of criminal jurisdiction on equal protection grounds. Means, an enrolled citizen of the Oglala Sioux Tribe, lived on the Navajo reservation for a decade with his Navajo wife before later moving away.[149] During a visit to the Navajo reservation, he threatened and battered his father-in-law (an Omaha tribal member) and another (Navajo) man.[150] *Morris* involved a juvenile who was a citizen of the Leech Lake Band of Ojibwe and was arrested for speeding on the Flathead Reservation.[151] Lower federal courts affirmed tribal jurisdiction in each case,[152] and the Supreme Court denied certiorari.[153]

The closest cousin to these cases was a Supreme Court decision thirty years earlier which upheld *federal* criminal jurisdiction over Indians against an equal protection challenge. In that case, *United States v. Antelope*,[154] three citizens of the Coeur D'Alene Tribe were convicted of murder in a robbery that resulted in the death of a non-Indian woman who lived on the reservation. Two of the defendants were convicted of first-degree murder.[155] Both defendants challenged their convictions, arguing that they were prosecuted under federal law, which included a felony murder provision, instead of under state law, which would have required proof of premeditation and deliberation, because of their race.[156] Rejecting the challenge, the Court explained that federal laws relating to Indian tribes, "although relating to Indians as such," are "not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities."[157] This was enough to uphold the federal law, but

146. *Id.* at 209.
147. 432 F.3d 924, 927 (9th Cir. 2005).
148. 288 F. Supp. 2d 1133, 1134-35 (D. Mont. 2003).
149. *Means*, 432 F.3d at 927.
150. *Id.*; *see also* Means v. Chinle Judicial Dist., 2 Am. Tribal Law 439, 445 (Navajo 1999).
151. *Morris*, 288 F. Supp. 2d at 1135.
152. *Means*, 432 F.3d at 935; *Morris*, 288 F. Supp. at 1143.
153. *See supra* note 11.
154. 430 U.S. 641, 642-43 (1977).
155. *Id.* at 643.
156. *Id*. at 644.
157. *Id*. at 645-46.

the Court continued, "[i]ndeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe."[158] The Court noted, however, that circuit courts did not require tribal citizenship in order for a defendants to face federal criminal prosecution, "at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'"[159] Because the defendants were Coeur D'Alene citizens, the court did not reach the issue of whether federal criminal law extends to Indians who are not tribal citizens.

Lara, *Means*, and *Morris,* like *Antelope*, were really cases about federal plenary power. In each case the court considered, in part, whether the federal government could carve out a category of "Indian" people and subject them to different laws, even where those laws might be viewed as placing Indian people at a disadvantage. As the Court has repeatedly made clear, Congress—in the exercise of its plenary power over Indian affairs—may do so without running afoul of the Constitution.[160] Congress also has the power to describe and change the boundaries of this Indian legal category, as long as the people within that category can fairly be described as related (by citizenship, descent, or otherwise) to the Indian tribes with which the federal government has a relationship.[161] Whether Congress has the power to define and legislate with regard to citizens who are also Indians, however, is only tangentially related to the question of who a particular tribal government can prosecute and why.

In *Lara*, *Means*, and *Morris*, the federal courts accepted that the defendants qualified as "Indians" and would be included in the Congress' restoration of jurisdiction over "all Indians" as long as the law was valid. The invocation of defendants' tribal citizenship provided an easy rejoinder to the question of whether Congress had illegally created a racially defined

158. *Id*. at 646.

159. *Id*. at 647 n.7 (citing *Ex parte* Pero, 99 F.2d 28, 30 (7th Cir. 1938); United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974)).

160. *Id*.; *see* Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont., in & for Rosebud Cnty., 424 U.S. 382, 390-391 (1976) (exclusive tribal jurisdiction over family law issue arising between tribal members on reservation is not an unconstitutional denial of access to state courts); *see also* Morton v. Mancari, 417 U.S. 535, 545-55 (1974) (federal Indian preference laws not unconstitutional racial classification); *see also* Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 480 (1976) (tax immunity for Indians on reservation not unconstitutional racial classification).

161. *See infra* note 354 (describing various standards for determining the boundaries of the Indian legal category).

category of second class citizens.[162] All three defendants were enrolled in other tribes, and easily met a citizenship-based definition of Indianness, so the courts did not analyze their Indian status further. As in *Antelope*, the courts were not forced to consider whether citizenship in a federally recognized tribe was an absolute requirement for Indianness, and none of them discussed why citizenship should be required for tribal court prosecution when it is not required for federal court prosecution.[163] Even more importantly, none of these cases addressed the non-constitutional questions about the purpose of, need for, or proper limits on tribal criminal jurisdiction.

Besides the fact of their citizenship in other tribes, the defendants in *Lara* and *Means* were also deeply connected to the communities in which they were prosecuted, forestalling questions about whether they were being unfairly prosecuted by an unfamiliar court system.[164] Lara was married to a Spirit Lake tribal member and he lived with her and their children on the Spirit Lake reservation.[165] Means was married to a Navajo woman, had lived on the Navajo reservation for ten years, and was actively involved in tribal political and social issues.[166] Significantly, the tribal court in *Means* did not base its assertion of criminal jurisdiction on Means' enrollment in the Oglala Sioux Tribe. Instead, the court based its jurisdiction on Means' role in and kinship obligations to the Navajo community.[167]

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162. The *Lara* court described the *Duro* fix as restoring tribal jurisdiction over Indians from other tribes. 541 U.S. at 193, 198. The *Means* court also emphasized Means' enrollment, although it acknowledged that federal law did not necessarily require enrollment to demonstrate political Indianness. 432 F.3d at 934-35 ("We therefore can and do leave for another day the challenging question *Bruce* invites: whether a person who was racially Indian, but who was not enrolled or eligible for enrollment in any tribe, would be subject to tribal court jurisdiction."). In *Morris*, tribal law limited criminal jurisdiction to enrolled members of other tribes, and the court viewed the "voluntary" nature of enrollment, and the fact that it could be renounced in order to avoid future prosecution, as an important factor in its holding that the classification at issue was political, rather than racial. 288 F. Supp. at 1133, 1141.

163. *See infra* Part I.C.3.

164. Morris did not live on the Flathead reservation, but the court pointed out that over 2000 other nonmember Indians did, and that the tribe provided health, social and emergency services to those people. *Morris*, 288 F. Supp. at 1142.

165. *Lara*, 541 U.S. at 196.

166. Means v. Chinle Judicial Dist., 2 Am. Tribal Law 439, 445-46 (Navajo 1999).

167. *Id*. at 450; Spruhan, Case Note, *supra* note 20.

2. Federal Court Review of Tribal Jurisdiction over Unenrolled People

Tribal communities include many people who are not formally enrolled citizens. This may be true for several reasons: some people are descended from tribal members but do not meet the minimum blood quantum requirements of their tribes;[168] some tribes are matrilineal or patrilineal, so they only permit members of a certain gender to enroll their children in the tribe;[169] some people who are eligible for citizenship simply have not followed the official procedures to enroll; and some people are not descended from that tribe at all, but are related through marriage or adoption. Some of these people are enrolled in other tribes (e.g., a child of parents from two different tribes may be enrolled in one parent's tribe, but not in the other), but some are not enrolled anywhere.[170] Many of these nonmember Indians are fully integrated into their communities, live their lives on the reservation, and participate fully in tribal religious, cultural and social life.

Because almost every case in which a federal court was asked to review the legality of a *tribe's* exercise of criminal jurisdiction over a nonmember Indian involved a defendant who was enrolled elsewhere, the issue of jurisdiction over unenrolled people has not been carefully considered. The first federal case to address this question was *Las Vegas Tribe of Paiute*

168. *See, e.g.*, JILL DOERFLER, IDENTITY, FAMILY, BLOOD, AND CITIZENSHIP AMONG THE WHITE EARTH ANISHINAABEG xxii, 61-90 (2015) (describing how White Earth constitutional revision was driven in large part by a desire to change the one-fourth blood quantum requirement for citizenship); MELISSA TATUM, MIRIAM JORGENSEN, MARY E. GUSS & SARAH DEER, STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS 46 (2014) [hereinafter STRUCTURING SOVEREIGNTY].

169. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 n.2 (1978) (citing ordinance enacted in 1939 by Santa Clara Pueblo Council disallowing membership in Santa Clara Pueblo to children born of female members and male non-members); *Genealogy*, SENECA NATION OF INDIANS, http://www.sni.org/Culture/Genealogy.aspx (last visited July 22, 2015) ("[T]he mother must be an enrolled member in order for the children to be enrolled.").

170. Some may be members of a tribe that is not formally recognized by the United States government. Members of those tribes may not qualify as Indians for most federal law purposes, and thus could be treated the same way as non-Indians if the standard used relied on enrollment in a recognized tribe. *E.g.*, LaPier v. MacCormick, 986 F.2d 303, 305 (9th Cir. 1993) (enrolled member of Little Shell Band of Ojibwe not an Indian for purposes of federal prosecution because tribe not recognized); United States v. Maggi, 598 F.3d 1073, 1080 (9th Cir. 2010), *overruled in part by* United States v. Zepeda, 792 F.3d 1103 (9th Cir. 2015) (same). As described in Part II, some tribes use a jurisdictional standard that specifically includes these people. *See infra* note 255.

Indians v. Phebus,[171] which involved a tribal member who was involuntarily disenrolled as a result of an internal review of enrollment criteria.[172] After his disenrollment he continued to live on the reservation as a member of the community while he contested his disenrollment through appeals to the tribal court and tribal council.[173] During this time, he was convicted of a crime and sentenced to six months in jail by the tribal court.[174] The tribe's appellate court vacated his conviction, holding that the tribe lacked criminal jurisdiction.[175]

While there may have been important *tribal* law arguments against the extension of criminal jurisdiction over a defendant in such a situation, the tribal appellate court did not engage them. Instead, it held that the tribe lacked jurisdiction because, as a result of the disenrollment, the defendant no longer qualified as an "Indian" under *federal* laws defining the limits of tribal jurisdiction, holding that "Indian" in this context includes only enrolled tribal citizens.[176] This statement misreads federal common law, which clearly does not require enrolled citizenship to qualify as Indian.[177] When the tribe sought a declaratory judgment from a federal district court that jurisdiction was proper, the federal court granted it in part, holding that a tribal court may prosecute anyone who would qualify as an Indian under federal law, including people who are not enrolled.[178]

However, the court expressed concern about the particular facts of *Phebus*, holding that a tribe that had disenrolled someone over his objection could not later premise a finding of Indianness on his affiliation with that same tribe.[179] The case raised previously unexplored questions about how disenrollment, especially involuntary disenrollment, should affect

171. 5 F. Supp. 3d 1221 (D. Nev. 2014).

172. *Phebus*, 5 F. Supp. 3d at 1225; *see also* Lynette Curtis, *Cast Out of Paiute Tribe, Disenrolled Confront Struggles*, LAS VEGAS REV. J., Apr. 22, 2012, http://www.reviewjournal.com/news/las-vegas/cast-out-paiute-tribe-disenrolled-confront-struggles (discussing the background and aftermath of the decision that led to Phebus' disenrollment).

173. *Phebus*, 5 F. Supp. 3d at 1225; Interview with Tribal Attorney Patrick Murch (Mar. 28, 2014).

174. *Phebus*, 5 F. Supp. 3d at 1226.

175. *Id.* at 1226; *see also* Phebus v. Las Vegas Paiute Tribe, No. CA13-001 (Las Vegas Paiute Ct. App. June 10, 2013).

176. *Phebus*, No. CA13-001, at 3.

177. *See infra* note 207 and accompanying text.

178. *Phebus*, 5 F. Supp. 3d at 1230-31.

179. *Id.* at 1237.

jurisdiction.[180] Although federal law clearly protects tribes' right to determine their own citizenship,[181] and federal court review of tribal decisions to revoke citizenship is extremely limited,[182] recent instances of tribal disenrollment have garnered a great deal of media attention.[183] Even if these instances involve legitimate exercises of tribal sovereign power, they do not cast tribal governments in a particularly favorable light. A court considering the scope of tribal jurisdiction in a case involving a disenrolled person may have serious fairness concerns, as both the tribal and federal court did in *Phebus*. Whether these concerns should be addressed through a narrowing of tribal criminal jurisdiction is a different question, and one that neither court effectively addressed.

Although the discussion about nonmember Indians surrounding the *Duro* fix legislation seemed to focus on the problem of jurisdiction over Indians

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180. Voluntary and involuntary disenrollment could impact jurisdiction differently. *See infra* note 290 and accompanying text (discussing how each category would fare under a community recognition standard).

181. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); Roff v. Burney, 168 U.S 218, 222 (1897) (holding Chickasaw Nation empowered to grant and revoke citizenship, including naturalization of non-Indian spouses).

182. *Martinez*, 436 U.S. at 69. *But see* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 888 (2d Cir. 1996) (claiming "that authority to determine membership questions is 'complete and absolute'—simply goes too far. While Congress has deferred with regularity to tribal membership determinations, there is little question that the power to define membership is subject to limitation by Congress.")

183. *See, e.g.*, Curtis, *supra* note 172 (Las Vegas Paiute disenrollment); Associated Press, Disenrollment Leaves Natives "Culturally Homeless" (Jan. 20, 2014), *available at* http://www.cbsnews.com/news/disenrollment-leaves-natives-culturally-homeless (citing several examples of disenrollment battles and tracing increased visibility of disenrollment battles to the 1990s); K.C. Meadows, *Former Pinoleville Tribal Members Want Their Own Tribe*, UKIAH DAILY J., July 14, 2015, http://www.ukiahdailyjournal.com/general-news/20150714/former-pinoleville-tribal-members-want-their-own-tribe (discussing a group of nineteen former members of the Pinoleville Pomo Nation who were disenrolled after a 2005 constitutional amendment changed the tribe's enrollment criteria); Randi Schaffer, *Opinion Issued by Tribal Judge in Disenrollment Hearing*, MORNING SUN, Mar. 23, 2015, http://www.themorningsun.com/general-news/20150321/opinion-issued-by-tribal-judge-on-disenrollment-hearing (discussing Saginaw Chippewa disenrollment dispute); James Dao, *In California, Indian Tribes with Casino Money Cast Off Members*, N.Y. TIMES, Dec. 12, 2011, http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?_r=0 (discussing disenrollment dispute involving the Picayne Rancheria of the Chukchansi Indians and other California tribes). Although the media attention has intensified in recent years, "[d]isenrollment is not a new issue" for tribes. Duane Champagne, *The Debate Over Disenrollment*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 28, 2014), http://indiancountrytodaymedianetwork.com/2014/06/28/debate-over-disenrollment-155346.

enrolled in other tribes,[184] the concerns expressed in *Duro* and raised by some legislators[185] about the fairness of tribal court jurisdiction over people without political rights in that tribe extend to unenrolled people from that tribe as well. As the tribal and federal courts considering the *Phebus* case recognized, these peoples' status vis-à-vis tribal and federal law may present more challenging questions than the most common assumptions about the *Duro* fix recognize.[186] By erroneously assuming that federal law limits tribal court jurisdiction to citizens of tribal nations, the tribal appellate court in *Phebus* unnecessarily restricted its own jurisdiction and, more importantly, missed an opportunity to engage in a tribal law analysis of whether jurisdiction was proper under the circumstances.

3. Federal Jurisdiction Cases

To determine whether a person counts as an Indian for purposes of federal prosecution, courts apply a definition drawn from the 1845 case *United States v. Rogers*.[187] Under the *Rogers* test, Indianness requires both Indian ancestry and political recognition as an Indian.[188] The case involved a white man who had married a Cherokee woman, lived in Cherokee territory, and had become a naturalized citizen under Cherokee law.[189] The victim in the case was another white man who was also a naturalized citizen

184. *See* S. 963, 102d Cong. (1991) (draft bill introduced by Sen. Inouye to correct *Duro*, which states in the findings section that the tribes' historical jurisdiction over all Indians "was seriously disrupted by the Supreme Court's . . . holding that Indian tribes have lost their inherent criminal jurisdiction *over Indians who are members of other tribes*").

185. Newton, *supra* note 112, at 115 ("Senator Tom Daschle of South Dakota expressed his belief that the Constitution's Bill of Rights should apply to all nonmember Indians, especially because nonmembers cannot vote in tribal elections or run for office.").

186. *See supra* notes 172-179 and accompanying text (discussing *Phebus*).

187. 45 U.S. (4 How.) 567, 572-73 (1846).

188. *Id.; see, e.g.*, United States v. Zepeda, 792 F.3d 1103, 1118 (9th Cir. 2015); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (quoting United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996)) (finding test to consider "degree of Indian blood" and "tribal or government recognition as an Indian"); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); United States v. Prentiss, 273 F.3d 1277, 1280-1282 (10th Cir. 2001). For a comparison of the test across circuits, see generally Daniel Donovan & John Rhodes, *To Be or Not To Be: Who Is an "Indian Person"?*, 73 MONT. L. REV. 61 (2012); Bryan L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. RACE & ETHNIC JUSTICE 241 (2010).

189. Berger, *Power*, *supra* note 67, at 1960.

through inter-marriage.[190] Despite significant evidence that the tribe recognized Rogers as a member, the Court held that he could not escape federal prosecution under an exception to then-existing federal law barring federal prosecution of crimes committed by one Indian against another Indian.[191] Regardless of the tribe's view as to membership, the Court held that a person must also possess some degree of Indian blood in order to be considered "Indian" under federal law.[192]

Rogers involved a person who had been politically incorporated into a tribal community but was not descended from that community, or from any tribal community. The Court assumed that Rogers' naturalized status met the political recognition prong and focused instead on the descent prong. In contrast, federal courts today are usually confronted with cases where the descent prong has been met and the litigation involves the political recognition prong of the test. One way to establish political recognition is tribal enrollment. Nearly every tribe today has adopted formal enrollment criteria and documents enrollment via certificates or lists of members. When a person has some Indian blood and is enrolled in any tribe, it is relatively easy for a federal prosecutor to establish jurisdiction.[193]

Most of the federal court opinions on the question of Indianness consequently involve the gray area: people who are Indian by descent but who are not enrolled members of any tribe. One of the first circuit court cases to cite *Rogers* was *Ex parte Pero*, a case involving two defendants who argued that they were not Indian. One of the defendants, Moore, lived with his mother on the reservation of the St. Croix Band of Lake Superior Chippewa, although neither he nor his mother was an enrolled citizen because of procedural issues and federal agency rules governing enrollment at the time.[194] In an opinion that elucidated the political recognition requirement and laid the foundation for the modern tests, the court held that

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190. *Id.*

191. *Rogers*, 45 U.S. (4 How.) at 572-73.

192. *Id.* at 573. Varying degrees of Indian blood have been found to be sufficient under federal law, and because some tribes require only descent from an enrolled member, but not a particular quantum of Indian blood, it would be problematic for federal courts to impose a blood quantum floor that would effectively exclude some enrolled members.

193. Federal jurisdiction does not require that they be enrolled in the tribe whose territory encompasses the location where the crime occurred.

194. *Ex parte* Pero, 99 F.2d 28, 30 (7th Cir. 1938). The other defendant, Pero, argued that his acceptance of an individual allotment made him no longer an Indian under federal supervision. *Id*. at 29-30. The court held that he was still an Indian for jurisdictional purposes. *Id.* at 35.

> a child of an Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations, who himself lives on the reservation and maintains tribal relations and is recognized as an Indian, is to be considered an Indian within the protection of the federal guardian-ward relationship and within the meaning of "Indian" as used in the jurisdictional statute in question. The lack of enrollment in the case of Moore is not determinative of status.[195]

Circuit courts today agree that enrollment is not required;[196] this leaves the courts to determine alternative tests for political recognition in an era when formal citizenship has increasingly become the standard. The result is a varying and inexact set of factors, which courts apply differently in different circuits.[197] Courts agree that "political recognition" in this context can come from either the federal government or a tribal government,[198] so the factors consider both federal recognition and tribal recognition.

In the Ninth Circuit (the circuit with the most published opinions on this question), courts have listed four factors that are relevant to proving Indianness: "1) tribal enrollment; 2) government recognition formally and informally through the receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."[199] These factors are listed in declining order of importance.[200]

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195. *Pero*, 99 F.2d at 31.

196. *See infra* note 207 (enrollment not required by circuit courts); *supra* text accompanying notes 157-159 (describing *Antelope* Court's discussion of enrollment).

197. Although the term "Indian" is judicially defined in this context, courts have upheld the statute against challenges that it is unconstitutionally vague. *E.g.*, United States v. Broncheau, 597 F.2d 1260, 1264 (1979).

198. *See*, United States v. Bruce, 394 F.3d 1215, 1224-25 (9th Cir. 2005) (holding that federal recognition is not required and noting that the deference to tribal recognition "stems from the recognition that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership"); United States v. Dodge, 538 F.2d 770, 786-87 (8th Cir. 1976) (noting that courts consider "recognition by a tribe or society of Indians or by the federal government").

199. *Bruce*, 394 F.3d at 1223 (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)) (listing factors relevant to determining Indianness as a defense to a prosecution under § 1152); *see* United States v. Zepeda, 792 F.3d 1103, 1114 (9th Cir. 2015); United States v. LaBuff, 658 F.3d 873, 877 (9th Cir. 2011); *see also* United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009).

200. *Zepeda*, 792 F.3d at 1114.

Courts in other circuits have identified similar factors, but vary as to precisely which factors are relevant and how important each one is. The Eighth Circuit, for example, considers five factors: 1) enrollment; 2) governmental recognition through receipt of assistance; 3) tribal recognition via tribal court prosecution; 4) enjoying the benefits of tribal affiliation; and 5) social recognition as an Indian, including self-identification.[201] Tribal enrollment alone is dispositive, but the other factors need not be considered in any particular order and are not exhaustive.[202] This test places greater importance on informal forms of community membership because it does not require that social recognition be considered the least important factor, and it specifically considers self-identification.[203] Similarly, the Seventh Circuit uses a totality of the circumstances approach.[204] Factors that are relevant, but not dispositive, include tribal recognition, federal recognition, residence on a reservation, and "whether a person holds himself out as an Indian."[205] The Tenth Circuit also uses a "totality of the evidence" approach."[206]

Federal courts vary in their reliance on specific factors, but all agree that Indianness for purposes of federal prosecution requires descent and political recognition, and all agree that formal enrollment in a tribe is not the only way to demonstrate political recognition.[207] All courts also rely to some extent on informal recognition by a tribal community. Courts have considered receipt of tribal services or benefits, prior exercise of jurisdiction by a tribal court, formal non-citizen status under tribal law, cultural and social participation, social recognition, residence on the

201. United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009).

202. Lewis, *supra* note 188, at 242 (noting that Eighth Circuit's factors are "illustrative" while Ninth Circuit's factors are "exhaustive").

203. *See Dodge*, 538 F.2d at 787 (relying in part on the fact that defendants held themselves out to be Indian). *But see* Stymiest, 581 F.3d at 764 (self-identification relevant but not sufficient alone).

204. *See* United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984).

205. *Id.* at 456 (approving jury instruction listing those factors but advocating a "totality of circumstance" approach).

206. United States v. Diaz, 679 F.3d 1183, 1187 (10th Cir. 2012).

207. *LaBuff*, 658 F.3d at 877; United States v. Bruce, 394 F.3d 1215, 1224-25 (9th Cir. 2005) (citing numerous cases holding that lack enrollment is not determinative and rejecting dissent's proposal to adopt enrollment as the single determining factor); United States v. Broncheau, 597 F.2d 1260, 1262-63 (9th Cir. 1979) (enrollment not an absolute requirement for proving Indianness); *Ex parte* Pero, 99 F.2d at 31; United States v. Drewry, 365 F.3d 957, 961 (10th Cir. 2004); United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005).

reservation, and self-identification or self-presentation.[208] While tribal community recognition is dispositive if it comes in the form of enrolled citizenship,[209] federal courts have not been willing to rely on tribal community recognition alone if it comes in the form of social recognition or a formal tribal law designation short of enrolled citizenship. In other words, a person may be an Indian in the eyes of the tribal community and yet not qualify as an Indian under the factors set forth by a particular federal court.[210] Conversely, a person may be an Indian under federal law even though they are not recognized as such by the tribe.[211]

The *Duro* fix provides that Indianness for the purposes of tribal prosecution should be defined in the same manner as it is for federal jurisdiction.[212] Yet, the cases applying the federal jurisdiction standard

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208. *E.g.*, Cruz, 554 F.3d 840, 846-47 (9th Cir. 2009) (prior tribal prosecution, descendant status, reservation residence, and lack of participation in cultural activities), Stymiest, 581 F.3d at 764-65 (self-presentation, prior tribal court prosecution, social recognition), Dodge (self-presentation), United States v. Driver, 755 F. Supp. 885, 889 (D.S.D.), *aff'd* 945 F.2d 1410 (8th Cir. 1991) (lack of social participation a factor in holding that defendant was not an Indian), Drewry, 365 F.3d at 961 (participation in tribal summer program and social life and prior tribal child welfare involvement sufficient to support a find that the victims were Indian in a prosecution of a non-Indian defendant under §1152); Pemberton, 405 F.3d at 660 (self-presentation, reservation residence).

209. *E.g.*, United States v. Lossiah, 537 F.2d 1250, 1251 (4th Cir. 1976); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988); Stymiest, 581 F.3d at 764; Drewry, 365 F.3d at 961; Zepeda, 792 F.3d at 1115.

210. *E.g.* United States v. Cruz, 554 F.at 846-48 (finding defendant not an Indian under federal law despite being formally recognized as a descendant under tribal law and having been criminally prosecuted in tribal court); United States v. Maggi, 598 F.3d 1073, 1083 (9th Cir. 2010) (same). In each case, both involving unenrolled members prosecuted by the Blackfeet tribal court, the federal court did not investigate the circumstances of the prior prosecution or address whether tribal criminal jurisdiction over unenrolled descendant members was legal under tribal or federal law and, perhaps as a consequence, did not accord the tribal prosecutions much weight. *Cruz*, 554 F.3d at 846 n.7, 850; *Maggi*, 598 F.3d at 1083. *But see* United States v. LaBuff, 658 F.3d 873, 879 (9th Cir. 2011) (basing a finding of Indian status in part on Blackfeet tribal court prosecution) ("As we observed in *Bruce,* the assumption and exercise of tribal jurisdiction over criminal charges, demonstrates tribal recognition [particularly where defendant] did not challenge the authority of tribal officers to arrest him or the exercise of tribal criminal jurisdiction.").

211. *See, e.g.*, United States v. Juvenile Male, 666 F.3d 1212, 1215 (9th Cir. 2012) (finding defendant is an Indian subject to federal prosecution in federal court where he is enrolled in a tribe and has used his membership to access services, despite not self-identifying as an Indian and not being socially recognized as such by his community).

212. *See* discussion *supra* text accompanying notes 128-136 (examining the chain of references necessary to discern the *Duro* fix's definition of "Indian"). It is especially ironic

suggest that tribal recognition as a community member may be informal and, more importantly, may not always coincide with federal recognition as an Indian. In other words, federal common law indicates that a person may be eligible for criminal prosecution under tribal law, but not in federal court under federal law, and vice versa.[213] Many of the federal cases involve defendants who were previously prosecuted in tribal court, suggesting that the tribe had determined that they were proper subjects for jurisdiction.[214] In some of these cases, the defendant, while not enrolled in the tribe, is officially recognized as a "descendant" or similar marker of tribal affiliation, a designation short of full citizenship that may render him or her eligible for tribal services and also may serve as the basis for tribal court prosecution.[215] Courts treat previous tribal prosecution as evidence of tribal recognition as Indian, but it alone is not sufficient to establish any of the specifically enumerated factors.[216] Although the federal cases do not directly address the question of whether jurisdiction was proper in the prior tribal prosecution, they seem to accept the premise that the standard for Indianness under tribal law may be different from the standard for Indianness under federal law. Enrolled citizens satisfy both tests, but each category includes more than just enrolled citizens, and the categories diverge.

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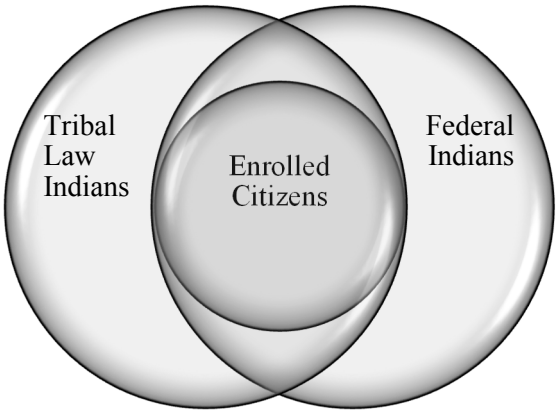
that the *Duro* fix legislation that affirms tribal criminal jurisdiction over all Indians refers to the definition of Indianness employed by federal courts because that definition originates from the *Rogers* case in which the Court acknowledged that there is in fact a difference between tribal and federal standards. United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846) ("[A person adopted by a tribe may] become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian [as defined by federal law].").

213. *Compare Juvenile Male*, 666 F.3d 1212 (holding that juvenile male was an Indian for federal law purposes even though he was not an accepted member of the tribe), *with Rogers*, 45 U.S. (4 How.) 567 (holding that Rogers was not an Indian for federal law purposes even though he was accepted as a member of the Cherokee community and had been criminally punished by the tribe).

214. *Cruz*, 554 F.3d 840; *Maggi*, 598 F.3d 1073; *LaBuff*, 658 F.3d 873.

215. *See generally* Adam P. Bailey, Threading the Needle: The Fort Peck Tribe's Associate Membership: A Modern Model for Tribal Affiliation (April 2011) (unpublished draft on file with author) (analyzing one tribe's two-tiered membership structure); *see also* discussion *infra* Part III.B.

216. *Labuff*, 658 F.3d at 878; *Cruz*, 554 F.3d at 846-48 (defendant prosecuted as "descendant member" under tribal law but ineligible for federal court prosecution).



To summarize, tribes clearly have jurisdiction over more than just enrolled citizens of that tribe. Several federal courts have upheld tribal jurisdiction over enrolled citizens of other tribes living and working in the community. However, while those courts point to the fact of tribal citizenship to justify jurisdiction, they do not discuss why citizenship in another tribe is a reason to subject the defendant to the prosecuting tribe's jurisdiction, while a non-Indian would not be, or whether the defendant's community connections were a significant factor.[217] Federal courts considering the reach of federal jurisdiction, and the only federal court to review tribal jurisdiction over an unenrolled community member, have held that unenrolled people may qualify as "Indians" as long as there is some other indication of that person's connection to a tribal community.[218]

D. Jurisdiction Extends to Non-Indian Domestic Abusers with Ties to the Tribe

In 2013, Congress amended the Indian Civil Rights Act again to restore concurrent tribal criminal jurisdiction over non-Indians in domestic violence cases.[219] This law partially restored the jurisdiction that the *Oliphant* Court held had been divested, but only over a very limited class of

217. *See supra* Part I.C.1 (discussing *Lara*, *Means*, and *Morris*).

218. *See supra* Part I.C.3 (discussing federal jurisdiction cases); *supra* notes 172-179 and accompanying text (discussing *Phebus*).

219. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 18, 22, 25, 42 U.S.C.).

non-Indians. First, the law applies only to offenders who commit certain specified offenses related to domestic and dating violence.[220] Second, this "special domestic violence jurisdiction" is optional, and a tribe wishing to exercise it must provide additional procedural protections to defendants.[221] Third, not all domestic violence offenders are covered by it: the law specifies that a tribe may not exercise jurisdiction over any defendant who "lacks ties to the Indian tribe."[222] The statute further defines sufficient ties to include residence, employment, or being the spouse or intimate partner of a tribal citizen or an Indian who lives in the tribe's territory.[223] Three tribes participated in a pilot project through which the U.S. Attorney General certified that their criminal justice systems satisfied the law's requirements, and those tribes began exercising special domestic violence

220. *See* 25 U.S.C. § 1304(c) (2012); *see also id.* § 1304(a)(1)-(2). As tribal advocates point out, the inclusion of a very limited class of offenses means that the law has been an imperfect tool for addressing family violence in tribal communities. Fee, *supra* note 123. The Tulalip Tribes' lead attorney discussed the impact of the law's provisions limiting tribal jurisdiction to only a few types of crimes, stating: "Unfortunately it's not quite gone far enough. In just three recent cases, we had children involved, and we're not able to charge on the crimes that were committed against those children including endangerment, criminal endangerment, possibly assault, [and] other attendant or collateral crimes." *Id.*

221. 25 U.S.C. § 1304(a)(4) ("The term 'participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe."). If a prison term of any length may be imposed on a non-Indian, these additional protections include a right to law-trained defense counsel at the tribe's expense; a guarantee of law-trained judges, publicly available criminal laws, and recorded criminal proceedings. *Id.* § 1302(c). Regardless of the possibility of imprisonment, the tribe must provide the defendant a trial by a jury that does not "systematically exclude . . . non-Indians." *Id.* § 1304(d)(3)(2). With the exception of the jury requirement, these procedural rights are also guaranteed to Indian (member or nonmember) defendants facing more than one year of imprisonment, as authorized by the Tribal Law and Order Act of 2010. *See* 25 U.S.C. § 1302 (2012) (amended by Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 234, § 202, 124 Stat. 2261, 2280). Tribes that cannot or do not provide these protections remain limited to one-year sentences and may prosecute only Indians. Even where a tribe opts into both laws, however, significant differences remain between the federal law requirements for prosecuting Indian and non-Indian defendants facing a sentence of one year or less. A non-Indian defendant charged with a crime of domestic violence and facing one year or less in prison must be guaranteed all of the rights discussed above. An Indian defendant charged with the same crime and facing one year or less in prison is guaranteed none of these rights as a matter of federal law. *Compare id.* § 1304 (non-Indian rights), *with id.* § 1302 (Indian rights). The law thus continues to draw an important distinction between Indians and non-Indians. *See id.* §§ 1302, 1304.

222. 25 U.S.C. § 1304(b)(4)(B).

223. *Id.*

jurisdiction over non-Indians in February 2014.[224] As of the writing of this article, these tribes had prosecuted several non-Indians under the law, and none of the defendants had challenged their prosecution in federal court.[225]

Table 4 – Jurisdiction After VAWA – Which Courts May Prosecute?

Defendant	Crime type	Indian victim	Non-Indian victim
Tribal citizen	**Major**	Tribal & Federal	Tribal & Federal
	Minor	Tribal	Tribal or Federal
Nonmember Indian	**Major**	Tribal & Federal	Tribal & Federal
	Minor	Tribal	Tribal or Federal
Qualifying non-Indian	**Domestic violence**	Tribal* & Federal	State
	All other crimes	Federal	State
Other non-Indian	**All crimes**	Federal	State

*** Jurisdiction restored by VAWA.**

It is notable that Congress, in enacting this law, chose to limit tribal jurisdiction to domestic violence offenders who have a demonstrated relationship to the tribal community.[226] Based on the reports and testimony provided in support of the legislation, Congress certainly could have chosen to restore tribal jurisdiction over any non-Indian committing a crime of domestic violence or sexual assault, regardless of community ties.[227] This

224. The three tribes are the Pasqua Yaqui Tribe, the Confederated Tribes of the Umatilla Indian Reservation, and the Tulalip Tribes.

225. "[M]ore than two dozen non-Indians have been charged with domestic violence and dating violence crimes. They all have the right to go straight to federal court and ask to be released if their rights are being violated. And how many have done so? Zero." Fee, *supra* note 123 (quoting Sam Hirsch, Acting Assistant Attorney General of the Environment & Natural Resources Division, U.S. Dep't of Justice).

226. *Compare* S. REP. NO. 112-153, at 9 (2012) (indicating extension of tribal criminal jurisdiction to only those offenders with sufficient ties to the prosecuting tribe), *with* Louise Erdrich, Op-Ed, *Rape on the Reservation*, N.Y. TIMES, Feb, 27, 2013, at A25, *available at* http://www.nytimes.com/2013/02/27/opinion/native-ameri cans-and-the-violence-against-women-act.html?_r=0 (implying that the gap in the law has attracted random non-Indian habitual sexual predators to tribal areas and that VAWA would somehow empower tribal governments to arrest and prosecute these roving rapists who otherwise have no ties to the prosecuting tribal communities).

227. *See Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 196 (2007), *available*

suggests a desire to balance the need to close an enforcement gap in Indian country against the need to maintain some kind of insider/outsider distinction in order to preserve fairness. With regard to domestic violence offenders today, the most significant distinction is not between Indians and non-Indians or members and nonmembers. Rather, it is between those people who have sufficient "ties to the tribe" and those who are strangers.

Authorizing prosecution of offenders who are not of Indian decent is a significant change, yet there are thematic consistencies between VAWA and prior laws. It does not require that the victim be a citizen of the tribe. An offender can be prosecuted for committing a crime of domestic violence against any Indian victim, but the offender must have sufficient ties to the prosecuting tribe.[228] Like the *Duro* fix and *Oliphant*, which focus on Indianness, VAWA acknowledges that a tribal community may include many Indian people who are not tribal citizens that tribes have an interest in protecting even these non-citizen community members through criminal jurisdiction. In contrast to the laws focusing on Indianness, however, VAWA's test focuses specifically on a defendant's connection to the prosecuting tribe; his or her ties to another tribe are irrelevant for purposes of this test. In this respect, the law echoes the *Duro* decision, which focused only on an offender's relationship to the prosecuting tribe (as opposed to his status as an Indian under federal law) and acknowledged that substantive law, procedure, language, and cultural norms vary widely among tribes.[229] In enacting VAWA, however, Congress corrected the *Duro* Court's unnecessarily narrow formulation of what it means to be sufficiently connected to a tribe to make tribal jurisdiction appropriate.

It is clear that tribes have criminal jurisdiction over their members. It is equally clear that they lack criminal jurisdiction over most non-Indians, but retain jurisdiction to prosecute nonmember Indians. Congress rejected the *Duro* holding, but has remained largely silent on *Oliphant*, so the Indian/non-Indian distinction remains, and Indianness in this case is not

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at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg39355/html/CHRG-110shrg39355.htm (referencing AMNESTY INT'L, MAZE OF INJUSTICE, *supra* note 16 (documenting the high rates of violent and sexual victimization by Native women at the hands of non-Native men, including both intimate violence and stranger violence)); *see also* NATIVE WOMEN'S ASS'N OF CAN., FACT SHEET: MISSING AND MURDERED ABORIGINAL WOMEN AND GIRLS 5 (2010), *available at* http://www.nwac.ca/wp-content/uploads/2015/05/Fact_Sheet_Missing_and_Murdered_Aboriginal_Women_and_Girls.pdf (noting that aboriginal women in Canada are nearly "three times more likely to be killed by a stranger" than non-Native women in Canada).

228. 25 U.S.C. § 1304(b)(4)(B) (2012).

229. Duro v. Reina, 495 U.S. 676, 678 (1990).

defined in terms of tribal citizenship. After the 2013 reauthorization of VAWA, tribes also have jurisdiction over a small subset of non-Indians: domestic violence offenders who have a sufficient tie to the tribal community. Although courts and commentators commonly assume that jurisdiction over people who are not citizens of the prosecuting tribe is justified by the defendant's citizenship in another tribe, the VAWA law and *Phebus* (in which a federal court ruled that a tribe may, consistent with federal law requirements, prosecute an unenrolled person) reveal flaws in this assumption.

The current doctrine seems to be the product of disagreement between Congress and the Court over the scope of modern tribal criminal power, but it also suggests the two branches may agree jurisdiction should be limited in some respect. The rationale behind each jurisdictional rule remains opaque, but taken together they reveal a recognition of the importance of criminal jurisdiction to tribal communities and a shared concern about the fairness of subjecting outsiders to prosecution in a tribal system that may be culturally foreign, procedurally different, or unknown. Reading the cases and statutes together, we can discern that federal law limiting tribal jurisdiction seeks to balance the interests served by tribal criminal laws against the fairness concerns expressed by the Court. We can also discern a desire to maximize tribal sovereign power within this framework: Congress has pushed back when the judiciary has imposed too narrow a limit.

II. The Community Recognition Standard

Two possible standards have occupied most of the judicial and scholarly discourse about criminal jurisdiction: a racial line (as the Court seemed to be drawing in *Oliphant* and as is enshrined through the incorporation of *Rogers* as the standard for tribal jurisdiction under the *Duro* fix) and a citizenship-based line (as the Court drew in *Duro* when it defined membership narrowly in terms of consent and political participation rights). An examination of how tribes define the limits of their own jurisdiction reveals another possibility: tribes may fairly exercise criminal jurisdiction over those people whom the community recognizes as members. This tribal law standard is remarkably similar to the standard Congress introduced in VAWA by drawing a distinction between non-Indians who have sufficient ties to the tribe and those who do not. In both cases, the primary inquiry is into the relationship between the defendant and the prosecuting tribe.

By asking how the community views the defendant, rather than whether the defendant has chosen to enroll or to avail himself or herself of tribal

services, this standard emphasizes that community members have certain obligations to their communities, rather than characterizing membership as simply a matter of voluntary association. The emphasis on obligation instead of consent makes this standard much more reflective of the purposes and concerns governing questions of criminal jurisdiction. Instead of relying on a rigid line, the standard focuses on the relationship between the defendant and the sovereign seeking to exercise jurisdiction. It does not unduly cabin the idea of membership by focusing on citizenship as the only possible indicator. While enrolled citizenship does indicate community recognition, other factors may indicate it as well. Finally, as explored in Section II.D, it offers a way to understand Indianness that is separable from the question of descent. Although Indian descent is an important factor in many tribal jurisdictional laws,[230] and even in the VAWA,[231] community recognition potentially offers a way to determine whether someone is Indian based solely on their relationship to the tribe. If federal law were amended to permit it,[232] the same standard could authorize jurisdiction over people who are not Indian by descent, but are nevertheless Indian in the sense that they are recognized as members by the tribal community.[233]

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230. The tribal codes reviewed here were written before the enactment of VAWA. In light of *Rogers* and *Oliphant*, it is not surprising that tribes would have developed the community recognition standard in defining the term "Indian" and that they would have done so under the assumption that Indianness required descent. While the descent requirement may be a product of tribal law standards, it is more likely a nod to federal restrictions. *See* discussion *supra* Parts I.A, I.C.3. Part II.E considers whether the community recognition standard could more fundamentally alter the Indian/non-Indian line in the criminal jurisdiction context by eliminating the descent requirement entirely.

231. *See supra* note 221. For offenders facing less than a year in prison, VAWA continues the Court's practice of treating Indians and non-Indians differently because non-Indians with sufficient ties to the tribe may be prosecuted only if they are accorded additional procedural protections to which Indian people facing a sentence of one year or less are not entitled. 25 U.S.C. § 1304(d)(2). Any person, Indian or non-Indian, is entitled to most of these procedural rights (counsel, publicly available laws, law-trained and licensed judges) if facing more than a year in prison. *Id.* § 1302(c). For those people, the only specific additional requirement imposed by VAWA is the requirement of a jury pool that does not exclude non-Indians. *Id.* § 1304(d)(3). This requirement may have been driven by concerns about bias that are unique to non-Indian defendants.

232. This could be accomplished through congressional restoration of jurisdiction over a broader class of non-Indians (a version of VAWA that applies to all crimes), or judicial rejection of *Rogers*, which is the source of the descent requirement. See discussion *supra* Part I.C.3 (examining the centrality of *Rogers* in the federal common law standard) and *infra* Part II.E (considering the consequences of eliminating the descent requirement).

233. The idea that a person may be a member of a tribal community even though that person is not descended from the same community *for purposes of asking whether the*

A. Tribal Law Approaches to Jurisdiction

A review of publicly available, pre-VAWA tribal codes provides some insight into how tribes envision and express the limits of their criminal jurisdiction.[234] Tribal law approaches to criminal jurisdiction vary. Some are broadly worded, providing for jurisdiction over any person who

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community can fairly subject that person to criminal prosecution should not be confused with the argument that descent is irrelevant to indigeneity in other contexts. *See* Rolnick, *supra* note 13, at 1003-06, 1023 (critiquing the Court's facile equation of ancestry-based indigenous classifications with illegal racial classifications and acknowledging that Indian tribes and other indigenous communities are primary structured around kinship and descent).

234. This is not a full-fledged empirical research project. There are 565 federally recognized tribes. Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 14, 2015). Of these, 229 are Alaska Native villages. *Id.* at 1946-48. I did not review the law of Alaska tribes because most tribes in Alaska do not presently occupy "Indian country" as that term is defined by federal law, Alaska v. Native Village of Venetie, 522 U.S. 520, 523 (1998), so criminal jurisdiction in Alaska presents unique issues, INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 45 (noting that the Alaska Attorney General "takes the position that its law enforcement authority is exclusive throughout the state, maintaining that Tribes do not have a land base on which to exercise any inherent criminal jurisdiction"). *But see* Ryan Fortson, *Advancing Tribal Court Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 132-50 (2015) (advancing a theory of member-based criminal jurisdiction); Geoffrey D. Strommer, Stephen D. Osborne & Craig A. Jacobson, *Placing Land Into Trust: Issues and Opportunties*, 3 AM. INDIAN L.J. 508, 511-517, 520-523 (2015) (describing proposed regulations to permit Alaska Native villages to have land taken into trust and the consequences of this for "Indian country" status and territorial criminal jurisdiction). About half of the tribes in the lower forty-eight states operate formal tribal court systems. Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, OFFICE OF JUSTICE PROGRAMS (Dec. 2005), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=543.

I reviewed approximately 100 tribal codes, which likely covers most, but not all, of the tribes with active court systems. The codes reviewed represent most of the publicly available codes, as well as some unpublished codes obtained directly from the tribes. Where possible, I supplemented my review of codes with analysis of the few publicly available tribal court decisions applying those codes and occasional conversations with tribal judges and prosecutors. Publicly available version of tribal codes may not reflect recent amendments or include separately enacted ordinances. In particular, many tribes have updated their criminal codes in light of the Tribal Law and Order Act and the Violence Against Women Act, so even the provisions cited here may have changed since the information was collected. While a full empirical investigation would no doubt be useful in determining the most common legislative approaches and gaining more information into how those approaches are implemented, such a project would require significant field research and is far beyond the scope of this article.

commits a crime within that tribe's territory,[235] or to all people who commit crimes within the tribe's territory to the extent that tribal criminal jurisdiction is allowed under federal law.[236] Although federal law still limits those tribes' jurisdiction, they have not incorporated those limits into tribal law.[237]

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235. *See, e.g.*, BAY MILLS INDIAN COMMUNITY TRIBAL COURT CODE ch. 1, § 102 (2001), *available at* http://www.baymills.org/resources/chapter1_bay_mills_tribal_court.pdf; WHITE EARTH NATION JUDICIAL CODE tit. 1, ch. 2, § 1(d) (1997), *available at* http://www.whiteearth.com/data/upfiles/files/JudicialCode.pdf; FORT BELKNAP TRIBAL CODE tit. I, § II (1999), *available at* http://www.ftbelknap.org/documents/Fort%20Belknap%20Tribal%20Code.pdf; SAINT REGIS MOHAWK TRIBAL COURT & JUDICIARY CODE § V (2008), *available at* http://www.srmt-nsn.gov/_uploads/site_files/TribalCourtAndJuduciaryCode.pdf (however, the tribe does not appear to have a criminal code); LUMMI NATION CODE OF LAW tit. 2, §§ 1.02.010, 1.02.030 (2003), *available at* http://www.narf.org/nill/codes/lummi/1Court.pdf; 3 PASCUA YAQUI TRIBAL CODE tit. 3, ch. 1-1, § 20 (2015), *available at* http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/index.php.

236. For example, the Skokomish Criminal Code contemplates jurisdiction over all persons "except that non-Indians must be apprehended and prosecuted in accordance with applicable federal law and consistent with the rule stated in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), *so long as such rule is good law*." SKOKOMISH CRIMINAL CODE § 9.01.030 (n.d.) (emphasis added), *available at* http://www.skokomish.org/SkokConstitution&Codes/Codes/STC9-01.htm; *see also* FORT MCDERMITT PAIUTE-SHOSHONE TRIBE LAW & ORDER CODE ch. 3, § 1 (1998), *available at* http://www.narf.org/nill/Codes/fort_mcdermitt/ch3.pdf ("[W]hen the State of Oregon effectively retrocedes criminal jurisdiction over the Oregon lands, and the Federal government approves same, the Tribal Court will assume exclusive criminal jurisdiction except that prohibited by federal law.").

237. Many of these codes acknowledge federal law as a limitation, but they do not incorporate the limits or define them further. For example, the Kalispel Law and Order Code extends tribal court jurisdiction "over Indians and Non-Indians to the full extent allowed by Federal and Tribal Law." LAW & ORDER CODE OF THE KALISPEL TRIBE OF INDIANS § 1-2.01 (2015), *available at* http://s3-us-west-2.amazonaws.com/kalispel/kalispel-tribe/pdf-uploads/LAW-AND-ORDER-CODE_15.2.23.pdf; *see also* CHEYENNE ARAPAHO TRIBES OF OKLAHOMA LAW & ORDER CODE tit. II, § 5 (1988), *available at* http://www.narf.org/nill/codes/cheyaracode/courts.html; COLORADO RIVER INDIAN TRIBES LAW & ORDER CODE art. 1, § 101 (n.d.), *available at* http://www.crit-nsn.gov/crit_contents/ordinances/Law_and_Order_Code.pdf; LOWER SIOUX COMMUNITY MINNESOTA JUDICIAL CODE § 1.04(2) (2010), *available at* http://www.lowersioux.com/pdffiles/Judicial%20Code%20Courts%20and%20Jurisdiction.pdf; MAKAH INDIAN LAW & ORDER CODE §§ 1.3.01, 2.1.01 (1999), *available at* http://www.narf.org/nill/codes/makahcode/index.html; MATCH-E-BE-NASH-SHE-WISH BAND OF POTAWATOMI INDIANS OF MICHIGAN JUDICIAL ORDINANCE ch. II, § 1 (2012), *available at* http://www.mbpi.org/PDF/TribalCourt/Judicial_Ordinance.pdf; TRIBAL GOVERNMENT OF MENOMINEE INDIAN TRIBE OF WI JUDICIARY & LAW & ORDER CODE art. VIII, § 120-33 (n.d.), *available at* http://ecode360.com/12174985; PAWNEE TRIBE OF OKLAHOMA LAW & ORDER CODE tit. I, § 5 (2005), *available at* http://www.narf.org/nill/codes/pawneecode/courts.html; PRAIRIE ISLAND MDEWAKANTON DAKOTA COMMUNITY

Broader statutory language is more protective of tribal sovereignty, leaving courts free to determine whether a particular defendant is subject to tribal jurisdiction. The tribal courts may formulate a specific test, or they may use various tests, but the legislation itself does not constrain the court's inquiry to particular factors. These tribal codes cast the widest possible jurisdictional net, placing the onus on the defendant to challenge jurisdiction and leaving the tribe free to adapt to changes in federal law that may expand tribal jurisdiction to certain non-Indians. A major change, such as VAWA's restoration of jurisdiction over certain non-Indian domestic violence offenders, can be incorporated into tribal law without a revision to the jurisdictional scope of their criminal courts. However, these codes offer little clarity regarding the tribe's vision of who is subject to its jurisdiction. They leave room for courts to adopt varying standards, opening the door to potential unfairness, and their lack of a clear definition could result in courts unduly limiting jurisdiction.

Others limit criminal jurisdiction to "Indians" but provide no further definition of the term.[238] These codes were no doubt written with an

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JUDICIAL CODE tit. 1, ch. II, § 1 (n.d.), *available at* http://prairieisland.org/wp-content/themes/tempera-child/docs/Judicial%20Code%20Title%201%20Courts.pdf; LAW & ORDER CODE OF THE SAUK-SUIATTLE INDIAN TRIBE ch. 2, § 2.020 (2006), *available at* http://www.sauk-suiattle.com/Documents/L&Ocode2006.pdf; SAULT STE. MARIE TRIBAL CODE ch. 71, subch. III, § 71.302 (2012), *available at* http://www.saulttribe.com/images/stories/government/tribalcode/CHAPTR71.pdf; LAW & ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION tit. I, ch. 2, § 1-2-3 (2013), *available at* http://www.narf.org/nill/codes/ute_uintah_ouray/t1.pdf; WASHOE TRIBAL CODE, tit. I, § 1-20-030 (2012); WINNEBAGO TRIBE OF NEBRASKA TRIBAL CODE tit. I, art. I, §§ 1-103, -104 (1994), *available at* http://www.winnebagotribe.com/images/tribal_court/tribal%20code%2009-21-11/2011%20 TRIBAL%20CODE.pdf.

238. Some of these codes refer to Indians generally. For example, the Chitimacha Code extends criminal jurisdiction "over all offenses committed by an Indian within the boundaries of the Chitimacha Indian Reservation." CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. 1, § 106 (2009), *available at* http://www.chitimacha.gov/sites/default/files/CCCJ%20Title%20I%20-%20Courts%20with%20amendments.pdf; *see also* ELY SHOSHONE TRIBAL CODE, tit. IV, ch. 1, § 1.300 (2008), *available at* http://www.narf.org/nill/codes/ely_shoshone/civil_1.pdf; TRIBAL COURT ORDINANCE, KLAMATH TRIBAL CODE tit. 2, ch. 11, § 11.09(e) (2000), *available at* http://klamathtribalcourts.com/wp-content/uploads/2013/05/Title-2-Chapter-11-Tribal-Court-Ordinance-11-22-03.pdf; STANDING ROCK SIOUX TRIBE CODE OF JUSTICE tit. 1, ch. 1, § 1-106 (2009), *available at* http://www.standingrock.org/data/upfiles/files/Title%20(1)%20I%20-%20COURTS.pdf; YOMBA SHOSHONE TRIBE LAW & ORDER CODE tit. I, ch. A, § 3 (2001), *available at* http://www.narf.org/nill/codes/yombacode/yomba1trct.html#b. Others specifically mention nonmember Indians. The Northern Cheyenne Law and Order Code provides for criminal jurisdiction "over all offenses committed by Tribal members or other Indians on the Reservation." NORTHERN

awareness that federal law from 1978 to 2013 prohibited tribes from prosecuting non-Indians. They ensure a closer match between tribal and federal standards, but they also incorporate the federal Indian-only limitation into their tribal law. As federal law regarding tribal jurisdictional limits changes, as it did in 2013 with passage of the VAWA amendments authorizing tribal jurisdiction over certain non-Indians, these tribes will need to amend their laws in order to extend jurisdiction to the fullest extent allowed by federal law.[239] Like the territory-based codes, these laws provide

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CHEYENNE LAW & ORDER CODE tit. IA, ch. 14, § 1A-14-2 (2008), *available at* http://indianlaw.mt.gov/content/northerncheyenne/codes/2008_updated_law_and_order_code/title_ia.pdf; *see also* ABSENTEE SHAWNEE CRIMINAL LAW CODE § 2 (2010), *available at* http://www.narf.org/nill/codes/absentee-shawnee/criminal_offenses.html; COUSHATTA TRIBAL CODE tit. 1, § 1.2.04(c) (2004), *available at* http://www.narf.org/nill/codes/coushatta/coutitle1.html ("The Court shall have subject matter jurisdiction over all criminal actions in which an Indian is alleged to have violated the criminal provisions of this Code. . . [i]n civil expulsion actions, the Court shall have subject matter jurisdiction to determine whether or not the non-member defendant, whether Indian or non-Indian, has violated the criminal provisions of this Code, whenever, pursuant to tribal law, such violation would be grounds for expulsion."); Persons Subject to Criminal Jurisdiction, MILLE LACS BAND STAT. ANN. tit. 5, § 112 (2011), *available at* http://www.millelacsband.com/pdf/mltitle 05judbranch.pdf; Territorial Applicability, 17 NAVAJO NATION CODE ANN. tit. 17, § 203 (2015), *available at* http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/ V0030.pdf; SAC & FOX TRIBAL CRIMINAL CODE tit. 10, § 2 (n.d.), *available at* http://sacandfoxnation-nsn.gov/sites/sfnation/uploads/documents/SF_CODES_Law/code_of_laws/10_Criminal_Offenses_-_ch_0_intro_-_2014-12-11.pdf; SHOALWATER BAY INDIAN TRIBE CODE OF LAWS tit. 2, § 2.00.03 (1995), *available at* http://www.shoalwaterbay-nsn. gov/assets/PDFs/Law--Order-Codes/SHO-TITLE-2-LAW-and-ORDER.doc; SWINOMISH INDIAN TRIBAL CODE tit. 4, ch. 1, § 4-01.050 (2003), *available at* http://www.swinomish.org/ media/3694/0401prelimprov.pdf. The Pokagon Band of Potawatomi Indians of Michigan and Indiana takes a similar approach, but does not use the term "Indian." The tribal courts have jurisdiction over "violations of Pokagon criminal law by members of the Band or by other Native Americans on the Reservation." POKAGON BAND TRIBAL COURT CODE NO. 10-21- 2002, § 3(A)(1)(b) (2002), *available at* http://www.pokagon.com/sites/default/files/assets/department/government/form/2012/tribal-court-code-842-639.pdf; *see also* CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIULSAW INDIANS TRIBAL CODE tit. I, ch. 1-1, § 1-1-23 (2014), *available at* http://ctclusi.org/sites/default/files/1-1.pdf ("The Tribal Court chooses not to exercise its right of criminal jurisdiction over any American Indian *or Alaskan Native* found within the jurisdiction of the Tribes . . . until such time as the Tribal Court establishes a criminal code of offenses.") (emphasis added).

239. *See, e.g.*, CONFEDERATED TRIBES OF THE UMATILLA RESERVATION CRIMINAL CODE ch. 1, § 1.02 (2014), *available at* http://ctuir.org/system/files/Criminal%20Code.pdf. Since the enactment of VAWA in 2013, several tribes have done so. *E.g.,* FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE tit. 2, § 106(b) (specifically providing for criminal jurisdiction over non-Indian domestic violence offenders where criminal jurisdiction was formerly limited to Indians).

no further guidance as to the definition of Indian, leading to potential confusion about its definition and increasing the likelihood that tribal courts will rely on assumptions or incorporate a blanket adoption of federal court definitions.

For purposes of understanding how tribes interpret the scope of their jurisdiction, codes that set forth a specific standard for determining who may be prosecuted are of greater interest. Although they cabin tribal courts more, these laws provide a clearer statement of the tribe's jurisdictional vision. Three types of code incorporate a more specific definition of "Indian." One type adopts a citizenship-based definition of Indian, extending tribal criminal jurisdiction to Indians enrolled in the prosecuting tribe or any other tribe.[240] This definition of nonmember Indian as an Indian who is a citizen of another tribe is more narrow than the definition provided under federal criminal law.[241] While it is possible that these tribes chose intentionally to limit tribal jurisdiction to enrolled citizens, it is more likely that this limitation reflects the common assumption that "Indian" is

240. Some also include people who are eligible for enrollment under tribal law, but may not be enrolled. *See* TOHONO O'ODHAM CRIMINAL CODE tit. 7, § 1.4 (n.d.) (jurisdiction over any Indian), *available at* http://www.tolc-nsn.org/docs/Title7Ch1.pdf; *id.* § 1.16 (defining Indian); NEZ PERCE TRIBAL CODE tit. 1, § 1-1-12 (2014), *available at* http://www.nezperce.org/~code/index.htm (jurisdiction over any Indian); *id.* § 1-1 (defining Indian); PRAIRIE BAND OF POTAWATOMI NATION LAW & ORDER CODE tit. 15, § 15-1-1 (2014), *available at* http://www.codepublishing.com/KS/Potawatomi/#!/Potawatomi15/Potawatomi1501.html#15-1-1 (jurisdiction over all Indian persons); *id.* tit. 1, § 4-1 (defining Indian); NOTTAWASEPPI HURON BAND OF POTAWATOMI TRIBAL CODE tit. VIII, ch. 6, § 101 (2013), *available at* http://nhbpi.com/wp-content/uploads/2014/09/Title-VIII-06-Law-and-Order-Code-Amended-8.21.20141.pdf (jurisdiction over offenses committed by any Indian); *id.* § 201 (defining Indian); CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION 25 C.F.R. § 11.114 (2008), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2012-title25-vol1/pdf/CFR-2012-title25-vol1-sec11-114.pdf (criminal jurisdiction); *id.* § 11.106 (defining Indian); CHICKASAW NATION CODE tit. 17, § 201.9 (2012), *available at* https://www.chickasaw.net/Documents/Long-Term/Chickasaw-Code/Title-17.aspx; COQUILLE INDIAN TRIBAL CODE § 610.200 (2010), *available at* http://www.coquilletribe.org/docbin/610TribalCourt_002.pdf; OGLALA SIOUX TRIBAL CODE ch. 1, § 1 (2010), *available at* http://www.narf.org/nill/codes/oglala_sioux/chapter01-courtproc.html; YANKTON SIOUX TRIBAL CODE tit. I, § 1-4-3 (1995), *available at* http://www.narf.org/nill/codes/yanktoncode/yanktoncodet1provisions.html (jurisdiction over offenses committed by an Indian); *id.* § 8-8 (defining Indian); NISQUALLY TRIBAL CODE tit. 24, § 24.03 (n.d.), *available at* http://www.nisqually-nsn.gov/files/1213/7356/7168/Title_24_-_Judiciary_and_Judicial_Procedure.pdf (jurisdiction over offenses committed by an Indian); *id.* tit. 10, § 10.02.06 (defining Indian); SQUAXIN ISLAND LAW & ORDER CODE tit. 9, ch. 9.12, § 9.12.020 (n.d.), *available at* http://squaxinisland.org/wp/wp-content/uploads/2014/06/Law-and-Order.pdf.

241. *See supra* Part I.C.3.

synonymous with "enrolled tribal citizens" in all contexts, rather than a decision about how the term should be defined for criminal jurisdiction purposes.[242] By tying jurisdiction to citizenship, these laws restrict tribal criminal jurisdiction to a narrower category of people than would be subject to federal criminal jurisdiction (the standard referenced in the *Duro* fix). Furthermore, if a tribe with a citizenship-based definition of Indian chose to exercise its jurisdiction under VAWA, tribal law would have to be amended to expand the jurisdictional reach of tribal criminal courts.

Another type of code extends jurisdiction to anyone who would be considered Indian under the laws authorizing federal criminal jurisdiction.[243] In these courts, a person may be prosecuted under tribal law if he or she would be eligible for prosecution under federal law. This requires that the person be of Indian descent and politically recognized as an Indian, but does not require citizenship in a tribe.[244] Tribal courts in

242. *See supra* Part I.C.1.

243. *See* SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS CODE ch. 71, subch. III, § 71.302 (2012), *available at* http://www.saulttribe.com/images/stories/government/tribal code/CHAPTR71.pdf (criminal jurisdiction over "all Indians"); *id.* ch. 71, subch. II, § 71.210 (defining Indian); MISSISSIPPI BAND OF CHOCTAW INDIANS CODE tit. I, § 1-2-1 (2013), *available at* http://www.choctaw.org/government/tribal_code/Title%201-%20General%20Provisions.pdf (tribal policy of asserting criminal jurisdiction over all Indians); *id.* § 5-8 (defining Indian); SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA CODE ch. 22, § 22-1101 (2009), *available at* http://www.meskwaki.org/Titles/Title%2022.%20 Exclusion.pdf. An additional seventeen tribes employ the federal definition because tribal jurisdiction is exercised through federal administrative courts called Courts of Indian Offenses (C.F.R. courts). 25 C.F.R. § 11.114 (finding C.F.R. courts have jurisdiction over any Indian); 25 C.F.R. § 11.106 (2008) (defining "Indian" for purposes of CFR jurisdiction as "a person who is a member of an Indian tribe which is recognized by the Federal Government as eligible for services from the BIA, and any other individual who is an 'Indian' for the purposes of 18 U.S.C. §§ 1152-1153"). The following tribes rely on CFR courts: Ute Mountain Tribe, Te-Moak Band of Western Shoshone, Winemucca Indian Tribe, Apache Tribe of Oklahoma, Caddo Nation, Comanche Nation, Delaware Nation, Eastern Shawnee Tribe, Fort Sill Apache Tribe of Oklahoma, Kiowa Tribe of Oklahoma, Modoc Tribe, Otoe-Missoura Tribe, Ottawa Tribe, Peoria Tribe, Seneca-Cayuga Tribe of Oklahoma, Wichita and Affiliated Tribes of Oklahoma, and Skull Valley Band of Goshutes. 25 U.S.C. § 11.100; 78 Fed. Reg. 14,020 (Mar. 4, 2013). These administrative courts were established by the Department of the Interior prior to the 1930s as a way to exercise jurisdiction over minor offenses in Indian country in the absence of a Western-style tribal justice system. They were often staffed by non-Indian judges and served an assimilative function, punishing Indian people for engaging in traditional activities. B.J. Jones, Role of Indian Tribal Courts in the Justice System 3-4 (2000) (monograph). Today, CFR courts continue to operate only in tribes that have not established a separate tribal court system.

244. *See supra* Part I.C.3.

these jurisdictions would presumably apply the definitional factors identified by federal judges in their circuit.[245] These codes move beyond citizenship, but they remain unnecessarily tied to a set of standards developed with very different concerns in mind.[246]

Although the *Duro* fix references federal jurisdiction standards, tribal and federal courts are situated very differently vis-à-vis criminal defendants, and the concerns about the scope of jurisdiction for each are quite different in the criminal context. The federal government has limited criminal jurisdiction within Indian country.[247] Its territory-based power functions as a backstop: it extends only to places like national parks and unincorporated territories, where there is no local government to exercise criminal jurisdiction.[248] Federal jurisdiction within Indian country exists because Indian country is federal territory and because the federal government has unique powers over Indian affairs.[249] This federal power generally excludes state jurisdiction, but it operates in tandem with tribal jurisdiction.[250] In other words, the proper scope of federal criminal jurisdiction in Indian country is a matter of congressional plenary power.[251]

Tribal criminal jurisdiction is more analogous to state criminal jurisdiction, except that it has been limited by Congress and by the Court.

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245. Because tribal courts are not federal courts, they may not be obligated to follow the test developed by any particular circuit, but the codes' reference to federal criminal laws point judges in the direction of the circuit and district courts generally. For a related discussion of the relationship between tribal civil jurisdiction laws and federal court review, see Fletcher, *Resisting Federal Courts*, *supra* note 18, at 1003-04. *Accord* Clinton, *No Supremacy Clause*, *supra* note 51, at 241-42 (arguing that tribal courts are not bound by the decisions of the lower federal courts or even the United States Supreme Court).

246. The difference between the tribal code provisions that refer to federal criminal law and the provisions that simply refer to federal law limitations on tribal jurisdiction is that the former direct courts to look directly at federal courts' interpretations of Indianness, whereas the latter might permit a tribe to ignore federal court's interpretation because it has never been expressed as an explicit limitation on *tribal* jurisdiction.

247. *See* Garnett, *supra* note 16, at 442-49.

248. 18 U.S.C. §§ 7, 1151-1153 (2012); *see Ex parte* Kan-gi-Shun-ca (Crow Dog), 109 U.S. 556, 571 (1883) (referring to territorial courts as courts of "special and limited jurisdiction").

249. Garnett, *supra* note 16, at 444.

250. *See* John J. Francis, Stacy L. Leeds, Aliza Organick & Jelani Jefferson Exum, *Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas*, 59 U. KAN. L. REV. 949, 951-53 (2011) (describing the general rules governing criminal jurisdiction on Indian lands, in which recognition state or federal jurisdiction generally preempted the exercise of the other, but the existence of federal jurisdiction was concurrent with tribal).

251. *See* Skibine, *supra* note 106, at 768 n.6.

Whereas federal criminal jurisdiction extends only so far as Congress has determined it must, tribal criminal jurisdiction exists within the tribe's territory except to the extent Congress or the Court has determined it must be limited.[252] Moreover, while the federal government has a unique relationship with all those who fit into the legal category of "Indian" and has plenary power to define that category for purposes of federal jurisdiction, individual tribes may rely on different factors to determine whether a person is amendable to their jurisdiction. While tribes must accommodate the limits imposed by federal law, it is odd to assume that the limits on federal jurisdiction must match the limits on tribal jurisdiction, as the two systems have very different purposes and histories.

Tribal laws that refer directly to federal standards incorporate a body of common law developed in cases that concern the proper scope of federal power, not tribal power. There is only one federal case (*Phebus*) addressing the scope of the Indian category for purposes of *tribal* jurisdiction.[253] Furthermore, circuits differ in the precise factors they have developed to implement the standard for Indianness under federal criminal jurisdiction set forth in *Rogers* (the only Supreme Court precedent), and a closer look at the federal cases suggests that they may not rely on the same factors if the question of *tribal* jurisdiction were presented.[254] For these reasons, tribes that look directly to federal common law standards may be missing an important opportunity to develop their own factors for implementing the *Rogers* test. Because their scope of jurisdiction is tied to a finding of Indianness under federal law, these tribes will also be required to amend their codes if they wish to exercise jurisdiction under VAWA.

B. Community Recognition in Tribal Statutory and Common Law

Of greatest interest for purposes of this inquiry are the tribal codes that acknowledge the existence of federally imposed limits on tribal criminal jurisdiction but implement those limits through a tribally developed standard. Written before VAWA was enacted, these codes acknowledge federal limits in terms of Indianness. While they all define "Indian" to be broader than citizens of federal-recognized tribes, they do not refer

252. *See supra* note 49 (citing *Wheeler*); *supra* note 60 (citing Frickey).

253. *See supra* text accompanying notes 172-179 (discussing *Phebus*).

254. *See supra* Part I.C.3 (discussing federal jurisdiction cases); *supra* note 212 (noting irony of using the *Rogers* standard to determine the limit of tribal jurisdiction given that Rogers, although not exempt from federal prosecution in the Court's view, had been separately prosecuted in tribal court).

automatically to federal standards.[255] Some of these codes simply specify that the definition of Indian includes people who are not enrolled citizens of federally recognized tribes,[256] leaving it to the courts to determine which factors are relevant. Others provide a more specific definition of the requirements for Indian status under tribal law; those codes rely on factors that include descent from a tribal member,[257] recognition by the federal government for any purpose,[258] and recognition by the tribal community as an Indian.[259]

The codes that expressly rely on community recognition outside of formal citizenship present the most interesting contrast with federal law. For example, the San Ildefonso Pueblo code defines "Indian" to include "[a]ny resident of the Pueblo who is considered Indian by the traditions, customs, culture, and mores of the Pueblo of San Ildefonso."[260] The Little Traverse Bay Band of Odawa Indians, the Little River Band of Ottawa

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255. For example, some tribes define Indian to include members of groups not typically recognized as Indian by the federal government, including Native Hawaiians, members of state-recognized tribes, members of unrecognized tribes, and Canadian Indians. *See* SALISH AND KOOTENAI TRIBAL CODE, tit. I, ch. 2, § 1-2-1-103 (jurisdiction over "any Tribal members, American or Canadian Indian, or Alaska Native"); SNOQUALMIE TRIBAL CODE tit. 7, ch. 1, § 4.0 (defining "Indian" as a member of an Indian Tribe, but defining "Indian Tribe" to include any group recognized as such by the Snoqualmie Tribe); *id.* tit. 3, ch. 1, § 5.0 (jurisdiction over American and Canadian Indians, Native Alaskans, and Native Hawaiians); TULALIP TRIBAL CODE tit. 2, § 2.1.2 (defining Indian to include members of federally recognized tribes and anyone "who is recognized as a Canadian Indian").

256. *E.g.*, SHOSHONE AND ARAPAHO TRIBES OF THE WIND RIVER RESERVATION LAW & ORDER CODE § 1-2-1.

257. *E.g.*, COLVILLE LAW & ORDER CODE § 1-1-363; FORT MCDOWELL YAVAPAI LAW & ORDER CODE § 1-1 (direct descent from a member plus one quarter Indian blood).

258. The White Mountain Apache defines Indian as including "any other person recognized by federal law as an Indian for any purpose[.]" WHITE MOUNTAIN APACHE JUDICIAL CODE § 1.1 (2012), *available at* http://www.wmat.nsn.us/Legal/Judicial%20Code%20-%2007.02.2012.pdf. The code also provides that the tribal court has subject matter jurisdiction over criminal actions involving "Indians." *Id.* § 2.1. The Poarch Band of Creek Indians defines the term as including "[a]ll enrolled Tribal Members, or other federally recognized Indians[.]" POARCH BAND OF CREEK INDIANS TRIBAL CODE tit. 4, § 4-1-2 (2014), *available at* https://www.municode.com/library/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances?nodeId=THTRCOPOBACRIN_TIT4JU. The tribe's civil jurisdiction provisions, by contrast, refer to enrolled members and "members of other federally recognized tribes[.]" *Id.* § 4-1-1.

259. *See infra* notes 260-265 (collecting codes that rely on recognition by the tribal community).

260. PUEBLO OF SAN ILDEFONSO CODE tit. II, § 2.4 (1996), *available at* http://thorpe.ou.edu/codes/san-ildefonso/san-ildefonso.html.

Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians exercise criminal jurisdiction over "any person of Indian blood who is generally considered to be an American Indian by the [tribe]."[261] The Leech Lake Band of Ojibwe tribal code definition includes "Indians who are recognized as such by an Indian community . . . for any purpose."[262] Similarly, the Hopi Tribe exercises criminal jurisdiction over enrolled tribal members and those "who ha[ve] Indian blood and [are] regarded as an Indian by the society of Indians among whom he lives."[263] The Confederated Tribes of the Warm Springs Reservation code defines "Indian" to include "any other person on the Reservation who is recognized by the community as an Indian, including a Canadian Indian or an Alaska native."[264] The Pueblo of Santa Clara defines "Indian" to include enrolled tribal members, Indians enrolled in other tribes, and "[a]ny resident of the Pueblo who is considered Indian by the traditions, customs, culture and mores of the Pueblo of Santa Clara."[265]

These definitions depart from federal definitions most clearly by expressly permitting the tribal courts to determine whether the prosecuting community views the defendant as an Indian. They reject the federal government's over-reliance on citizenship, political participation, or receipt of governmental services as the appropriate determinants of belonging, at least for purposes of criminal jurisdiction. Instead, they offer a vision of membership that is neither exclusively descent-based nor merely a matter of formal citizenship or consent.[266]

These codes permit the exercise of criminal jurisdiction over people affiliated with the governing tribe who may not be eligible for enrollment

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261. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF LAW tit. IX, § 9.102 (2015), *available at* http://www.ltbbodawa-nsn.gov/TribalCode.pdf.

262. LEECH LAKE BAND OF OJIBWE TRIBAL CODE tit. I, pt. 2, § 1(B)(1) (n.d.), *available at* http://www.llojibwe.org/court/tcCodes/tc_coTitle1-Judicial.pdf.

263. HOPI CODE tit. III, ch. 1, § 3.1.10 (2012), *available at* http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf.

264. CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION TRIBAL CODE ch. 200, § 200.010(1) (2011), *available at* http://www.warmsprings.com/.docs/_sid/7d79c07acd34155ef1cf9ec524fb57ac/pg/400/rid/10286/f/200_courts.pdf

265. SANTA CLARA PUEBLO CODE tit. 1, ch. 1 § 1.1 (2006). A separate provision extends the court's jurisdiction to "[a]ll [c]rimes enumerated in this Code and committed with-in the territorial jurisdiction of the Pueblo by Indians." *Id.* tit. 1, ch. 2, § 2.3.

266. Most incorporate a requirement of Indian descent, which is consistent with both *Rogers* and *Oliphant*. Without such a limitation, the community recognition standard could apply to a person without Indian ancestry as well. *See supra* Part II.E.

because they do not meet blood quantum requirements, or because the tribe determines eligibility for enrollment based on descent from either the mother or the father and the defendant is descended from the other parent. They also permit prosecution of adopted or intermarried people even if those people are not eligible for citizenship or particular tribal rights. These codes acknowledge that a person may be connected to a tribal community in a variety of ways, from legal rights and benefits to residence, family ties, and cultural and social participation.

The Navajo Supreme Court elaborated on this form of community membership. In *Navajo Nation v. Hunter*, the court construed the term "Indian" in the Navajo criminal code to refer to a person whose ancestors were indigenous to what is now the United States and who is considered Indian by his or her community.[267] It added that if a non-Navajo "assumed tribal relations," he or she would be considered Indian by the Navajo community.[268] This type of community membership is not a matter of formal adoption, but a matter of Navajo common law.[269] In *Means v. Chinle Judicial District*, the court described this form of membership under Navajo common law:

> While there is a formal process to obtain membership as a Navajo, that is not the only kind of "membership" under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother[.] A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law.[270]

The Eastern Band of Cherokee Indians' (EBCI) court uses a similar approach in their case law.[271] The EBCI's court has looked to federal

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267. 7 Navajo Rptr. 194, 196 (Navajo 1996).

268. *Id.*

269. *Id*. at 198.

270. 2 Am. Tribal Law 439, 450 (Navajo 1999) (internal citation omitted).

271. Legislatively, the Band's rules about jurisdiction are a bit unclear. Although the EBCI Tribal Code provides that its criminal provisions apply to "all members of any federally recognized Indian tribe," EASTERN BAND OF CHEROKEE INDIANS CODE ch. 14, §

criminal law standards for guidance, but has applied the test in a manner that emphasizes a broad notion of community membership.[272] Citing two federal circuit cases, the court considered "whether the Government has provided [the defendant] with assistance reserved only for Indians, whether the person enjoys the benefits of tribal affiliation, and whether [the defendant] is recognized as an Indian by virtue of her living on the reservation and participating in Indian social life."[273] It held that a person who qualified as a "First Lineal Descendant" under tribal law was an Indian for purposes of criminal prosecution,[274] but a person who qualified as a "Second [Lineal] Descendant" was not.[275]

Under EBCI law, a first descendant is a child of an enrolled member who does not possess the minimum blood quantum (1/16) required for enrollment. A first descendant may inherit trust property, access Indian health services, take advantage of Indian (but not tribal) preference in hiring, and access tribal education funds (but with a lower priority than enrolled members).[276] According to the court, a first descendant is treated in the same manner as an Indian from another tribe when seeking assistance from the Council or tribal administrative bodies.[277] A first descendant may not hold elective office, vote in tribal elections, purchase trust property, or

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14.1.1 (2000), *available at* https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=PTIICOOR_CH14CRLA_ARTIINGE_S14.1.1APPESUCRJUCHCO, the Code further provides that EBC law applies equally to all persons "regardless of race, age, or sex," *id.* ch. 14, § 1.5(a), and that tribal police and courts may impose fines and penalties on "non members, as well as members," *id.* ch. 14, § 1.5(c)-(d). Even if federal law prohibits the exercise of criminal jurisdiction over a particular defendant, the code provides that a person may still be subject to civil suits for damages, revocation of tribal licenses, and exclusion from tribal land for any criminal offense. *Id.* ch. 14, § 1.2. Thus, although the code defines nonmember Indians as enrolled members of other tribes, its other provisions leave room for broader exercise of jurisdiction over nonmembers and provide an alternative in the event a federal court disagrees with a tribe's interpretation. In its case law, the Band cites the federal common law standard, in which enrollment is a sufficient, but not necessary, factor, but it applies the test in a manner that emphasizes community recognition over federal recognition.

272. *In re* Welch, No. SC 03-13, 2003 WL 25902440, at *4 (E. Cherokee Ct. Oct. 17, 2003); E. Band of Cherokee Indians v. Lambert, No. CR 03-0313, 2003 WL 25902446, at *2 (E. Cherokee Ct. May 29, 2003).

273. *Lambert*, 2003 WL 25902446, at *3.

274. *Id.* at *1, *3.

275. E. Band of Cherokee Indians v. Prater, No. CR 03-1616, 2004 WL 5807679, at *2 (E. Cherokee Ct. Mar. 18, 2004).

276. *Lambert*, 2003 WL 25902446, at *1.

277. *Id.*

enroll in the tribe, but the court found that they "are participating members of this community and are treated as such."[278]

A second descendant is a grandchild of an enrolled member who does not possess the minimum blood quantum required for enrollment.[279] Second descendants may also access Indian health services, but they do not have access to benefits reserved for members.[280] With the possible exception of tribal educational benefits and inheritance of trust property, their rights under tribal law are likely similar to those of first descendants. In *Prater*, the defendant had a child who was enrolled in the tribe and had lived most of her life in tribal territory, but the court found that she was not treated as an Indian by members of the community.[281] The court held that she was not an Indian for jurisdictional purposes under section 14-1.5 of the EBCI code.[282] It did not, however, hold that no second descendant could qualify as Indian under ECBI law.

C. Community Recognition as a Model Tribal Standard

Tribes that employ a community recognition standard have created a novel, flexible standard for criminal jurisdiction.[283] Tribal courts that rely on this standard are able to engage in a context-sensitive analysis into whether the defendant is an Indian in the eyes of the tribal community. This

278. *Id.* at 3.

279. *Prater*, 2004 WL 5807679, at *1.

280. *Id.*

281. *Id.* at *1, *2.

282. *Id.* at *2. The defendant in *Prater* did qualify for federal Indian health services. It is likely that she would have been be eligible for prosecution in federal court, where receipt of federal benefits would trump the lack of tribal community recognition. *See supra* text accompanying notes 199-206 (describing factors relevant to a determination of Indianness in federal cases).

283. It is notable that neither the Navajo Nation nor the EBCI include a community recognition standard in the primary jurisdictional provisions of their codes. NAVAJO NATION CODE tit. 17, § 203; *id.* tit. 7, § 253(A)(1) (criminal jurisdiction over "any person" who commits an offense in Navajo territory"); EASTERN BAND OF CHEROKEE INDIANS CODE ch. 14, §14.1.1 (criminal provisions applicable to "all members of any federally recognized Indian tribe"). This suggests that many more tribes may apply a community recognition standard than specify it in their codified laws. The Navajo Code, however, acknowledges a distinction between Indians and non-Indians in a provision authorizing civil prosecution of non-Indians. That provision was amended after the *Means* case to include a community recognition test: "Nothing in this section shall be deemed to preclude exercise of criminal jurisdiction over any person who, by reason of assuming tribal relations with the Navajo people or being an "in law" or *hadane* or relative as defined by Navajo common law, or tradition, submits himself or herself to the criminal jurisdiction of the Navajo Nation." NAVAJO NATION CODE tit. 17, § 204(C).

allows tribes to determine the nature and strength of the defendant's connection, recognizing that it may take different forms. The standard emphasizes recognition by the tribal community, as opposed to recognition by the federal government (a key factor in federal criminal cases),[284] which is a more appropriate way for tribal courts to determine if they have valid jurisdiction.

Ideally, for tribal courts to implement this standard, they would elaborate the basis for a finding of jurisdiction, as the Navajo and EBCI courts did. Because many community members are also enrolled citizens, whether in their home community or elsewhere, a community recognition standard will often lead to the same result as an enrollment-based standard. The reasoning, however, would be different. Evidence of enrollment in the prosecuting tribes would likely be dispositive evidence of community recognition, but defendants enrolled elsewhere could only be prosecuted on the basis of their non-citizenship ties to the prosecuting tribe, which was the Navajo Supreme Court's approach in *Means*.

A community recognition standard could also sweep more broadly than an enrollment-based standard to encompass anyone who is recognized as a community member even if not enrolled in any tribe, as in *Lambert*. Factors that may indicate community recognition for unenrolled people include family relationships (e.g., descent, adoption, inter-marriage, or *hadane*), receipt of or eligibility for tribal services (e.g., health care, housing, general assistance), prior prosecution by tribal court, political participation, non-citizen status under tribal law (e.g., as a descendant or resident), cultural participation, and religious or clan affiliation.

For a defendant who is enrolled in another tribe, but is a stranger to the prosecuting tribe, the opposite result would obtain: jurisdiction would be permitted under an enrollment-based standard, but not under a community recognition standard.[285] Visitors from other tribes who attend pow wows or feast days present an interesting example. Using a community recognition standard, a court could find it had no jurisdiction over visitors who are merely attending as tourists. On the other hand, the same court would likely

284. *See supra* text accompanying notes 160-161 and 199-211 (explaining that the scope of federal plenary power is at the heart of federal cases considering the legality of tribal and federal prosecutions, and how federal criminal courts view federal government classification as an Indian as a factor distinct from tribal government recognition).

285. The defendant in *Morris v. Tanner* is an example: the facts of the case do not reveal that the defendant, although enrolled in Leech Lake, had any connection to the Flathead community. *See supra* note 164 (discussing *Morris*). This potential narrowing effect is discussed at length in Part III.C.

recognize jurisdiction over visitors who participate or visit relatives or friends who are member of the local tribe, or who are members of related tribal communities.[286]

These factors are similar to those used by federal courts determining the scope of federal criminal jurisdiction. For defendants who are not enrolled anywhere, a community recognition standard would frequently lead to the same result as applying the federal common law standard. There are, however, important differences. For example, federal courts emphasize recognition by a government, so they consider receipt of tribal services and official non-citizen status under tribal law, but not the kind of family relationships that were central to the Navajo court's decision in *Means*. A tribal court relying on a community recognition test could consider a variety of indications of community ties and would not be limited to those that indicated governmental recognition. Where the federal courts do consider such community engagement factors, they fall under the heading of "social recognition" which, at least in the Ninth Circuit, is the factor accorded the least weight. A community recognition test would permit prosecution of some defendants who might fail to meet the federal standard, as demonstrated by cases like *Cruz*, where the defendant was prosecuted by the tribe but was not considered Indian for purposes of federal prosecution.[287]

On the other hand, several factors relevant to Indian status under federal law would not be relevant to a community recognition test. Self-presentation by itself, which is a factor considered by some federal courts, would in most cases not be relevant to a test that considers whether the community claims the defendant, and thus whether the defendant owes some responsibility to the community. Recognition by the federal government as an Indian, including receipt of federal services, would also not matter. The community recognition standard focuses on a person's status within the tribal community rather than his or her relationship to the federal government. In contrast, federal courts place more weight on

286. There is evidence that Congress was specifically concerned about visitors from other tribes when it passed the *Duro* fix legislation. *See supra* notes 110-113 and accompanying text (discussing this concern). Absent tribal jurisdiction over these offenders, no government could prosecute them for minor offenses and this analysis is not meant to suggest that Congress had no power to restore jurisdiction over these offenders. However, because many people have connection to the prosecuting tribe and citizenship in another tribe, the population of strangers enrolled in other tribes may be relatively small. See *supra* Part III.C for a more detailed discussion of this issue.

287. *See supra* note 210 and accompanying text (discussing *Cruz*).

evidence of federal recognition and receipt of federal benefits, which makes sense because they are concerned with the defendants' eligibility for federal prosecution. A community recognition standard would likely not permit prosecution of those who qualify as Indians for some federal purposes but are not part of any tribal community, as the EBCI court determined in *Prater*, where the defendant qualified for Indian health services, but was not otherwise a treated as an Indian by the community.[288] Finally, the fact of enrollment in another tribe, which is dispositive under the federal common law test (regardless of ties to the tribe in whose territory the offense occurred), would not be sufficient alone to establish Indian status under a community recognition test.[289]

An individual who voluntarily renounces his or her tribal citizenship could potentially break the community ties that form the basis for criminal jurisdiction, but the individual must do more than just formally disenroll. For example, a defendant who voluntarily disenrolls but remains living in or connected to the tribal community could still be prosecuted. A defendant who has been involuntarily disenrolled, like the defendant in *Phebus*, who was effectively demoted from citizen to descendant member by a change in enrollment rules, could also be prosecuted as long as he or she maintains a tie to the tribal community.[290]

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288. *See supra* notes 281-282 and accompanying text (discussing *Prater*).

289. Some of these codes are worded in a way that would permit prosecution of Indians from other tribes, regardless of enrollment status in that tribe and regardless of connection to the prosecuting tribe. *E.g.* LEECH LAKE BAND OF OJIBWE TRIBAL CODE tit. I, pt. 2, § 1(B)(1) (n.d.), *available at* http://www.llojibwe.org/court/tcCodes/tc_coTitle1-Judicial.pdf (jurisdiction over any Indian who is "recognized as such by an Indian community"); HOPI CODE tit. III, ch. 1, § 3.1.10 (2012), *available at* http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf (definition of Indian includes anyone who is "regarded as Indian by the society of Indians among whom he lives"). The approach described in these codes seems to combine the idea that an Indian is anyone who is integrated into a tribal community with the idea embraced by the citizenship-based codes that nonmember Indians are Indians from other tribes. Employing this approach, a person without significant ties to the charging tribe could nevertheless be prosecuted on the basis of his ties to another tribe. My focus here is on the community recognition test for membership vis-à-vis the charging tribe. In Part III.C, I address the question of jurisdiction over Indians from other tribes who lack community ties to the charging tribe.

290. This is not to say that a tribal court may not find other flaws with a tribal process that permitted involuntary demotion from citizen to subject, especially for non-punitive reasons. However, these issues are more properly addressed in tribal court review of the disenrollment, or in the context of a specific case, than in a blanket ruling that tribes cannot prosecute disenrolled members. The issue presented by this class of people is discussed further at *infra* Part III.B.

The community recognition standard closely resembles the federal VAWA standard as both emphasize ties to the prosecuting tribal community. This makes sense, because the VAWA standard was written specifically to sketch the boundaries of tribal jurisdiction. The definition of community ties set forth in the VAWA, under which a non-Indian defendant must live or work in the tribal community *and* be in a relationship with an Indian person that gives rise to a domestic violence charge, provides another example of how a community recognition standard might be applied in practice. Because the law only applies to domestic violence crimes, a person who is employed by the tribe must also commit a covered offense against an intimate partner, deepening his ties to the tribe.

The advantage of the VAWA formulation is its predictability: it sets forth clear factors for determining community ties and leaves little room for judicial interpretation, which helps protect against bias. A tribe could similarly enumerate a clear set of factors sufficient to show community recognition, alone or in combination, but such a test could vary among tribes to reflect the unique relational structure of each community. For example, residing on the reservation is a strong indicator of community membership in some communities, but it may have little relevance on reservations with a significant non-tribal population. Outside of the domestic violence context, residence or employment alone may not be sufficient to indicate community recognition.

A community recognition approach analyzes the relationship between individual and community in a way that emphasizes existence and obligation, not simply political participation, consent, or voluntary association.[291] By asking how the community views the person, rather than how the person identifies himself or herself or whether the person is formally enrolled, this standard focuses on obligation as opposed to consent. It offers a vision of community membership as a reciprocal arrangement in which the individual is granted certain rights, privileges, or status in the community and also assumes certain obligations with respect to that community. Community membership, according to this standard, is more than a fleeting, voluntary association. It cannot simply be discarded when inconvenient.[292] This approach to the relationship between individual

291. See *infra* Part III for additional discussion.

292. Community recognition is not a prison. A person could expatriate by voluntarily disenrolling, leaving the community, and severing all ties. In this case, a person would probably no longer be recognized as a member of a tribal community. By looking beyond formal citizenship, however, the standard would permit prosecution of a person who formally disenrolled, but remained living in (and committing crimes in) the community.

and community reflects the kinship model described by the Navajo court in *Hunter* and *Means* and treaty language that differentiates between outsiders who assume tribal relations and those who do not.[293]

The community recognition standard is neither the broadest possible articulation of tribal jurisdiction, nor the clearest and easiest to implement. Tribes adopting it may find it necessary to articulate a factor test similar to the federal common law or VAWA standards. It does, however, allow tribes to work within existing federal law limitations while focusing on the purposes and appropriate scope of tribal power. The standard invites tribal courts to examine the relationship between the tribal government and the defendant, to rely on that relationship as a basis for the exertion of criminal power, and to more directly confront any potential concerns about whether it is fair for *that tribe* to prosecute *that defendant*.

D. Community Recognition as a Federal Standard

The community recognition standard is useful for tribal courts considering the limits of their own criminal jurisdiction because it recalibrates the focus to the reciprocal relationship between community and individual and gives courts the flexibility to acknowledge the multiple ways this relationship might manifest. This section asks whether it could also work as a unified federal law standard to demarcate the limits of tribal jurisdiction.

Recall that federal law governing the scope of tribal criminal jurisdiction provides only the following: 1) a tribe may prosecute all Indians, 2) the term "Indian" includes anyone who could be prosecuted in federal court under § 1153, 3) federal jurisdiction under § 1153 extends, as a matter of federal common law, to anyone who is of Indian descent and is politically recognized as an Indian, 4) a tribe may not generally prosecute non-Indians, and 5) a tribe may elect to prosecute non-Indians who have sufficient ties to the prosecuting tribe and who commit crimes of domestic violence against Indian people.[294] When a federal court reviews the legality of a tribe's exercise of criminal jurisdiction, the federal court should defer to the tribal court's findings and conclusions regarding the scope of that tribe's jurisdiction, the definition of "Indian" used by that tribe, and the factors that tribe uses to determine jurisdiction, including any findings regarding

293. *See* Means v. Chinle Judicial Dist., 2 Am. Tribal Law 439, 449-50 (Navajo 1999); *see supra* note 67 (discussing treaty provisions); *supra* notes 267-270 (discussing Navajo law).

294. *See supra* Part I (describing the source of these rules and highlighting unanswered questions about their precise scope).

community recognition. Federal court review of the jurisdictional standard is properly limited to testing whether the tribal court's approach violates the overall federal law requirement that a person be Indian—that is, he or she has some Indian descent and some political affiliation with an Indian tribe, or some claim to Indian legal status under federal law—or be a non-Indian with sufficient ties to his victim and the tribal community such that VAWA authorizes prosecution. A tribe's approach may be narrower than what is allowed under federal law, and the role of a federal court is to determine only whether that approach exceeds to outer bounds of what is permissible under federal law. A federal court should uphold the court's exercise of jurisdiction over an Indian as long as it is based on factors that indicate tribal community recognition.[295]

But is community recognition the best substantive standard for determining the bounds of Indianness in the context of tribal court prosecutions? Federal Indian law doctrine includes a presumption that tribes retain all aspects of their inherent sovereignty that have not been expressly lost.[296] This means that, whether or not tribes exercise a particular aspect of sovereign power frequently, they retain that power unless and until it is expressly limited by Congress or, as the Court found in *Oliphant*, implicitly divested because its exercise would be inconsistent with the United States' sovereign interests.[297] This rule suggests that federally imposed limits should be interpreted as narrowly as possible, foreclosing tribal criminal jurisdiction only where absolutely necessary to effectuate the Court's concerns. To work as a unifying standard, community recognition should maximize tribal sovereignty, while exempting people over whom the exercise of criminal jurisdiction would be unfair (in the view of the federal government) because of a lack of familiarity with a system that differs from

295. Contrast a deferential approach with the Ninth Circuit's approach in *Cruz* and *Maggi*, which accorded only minimal weight to a tribe's determination that the defendants qualified as descendant members, referring to it as the least important of all the relevant factors, and ultimately held that the defendants were not Indians under federal law despite evidence of some community recognition. *See* United States v. Cruz, 554 F.3d 840, 846-48 (9th Cir. 2009); United States v. Maggi, 598 F.3d 1073, 1083 (9th Cir. 2010). Deference to a community's determination of membership would also help avoid the potential problem of federal judges relying on stereotypical views of Indianness. *See* Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1380-88 (2002) [hereinafter Goldberg, *Descent into Race*] (describing cases in which the courts have limited the application of Indian laws to those individuals who appear in the Court's view to be culturally Indian).

296. *E.g.,* United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* Frickey, *supra* note 60, at 8-13.

297. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-10 (1978).

other American systems in key ways. This article argues that relying on a flexible understanding of tribal community recognition is best way to accomplish this balance.

Tribal sovereignty here is more than just a phrase. Understanding its meaning requires inquiring why sovereigns need the power to criminally punish and how to ensure that tribes can function largely as other governments do in this regard. In the criminal context, this does not simply mean prosecuting as many people as possible. Rather, it means examining the governmental interests served by criminal jurisdiction to ensure that tribal governments are able to protect those interests. Criminal laws perform public safety, expressive, and accountability functions. A careful examination of these interests, informed by criminal theory and the practical realities of modern tribal governments, reveals why a community recognition standard strikes the most appropriate balance between maximizing sovereignty and ensuring fairness.

A primary function of criminal law is to ensure public safety. Criminal laws proscribe certain conduct, including conduct that harms other people. Criminal law is "a means of protecting individual rights and other valuable goods"[298] through deterrence, incapacitation or rehabilitation of criminals.[299] Whether a society responds to a violation with incarceration or through less coercive means, criminal laws play an important role in establishing and enforcing basic rules of conduct that keep people and goods safe. This practical focus of criminal law informs most non-philosophical discussions of the importance of criminal jurisdiction, and reinforces the link between criminal law and territorial jurisdiction. Sovereigns cannot keep people safe if they lack criminal jurisdiction over a subset of people within their borders.

Criminal laws and criminal procedure also reflect the cultural and moral consensus of a society.[300] Criminal law is "critical to community identity" because it "codif[ies] the moral foundations of the community."[301] While

298. CHEHTMAN, *supra* note 1, at 43.

299. *See* Morris K. Cohen, *Moral Aspects of Criminal Law*, 49 YALE L.J. 987, 1007-17 (1940) (discussing justifications for criminal punishment) [hereinafter Morris Cohen, *Moral Aspects*].

300. *See* Washburn, *supra* note 16, at 784-85, 840; Garnett, *supra* note 16, at 440 ("The criminal law purports to proclaim and vindicate the *particular* moral commitments of *particular* communities."); *Id.* at 1077 ("It is one of the functions of the criminal law to give expression to the collective feeling of revulsion toward certain acts . . . .").

301. Washburn, *supra* note 16, at 834. As Washburn points out, the dominant role of the federal government in prosecuting local crime in Indian country undermines this function for tribal governments. *Id.* at 784.

most societies criminalize violence and theft, the definition of some activities as criminal (e.g., incest, statutory rape, or polygamy) varies depending on the cultural beliefs of each society.[302] Different societies may also choose to address crime differently. For example, one society may rely primarily on imprisonment as a means for addressing crime, and another may rely primarily on restitution. One society may guarantee particular rights to defendants in court that another system does not protect, or it may outlaw certain types of punishment that another jurisdiction permits. Even among societies with similar criminal laws, individuals in a given society share an interest in having in force a system of criminal laws specific to that society, which requires a belief that the government with power over that territory has the power to enforce those laws.[303]

Another central purposes of criminal law is accountability.[304] Criminal law "provides the institutional framework within which . . . perpetrators of public wrongs can be called to account (held responsible) for those wrongs."[305] This purpose underlies the focus on retribution as a justification for punishment.[306] The law defines which moral wrongs will require such a public calling to account, provides procedures for public adjudication and condemnation, and sets forth consequences for wrongdoing.[307] In so doing, it provides "an appropriate formal, public response" to criminal conduct.[308] Punishment is justified as a necessary response to the moral choice made by an actor who commits a crime.

Public safety concerns are significant for Indian tribes. They, like other sovereigns, are responsible for prescribing and enforcing basic codes of conduct that keep people safe within their borders, and criminal jurisdiction is the primary means through which they accomplish this. Tribes, like other governments, need the power to arrest, prosecute, and punish (or not

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302. Within the United States, this expressive function may be one reason that criminal law is understood to be a matter for the states. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that states are the primary sources of criminal power in the federal system).

303. *See* CHEHTMAN, *supra* note 1, at 40 ("[T]he fact that German courts claim the power to punish every act of arson perpetrated in Korea would hardly ground the belief in Korea's criminal laws against arson being in force.").

304. *See* Washburn, *supra* note 16, at 784-85, 840.

305. R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 126 (R.A. Duff & Stuart P. Green eds., 2011).

306. *Id.* at 127-28.

307. *See id.* at 126.

308. *Id.* This public condemnation and response is important for conduct that is viewed as an independent moral wrong and for conduct that is legally prohibited but may not be morally wrong.

punish) all people who commit crimes in their territory. Indeed, tribal sovereignty was historically understood to include the idea that tribes—together with the federal government—were primarily responsible for maintaining and enforcing general criminal laws within their borders.[309]

The public safety function of criminal law has been at the center of debates about tribal criminal jurisdiction.[310] Many Indian reservations have high crime rates.[311] Although no single factor can explain crime, one factor associated with high crime rates seems to be the perception that Indian reservations are "lawless" places where criminals can operate beyond the reach of criminal laws.[312] This perception is driven largely by the fact that tribes cannot prosecute most non-Indian criminals, and the view that the federal government, which has jurisdiction over those offenders, will not bother to prosecute them.[313] American Indians are also more likely than

309. *Worcester v. Georgia*, a case that helped defined tribes' status in the United States and lay the foundation for federal Indian law, involved Georgia's efforts to arrest and prosecute a white man in Cherokee territory. 31 U.S. (6 Pet.) 515, 537-38 (1832). The Court clearly held that Georgia's criminal laws have no reach or effect in Cherokee territory and described tribes as "distinct political communities, having territorial boundaries within which their authority is exclusive." *Id.* at 557, 561-62.

310. *See, e.g.*, Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709, 713, 738-39 (2006) (arguing that the encroachment of federal jurisdiction and the role of federal prosecutors in Indian country undercut the ability of tribal governments to maintain public safety).

311. *See, e.g.*, John Dougherty, *Problems in Paradise*, HIGH COUNTRY NEWS (May 28, 2007), http://www.hcn.org/issues/347/17026 (describing violent crime, including the murder of a tourist, on the Havasupai Reservation); Timothy Williams, *Brutal Crimes Grip an Indian Reservation*, N.Y. TIMES, Feb. 2, 2012, http://www.nytimes.com/2012/02/03/us/wind-river-indian-reservation-where-brutality-is-banal.html (discussing crime, and efforts to fight it, on the Wind River Reservation); Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES, Feb. 20, 2012, http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html (describing high crime rates on reservations).

312. *See* INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 17 (attributing high crime rate to a jurisdictional scheme that results in under-enforcement and "displaces tribal authority"); *see also* Michael Riley, *Promises, Justice Broken*, DENVER POST (Nov. 11, 2007, 1:00 AM), http://www.denverpost.com/ci_7429560 (first article in a series on crime and jurisdiction in Indian country called "Lawless Lands").

313. *See, e.g.*, Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC MONTHLY (Feb. 22, 2013, 9:16 AM), http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ (describing increased crime by non-Indians on the Fort Berthold Reservation in the wake of the Bakken oil boom and how jurisdictional rules make it difficult to investigate and prosecute); Riley, *supra* note 312; Troy A. Eid, *New Mexico High Court Ruling May Make Indian Country Safer*, LAW360 (May 27, 2015), http://www.law360.com/articles/659636/

people of other races to be victims of violent crimes,[314] and the perpetrators of this violence are very often non-Indians.[315] Native women in particular have extremely high rates of violent victimization, and their abusers are most often non-Indian.[316] Enforcing public safety in most cases requires that a sovereign exercise criminal jurisdiction over all people who commit crimes within the sovereign's territory. Any crime threatens public safety, no matter who commits it, and public safety cannot be ensured if certain criminals are free to operate beyond the constraints of local law.

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new-mexico-high-court-ruling-may-make-indian-country-safer (describing how the patchwork of jurisdictional rules makes Indian country less safe). Although the federal government has jurisdiction to prosecute non-Indian offenders, recent data shows that U.S. Attorneys declined to prosecute half of all Indian country cases. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010), at 3, *available at* http://www.gao.gov/assets/100/ 97229.pdf. *But see Indian Country Investigations and Prosecutions 2011-2012*, U.S. DOJ, http://www.justice.gov/sites/default/files/tribal/legacy/2013/05/31/tloa-report-cy-2011-2012.pdf (showing fewer cases declined).

314. LAWRENCE A. GREENFIELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 1-3 (NCJ 173386, Feb. 1999), *available at* http://bjs.gov/content/pub/pdf/aic.pdf. Federal statistics, based on census categories, do not differentiate between Indians on and off the reservation. *Id.* at 35-37 (describing data sources and noting that most do not distinguish between reservation and non-reservation crime); *see also* Address by Sarah Deer, in *Conference Transcript: Heeding Frickey's Call: Doing Justice in Indian Country*, 37 AM. INDIAN L. REV. 347, 377-81 (2012-2013) (delivered to the Berkeley Law Thelton E. Henderson Center for Social Justice Symposium, Berkeley, Cal, Sept. 27-28, 2012) (discussing difficulty presented by using national crime data to describe victimization of Native women). It is not clear, therefore, how rates of violent victimization among Indians on the reservation compare to the rates for other groups.

315. GREENFIELD & SMITH, *supra* note 314, at 7.

316. *Id.* at 4, 7; AMNESTY INT'L, MAZE OF INJUSTICE, *supra* note 16, at 4-5. National sexual assault statistics also fail to distinguish between Native women on and off the reservation. *See* Timothy Aqukkasuk Argetsinger, *VAWA's Loudest Advocates Further Silence Native Women*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 24, 2013), http://indiancountrytodaymedianetwork.com/opinion/vawas-loudest-advocates-further-silence-native-women-148312 (questioning the widespread use of Department of Justice statistics regarding inter-racial victimization rates of Native women because those statistics include all Native women, the majority of whom live in urban areas, and therefore obscure the reality faced by Native women living in Indian country); *accord* Address by Sarah Deer, *supra* note 314, at 381 ("So we really can't say for sure whether most Native women who experience crime on tribal lands are more likely victims of Native people or non-Native people."). *But see id.* at 380-81 (acknowledging that the comparative rates of inter-racial victimization of Native women in Indian country is unclear, but calling the debate "a bit of a distraction" and arguing that "studies showing that most perpetrators of violence against Native women are non-Native are certainly compelling reasons to fix *Oliphant*").

Theoretically, federal jurisdiction might be enough to ensure public safety for tribes, even where tribes lack jurisdiction to criminally prosecute non-Indians. In practice however, the experience of those who rely on federal prosecution suggests that federal jurisdiction alone has failed to ensure public safety on reservations, and may even undermine it.[317] Instead, federal jurisdiction has resulted in under-policing, ineffective investigations, and declined prosecutions, feeding the perception of reservations as places without criminal laws.[318] The public safety purpose of criminal law, then, is best served by full territorial jurisdiction.

The expressive function of criminal law also suggests that it is important for tribes to have criminal jurisdiction over all lawbreakers in their territory. In general, for criminal laws to effectively function as expressive instruments, a sovereign must have jurisdiction over all people who violate those laws within its borders, including foreigners.[319] Potential lawbreakers must believe that the sovereign with primary authority over that territory can and will enforce its own criminal laws. This refutes the argument that tribes do not need jurisdiction over everyone as long as some government has the authority to prosecute; the expressive function of criminal law is one reason that federal jurisdiction is not enough.

However, the expressive function also reveals why exercising criminal jurisdiction over people who are complete strangers to that culture and its values might be viewed as unfair. Tribes have the right, like other sovereigns, to determine how crimes are defined and addressed. Like states, tribes may vary in their definitions of crimes and their procedural approach to justice, and they have the right to enact criminal laws that reflect this.[320] On one hand, tribes need the power to punish everyone who commits crimes within their borders, because having people the tribe cannot punish undermine the tribe's rule of law. On the other hand, if the criminal law is

317. *See supra* note 310 (citing Washburn); *supra* note 313 (citing articles on under-prosecution).

318. *See* INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 17.

319. *See* CHEHTMAN, *supra* note 1, at 57-58 (explaining that crimes committed by or against foreigners undermine public confidence in the existence and effectiveness of the system of laws just as much as do crimes by or against citizens).

320. Some of this potential variation is smoothed by the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304 (2012). The Indian Civil Rights Act extends many of the protections found in the Bill of Rights to tribal governments, ensuring that due process rights in criminal cases will roughly parallel those in state and federal courts, limits the length of sentence that a tribal court may impose, and authorizes federal habeas corpus review of tribal criminal court prosecutions, offering additional protection against unfair decisions. *See generally id.* § 1302(a)-(c), § 1302.

an expression of each society's unique value system, it is potentially unfair to impose that system on someone who is unfamiliar with or opposes that value system. Of course, one might similarly argue that it is unfair for any state to prosecute a citizen of another state because the criminal laws in each state reflect different values. Whether fairness concerns related to the expressive function of criminal law should outweigh the public safety interest in territorial jurisdiction ultimately turns on how different the foreign court is. Similarity trumps difference for interstate jurisdiction, but currently law suggests that it does not for tribal courts, which the Supreme Court has described as extra-constitutional[321] and which may be based on very different cultural value systems.[322]

Finally, the accountability function of criminal law requires citizens to be accountable to their community. Only members of a community can effectively be called to account before the rest of the community, and the community's response will be most significant its for members. Unlike the public safety and expressive purposes of criminal law, a sovereign's criminal laws need not reach everyone within its territory in order to make its citizens accountable. A focus on accountability thus recalibrates the focus of criminal jurisdiction from territory to community.

The Court sharply curtailed tribal jurisdiction over non-Indians in *Oliphant*, driven in large part by the idea that tribal court systems are different.[323] An important part of this difference was the possibility that

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321. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (quoting United States v. Lara, 541 U.S. 193, 212 (2004)) ("Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.'")

322. *See generally* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1997); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 108 (Wanda D. McCaslin ed., 2005); Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT (2008); Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134 (1995); Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions Into Tribal Law*, 1 TRIBAL L.J. (2000-2001), http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php; Gloria Valencia Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

323. Although the Court used the neutral language of difference, the implication of its reasoning and the cases it chose to rely on clearly implied a judgment that tribal courts are inferior to Western courts. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97-115 (2005). Instead of relying on the case law from the previous two decades that affirmed the competence of tribal courts and recognized their importance to tribal governance, the Court

non-Indians would not be guaranteed the same procedural protections that they would have under federal constitutional law.[324] This concern reflects the expressive and accountability functions of criminal law by suggesting that it would be unfair to subject certain people to tribal criminal jurisdiction because it would subject them to an unknown system of legal values, and because it would require them to answer for their wrongs according to a standard set by a foreign community.[325]

The Court understood that lack of criminal jurisdiction would potentially leave a serious crime problem on reservations, but, reversing the approach of prior case law, it held that Congress must weigh this "consideration" and, if it chose to, act affirmatively to recognize or restore tribal criminal jurisdiction.[326] Congress then chose to restore inherent criminal jurisdiction over a limited subset of non-Indians to address reservation public safety needs relating to domestic violence and sexual assault.[327] That restored jurisdiction depends on tribes restructuring their criminal justice systems to ensure that defendants receive the same procedural protections applicable in non-tribal systems.

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relied on the explicitly racist reasoning of assimilation-era cases that denigrated tribes as savage and refused to acknowledge the existence tribal sovereignty. *Id.* at 76-79. This was an odd choice because those two ideas about Indian policy had been clearly rejected by Congress and the Executive at least twice since cases like *Crow Dog* were decided. *See* Rolnick, *supra* note 13, at 981-83 (describing Indian Reorganization Act era); *id.* at 986-89 (describing self-determination era).

324. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978) ("As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases. Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary.") The Court only briefly acknowledged that many tribes at the time of the case had Western-style court systems, and that Congress extended certain procedural guarantees to tribal courts through enactment of the Indian Civil Rights Act. *Id.*

325. The Court reasoned that, in light of their extra-constitutional status, tribal criminal jurisdiction infringes upon the overriding sovereignty of the United States because it could potentially subject U.S. citizens to criminal prosecution without constitutionally guaranteed protection. *Id.* at 210. The reference to citizenship, however, sheds little light on the line drawn by the Court between insiders and outsiders. *Id.* at 211. While members of a tribal community were considered citizens of foreign nations in the past, all Indians (tribal members and nonmembers) were recognized as federal and state citizens more than a century ago. *See supra* note 73 (describing Indian Citizenship Act).

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

327. *See supra* Part I.D.

This interplay suggests that, despite Congress' and the Court's disagreement about the proper scope of tribal criminal jurisdiction, they seem to share a concern about the potential unfairness of extending tribal jurisdiction to people located within a tribe's territory who are otherwise strangers to the tribe and its criminal justice system. This limitation seems rooted in the idea that the expressive and community accountability functions of criminal law can be achieved if jurisdiction is limited to people who are part of the tribal community, and assumes that the potential differentness of tribal justice systems makes extending jurisdiction beyond that community a subject of concern. At the same time, both branches acknowledge the public safety needs of tribes and are at least nominally committed to a jurisdictional regime that facilitates that purpose.

But the Court's concern about unfamiliarity is overblown. Today, the similarities between tribal and non-tribal courts usually outweigh the differences.[328] While tribes are not governed by the Constitution's requirements related to criminal procedure, nearly all of these requirements do apply to tribal courts because they are included in the Indian Civil Rights Act,[329] a fact that the *Oliphant* court brushed aside,[330] but which undermines the Court's reliance on historical notions of differentness. In fact, a recent federal commission recommended restoring full territorial jurisdiction, emphasizing the degree to which Western approaches to criminal justice have influenced tribal systems.[331] Like Congress did in enacting the VAWA, the commission conditioned its recommendation on closing the remaining procedural gaps between tribal and Western courts.[332] The idea that tribal courts are still so different as to justify exceptional

328. *See* INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 117 (contrasting tribal justice systems of the late 1800s, when the extension of federal jurisdiction to Indian country crime was premised on the notion that they were insufficiently punitive, with modern tribal justice systems, in which incarceration often plays a central role).

329. 25 U.S.C. § 1302 (2012).

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

331. INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 17-22 (describing procedural safeguards guaranteed by the ICRA and noting that several tribal courts provide additional protections, most notably the guarantee of counsel for indigent defendants, not required by the ICRA).

332. *Id.* at 17-27; *accord* Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era,* 38 AM. INDIAN L. REV. 421, 433-55 (2013-2014) (arguing that the federal government, through legislation restoring tribal criminal jurisdiction, allocation of tribal justice funding, and application of comity principles to tribal court decisions, has pushed tribal criminal courts in a more Western direction).

limitations on criminal jurisdiction is fundamentally unsound, but it nevertheless reflects current law, and therefore must be taken into account.

Moreover, while many modern tribal courts are similar to Western courts, the power to be different is important. The right to sustain and nurture cultural differentness through separate governance is an important aspect of the sovereignty tribes retain.[333] Tribal governments can govern illiberally[334] and they can craft court systems that are procedurally quite different from the standard U.S. adversarial model.[335] Given this, the Court's concern about exposing outsiders to unfamiliar systems and cultures echoes concerns about subjecting certain foreign travelers and diplomats to the jurisdiction of foreign nations with culturally different criminal justice systems.[336]

Criminal jurisdiction is a core aspect of sovereignty, but it has a dark side as well: sovereigns can and do wield criminal power as a tool of conflict, domination and subordination.[337] Critical theorists argue that the primary function of criminal laws is to preserve a system of social stratification.[338] Particularly when applied to those groups with little or no

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333. *See generally* POMMERSHEIM, *supra* note 322, at 99-135.

334. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 816 (2007).

335. *See generally* Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equality and Justice*, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 157-74 (Burt Galaway & Joe Hudson eds., 1996) (describing fundamental differences in values and procedure between Navajo and Western court systems).

336. *See* Elizabeth Helen Franey, Immunity, Individuals and International Law 63 (June 2009) (unpublished Ph.D. thesis, London School of Economics), *available at* http://etheses.lse.ac.uk/309/1/Franey_Immunity,%20individuals%20and%20international%20law.pdf (noting that immunity is sometimes necessary for diplomatic and state officials to function "in a foreign state with a different culture, and different laws" and to guard against the risk that they "may inadvertently infringe the criminal law through ignorance of cultural differences").

337. *See, e.g.*, Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911, 922 (1994).

338. Some of these are arguments about poverty and class domination, *see, e.g.*, Malcolm M. Feeley & Jonathan Simon, *The New Penology: Note on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 467-70 (1992), while others focus on the criminal law's role in maintaining racial hierarchies, *see, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16 (1st ed. 2010), or gender hierarchies, *see, e.g.*, Meda Chesney-Lind, *Girls' Crime and a Woman's Place: Toward a Feminist Model of Female Delinquency*, 35 CRIME & DELINQUENCY 5, 14-19, 25-26 (1989). *See generally* RANDALL G. SHELDEN, CONTROLLING THE DANGEROUS CLASSES (2d ed. 2007).

political or economic power,[339] this social control function of criminal law suggests that criminal power should be limited to prevent governments from using their criminal laws as tools of hierarchy to oppress powerless groups.

This is an important critique that tribes should consider, but it is better addressed at the substantive level. This article addresses a very limited question about tribal criminal justice systems: who must tribes have jurisdiction over in order to accomplish the aims of their criminal justice systems? Fortunately, the community recognition model presented here provides a simple answer. It balances the tribes' needs with the concerns expressed by the Supreme Court. It is a modest proposal that would not even put tribes on par with other governments when it comes to the scope of criminal jurisdiction (as that would require full territorial jurisdiction and a rejection of the Court's concerns about differentness and fairness). It is important to distinguish between expanding jurisdictional scope (e.g., which lawbreakers the tribe can reach) and expanding the substantive scope of tribal criminal powers (empowering tribes to mete out harsher punishments or define more activities as criminal). Critiques of criminal justice as social control are primarily concerned with substantive expansions because they are critiques of systems where jurisdictional scope and the existence of criminal power are rarely questioned.[340] Tribes are alone in having their jurisdiction so severely curtailed, and one premise of this article is that jurisdiction must exist and be clearly defended before an effective critique of the *content* of tribal criminal power can be made.

The community recognition model could also set the stage for tribes to build criminal justice systems that do not create or maintain racial, gender, or class-based hierarchies. In contrast to other recent efforts to fortify or expand tribal criminal jurisdiction, this model does not rely on the punitive nature of tribal courts to justify existing or expanded tribal jurisdiction.[341] Indeed, this model views the Supreme Court's fairness concern as reflecting

339. SHELDEN, *supra* note 338, at 61-62.

340. *E.g.*, Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 737-44 (2005-2006) (describing how habitual offender laws substantively expand the state's criminal power).

341. By contrast, the two recent legislative restorations of tribal jurisdiction, the Tribal Law and Order Act and the Violence Against Women Act of 2013, primarily address the question of who a tribe may punish and for how long they may incarcerate those people, and both require that tribal courts go further toward a United States model of individual rights in order to expand their power to imprison. *See generally* 25 U.S.C. §§ 1302, 1304 (2012).

in part the right of tribes to build criminal justice systems that are *different* from the punitive Western model.

Short of pure territorial jurisdiction, the community recognition framework for determining proper subjects for criminal jurisdiction makes the most sense: even if a tribe cannot enforce criminal laws against all who enter their territory because of fairness concerns, it is still fair for the tribe to enforce its criminal laws against all people who have integrated into the tribe to the extent that they are familiar with the community, enjoy some benefits (even informal benefits) of tribal affiliation, and have some obligations toward the community. The community recognition model emphasizes an individual's obligation to community, which provides an important philosophical basis for the exercise of criminal jurisdiction, and in so doing it addresses the concerns about fairness and differentness outlined in *Oliphant*.

Any imposition of federal limitations on tribal criminal jurisdiction infringes on tribal sovereignty and strips tribes of self-determination, because it fails to allow each tribe to determine for itself who should be covered by tribal criminal laws. Specifically, these limitations prevent tribes from exercising full territorial criminal jurisdiction, which is a power rarely questioned for other sovereigns. The community recognition standard acknowledges federal fairness-based limitations without sacrificing self-determination any more than is required. While there is a compelling argument that Congress should amend the law to restore full territorial jurisdiction,[342] the community recognition standard offers a way to interpret existing law in a manner that maximizes tribal jurisdiction, without requiring any legislative change.

The *Oliphant* Court used the Indian/non-Indian distinction to differentiate individuals whose relationship to Indian tribal nations make them members of a special legal class,[343] but the Court's concerns about "foreignness" are less about a person's Indian ancestry than they are about whether a person has an adequate connection to a tribal community so that

342. *See* INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 3-4, 23 (citing a "public safety crisis" and "[i]nstitutional illegitimacy" as costs of the current system and recommending restoration of territorial jurisdiction). *See generally* Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 U.C.L.A. L. REV. 553 (2008).

343. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-12 (1978); *accord* Garnett, *supra* note 16, at 440 n.50 (noting that both the *Oliphant* and *Duro* opinions "recognize the tie between the moral authority and legal reach of the criminal law and membership in the community for which that criminal law speaks").

the tribe's law would not be unfamiliar to them, and that the different due process protections applicable to tribal court prosecutions would not result in an unfair surprise.[344] The community recognition approach best addresses these concerns. This test asks whether the community considers the person to be an Indian—whether the individual is sufficiently integrated within the tribal community that others recognize him or her as a member. It does not require that the individual be a citizen, or even a lifelong member of the community. It does not require any specific form of membership, such as formal enrollment or political participation. Instead, it addresses the Court's concerns about familiarity by ensuring that a connection exists between individual and community, but retains flexibility as to the precise form of that connection.

While the community recognition standard speaks to the Supreme Court's concerns about fairness and familiarity, it also defers to tribes to determine the appropriate limits of their own powers. It is faithful to the federal approach to the Indian category, in which Indianness is shorthand for having a sufficient connection to an indigenous entity that is politically recognized by the United States.[345] It is also consistent with Congress's approach in the VAWA, which distinguishes between non-Indian domestic violence offenders according to whether they have sufficient ties to the community and have victimized a member of it.

This standard provides an alternative basis for upholding tribal court jurisdiction in *Means* and *Lara*. Although the federal courts in those cases focused on the defendants' status as enrolled citizens of other tribes, both defendants were also members of their local tribal communities.[346] They

344. This is not to suggest that, even in the view of the Supreme Court, a criminal defendant must be familiar with the specific provisions of tribal law in order for jurisdiction to be fair. Many tribal citizens are unfamiliar with their own government's criminal laws, just as many state citizens are unfamiliar with each state's particular laws. I thank Paul Spruhan for this insight.

345. United States v. Antelope, 430 U.S. 641, 646 (1977). The Ninth Circuit makes this explicit by requiring that the defendant be affiliated with a federally acknowledged Indian tribe. LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993) ("It is . . . the existence of a special relationship between the federal government and the tribe in question that determines whether to subject the individual Indian affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country.") Because tribal jurisdiction serves different purposes than federal jurisdiction, *see supra* text accompanying notes 246-254, and in light of the kinship relationships between some recognized tribes and tribes that are either unrecognized or located across an international border, it is notable that some tribal codes define Indian to include members of unrecognized tribes. *See supra* note 255.

346. *See supra* Part I.C.1 (discussing *Lara* and *Means*).

were married to tribal members, had family within the tribe, and lived and worked in the community.[347] Their crimes arose out of their relationships with other tribal community members.[348] Had the federal courts focused on the defendants' connection to the tribal community in which they were being prosecuted, as the tribal court did in *Means*, they could have provided a well-reasoned explanation for jurisdiction, rooted in the work of criminal law. Instead, the federal courts' focus on enrolled citizenship left unanswered questions about why citizenship in one tribe should matter in determining the jurisdiction of another.

E. Community Recognition and Non-Indians

The community recognition standard need not necessarily be limited to people of Indian descent. While many tribal criminal codes, including some that employ a community recognition standard, also incorporate a requirement of Indian ancestry,[349] this may be a nod to the *Oliphant* and *Rogers* rules instead of an expression of tribal ideas about community membership. However, some tribes define community recognition without requiring Indian ancestry.[350]A focus on community membership and reciprocal obligations calls the logic of *Oliphant* into question as it applies to non-Indians who are integrated into tribal communities. With VAWA's restoration of tribal jurisdiction over certain non-Indian community members,[351] federal law has moved closer to the community recognition model expressed by these tribes.

The VAWA includes a carefully crafted standard for determining which non-Indian offenders may properly be the subject of tribal jurisdiction, which relies on the offender's "ties to the Indian tribe."[352] This suggests that Congress wanted to fix the problem of federal courts not prosecuting enough domestic violence offenders, but also wanted to retain an element of community connection. If under-prosecution was the only issue, Congress

347. *Id.*

348. *Id.*

349. *E.g.*, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA CODE tit. 9, § 102 (2012), *available at* http://www.narf.org/nill/codes/grand_traverse/index.html; HOPI CODE tit. III, ch. 1, § 3.1.10 (2012), *available at* http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf.

350. *E.g.*, SANTA CLARA LAW & ORDER CODE tit. 1, ch. 1, § 1.1 (2006); LEECH LAKE BAND OF OJIBWE TRIBAL CODE tit. I, pt. 2, § 1(B)(1) (n.d.), *available at* http://www.llojibwe.org/court/tcCodes/tc_coTitle1-Judicial.pdf; *supra* notes 270 and 283 and accompanying text (describing Navajo law).

351. *See supra* Part I.D (describing VAWA).

352. *Id.*

could have restored jurisdiction over all non-Indians who commit domestic violence or sex crimes against Native women on reservations—but it instead only restored jurisdiction over those with sufficient "ties to the tribe."

Breaking for a moment from the confines of *Rogers*,[353] the community recognition standard presents an alternative way to define the Indian legal category. At its most basic level, the "Indian" legal category refers to indigenous groups recognized as having a government-to-government relationship with the United States, and the people with sufficiently strong connections to those recognized groups to be fairly within the reach of laws arising out of that relationship.[354] A person who is not Indian by descent,

353. *See supra* note 212 and accompanying text (arguing that *Rogers*—although incorporated by reference—is a poor standard for tribal criminal jurisdiction because that case concerned the wholly different question of whether an intermarried white Cherokee citizen should be considered an Indian for the purposes of escaping federal criminal jurisdiction).

354. Skibine, *supra* note 106, at 768 n.6 ("[T]he constitutionality of the *Duro* legislation hinges on the plenary power of Congress over Indian affairs. Because this power is derived from Congress' power to regulate commerce with Indian tribes, it follows that this plenary authority is limited to Indian tribes and their members. The term "Indian," therefore, must be understood as being limited to members of Indian tribes."). Professor Skibine notes, however, that "membership" may be understood in different ways and concludes that a person should be considered a member "so long as that tribe considers such person a member." *Id.* One way the federal government drew this line was to differentiate between those people who "maintained tribal relations" and those who did not. *See, e.g.*, LUCY MADDOX, CITIZENS INDIANS: NATIVE AMERICAN INTELLECTUALS, RACE, AND REFORM 109 (2006) (discussing the Court's holding in *Lone Wolf v. Hitchcock* that Indians who maintained tribal relations were wards subject to congressional plenary power); Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1464 n.8 (1991) (describing census categories that differentiated between "civilized" Indians and those who "retain[ed] their tribal character," as well as between "out of tribal relations" and "sustaining tribal relations"). This standard had a clearly assimilationist purpose: federal policy encouraged Indian people to leave their tribes and adopt non-Indian customs. Rolnick, *supra* note 13, at 979-81 (describing the relationship between allotment policy, citizenship, and assimilation); Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 634-35 (2009) [hereinafter Berger, *Red*]. The people who left were then excluded from the Indian legal category in an era when the federal government's goal was to reduce or eliminate the presence of Indian people. Rolnick, *supra* note 13, at 981. In this regard, modern enrollment rules help to counter assimilationist pressure, as Indian people who move away may still remain tied to their tribes—and thus legal Indians—as formal citizens. Enrollment, then, is one method of "maintaining tribal relations" despite distance. William Wood, Indians, Tribes, and (Federal) Jurisdiction (August 28, 2015), at *31 n.117, *40 n.161, *45 (unpublished draft, on file with

while unlikely to be an enrolled citizen today,[355] may nevertheless be considered a member of the community. If "Indian" is defined to include all people who are members of a tribal community under the community recognition standard, eliminating the reference to descent in the *Rogers* definition, then a tribal court could redefine *Oliphant*'s bright line rule (even if the case remains good law) to permit tribal jurisdiction over all people who are recognized members of a tribal community, regardless of their ancestry.

Eliminating the requirement of Indian descent entirely, while a significant departure from modern interpretations, is a more accurate reflection of historical practice.[356] A recent concurring opinion authored by

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author). It is not, however, the only indicator of tribal relations, and the community recognition standard acknowledges this.

355. Most tribes today have descent requirements for tribal citizenship. Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 271-72 (2008-2009) (citing increased proportion of documented tribal constitutions using lineal descent rules (forty-four percent) and blood-quantum rules (seventy-one percent)). *But see* Berger, *Red*, *supra* note 354, at 652 (noting that Cherokee citizenship requires documented descent from base rolls, which included inter-married whites and Black former slaves known as freedmen, but describing present-day efforts to limit citizenship to those descended from Cherokee-by-blood rolls). For a nuanced account of the history of, and current controversies related to, the citizenship status of the Cherokee freedmen, see CIRCE STURM, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA (2002).

356. As Robert Clinton observed in 1976, "Both intermarriage and the adoption of ethnologically non-Indian people into Indian tribes require that 'Indian,' when used in [the] context [of federal criminal jurisdiction], take on a social as well as a racial meaning." Clinton, *Jurisdictional Maze*, *supra* note 16, at 514; *see also* Nofire v. United States, 164 U.S. 657, 662 (1897) ("[The victim, a white man married to a Cherokee woman] sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen, and still asserts his citizenship. Under those circumstances, we think it must be adjudged that he was a citizen by adoption, and, consequently, the jurisdiction over the offense charged herein is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of that Nation."); Lucas v. United States, 163 U.S. 612, 615 (1896) (federal criminal jurisdiction depends on whether the victim, a Black man living in Choctaw territory, is determined to be a "negro[] who ha[d] been adopted into the tribe . . . [and therefore] within the jurisdiction of its judicial tribunals"); Alberty v. United States, 162 U.S. 499, 501 (1896) (federal court had jurisdiction over case about murder of a Black man who was not a Cherokee citizen by a Black man who became a Cherokee citizen when the Nation incorporated the freedmen). (Unlike *Rogers*, these cases did not require the Court to determine whether naturalization led to Indian status for federal jurisdiction purposes because they involved a specific treaty provision securing to exclusive tribal jurisdiction all cases "in which members of the Nation, by nativity or adoption, shall be the only parties."

Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit advocates eliminating the descent requirement from the definition of Indian for purposes of federal criminal jurisdiction. In its most recent opinion concerning the test for federal criminal jurisdiction, the majority of the Ninth Circuit, sitting *en banc*, reaffirmed that Indianness requires "some quantum of Indian blood"[357] in addition to political affiliation with a present-day tribe. Judge Kozinski disagreed in his concurrence, contending that the requirement of "Indian blood" standing alone rendered the statute an unconstitutional racial classification.[358] He suggested instead "applying the [Major Crimes Act] to all members of federally recognized tribes irrespective of their race."[359]

Judge Kozinski's critique assumes that tribes include both members of Indian descent and members not of Indian descent.[360] He castigates the

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Treaty with the Cherokees, U.S.-Cherokees, July 19, 1866, art. 13, 14 Stat. 799, *quoted in Alberty*, 162 U.S. at 502.) As Clinton explained,

> Since *Nofire* has never been overruled, it calls into question the prong of the traditionally accepted test for Indian status which requires an Indian to be in part genetically descended from person of Indian blood. At the very least, for purposes of ascertaining tribal court jurisdiction, tribal adoption of non-Indians might render such persons Indians.

Clinton, *Jurisdictional Maze*, *supra* note 16, at 516 n.60; *see* United States v. Rogers, 45 U.S. (4 How.) 567, 567-68 (1846) (federal criminal case involving inter-married white man who was prosecuted by the tribe); *see also* Berger, *Power*, *supra* note 67 (describing other cases of whites prosecuted by tribal courts); Spruhan, *supra* note 67, at 85-91; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 n.8 (1978) (acknowledging that treaties also provided that whites who settled in Indian country could be punished by the tribe).

357. United States v. Zepeda, 792 F.3d 1103, 1106 (9th Cir. 2015). The court overruled a prior case, *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010), which had added a requirement that a person's "Indian blood" be traceable to a federally recognized tribe. *Id.*

358. I disagree with Judge Kozinski on this point and instead share the majority's view, *Zepeda*, 792 F.3d at 1110, that a federal statute that classifies Indians in whole or in part on the basis of ancestry is not necessarily an illegal racial classification. *See supra* Rolnick, *supra* note 13, at 995-96 (describing various constitutional arguments for upholding Indian classifications); *id.* at 1003-06 (critiquing the Court's facile equation of ancestry-based laws concerning indigenous peoples with racial classifications).

359. *Zepeda*, 792 F.3d at 1116 (Kozinski, J., concurring).

360. *See id.* at 1117 ("[The] political affiliation prong may provide a non-racial basis for limiting [federal jurisdiction] only to tribe members. But not all tribe members are subject to the [Major Crimes Act]."). It is not clear to whom Judge Kozinski is referring when using the term "tribe members." With few exceptions, tribes' formal membership rolls probably do not include people who lack any indigenous ancestry. While modern tribal communities do include some non-Indians who are recognized as informal members of the community, these people probably make up only a small fraction of informal community members on most

majority for continuing to rely on *Rogers* in determining who is subject to federal jurisdiction as an Indian:

> *Rogers* is a nearly 170-year-old case, authored by Chief Justice Taney, in which the Court held that an adopted, non-racially Indian tribe member wasn't subject to an exemption from federal criminal jurisdiction for crimes committed by an "Indian" against another "Indian." In defining "Indian" for purposes of the statute, the Court noted that the law "does not speak of members of a tribe, but of the race generally,--of the family of Indians," and justified the federal government's exercise of power over "this unfortunate race" in part based on the need "to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices."
>
> Reliance on pre-civil war precedent laden with dubious racial undertones seems an odd course for our circuit law to have followed . . . . [*Rogers* is] obsolete [and] clearly distinguishable [because it] stands for the limited proposition that "a white man who at a mature age is adopted into an Indian tribe does not thereby become an Indian" when the adoption occurs for the purpose of evading prosecution. A case that does no more than prohibit a tribe from making membership exceptions designed to circumvent criminal punishment is a weak reed upon which to rest the federal government's unfettered ability to racially discriminate between tribe members.[361]

By advocating for elimination of the descent prong, which would leave only the Ninth Circuit's political recognition prong (one that recognizes forms of tribal affiliation beyond citizenship),[362] Judge Kozinski effectively advocates for replacing the federal jurisdiction standard with one that considers only governmental recognition (including tribal community recognition) to determine "Indian" status. If the federal courts were to follow Judge Kozinski's suggestion, tribes would be free (but not required) to eliminate the descent requirement from their definitions of "Indian" for purposes of criminal jurisdiction, which would potentially permit them to

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reservations. To the extent that Judge Kozinksi imagines a substantial population of Indians without indigenous ancestry, he is likely factually incorrect.

361. *Id.* at 1118 (citations omitted).

362. *See id.* at 1114. *But see* Prentiss, 273 F.3d at 1282 (declining to eliminate the descent prong).

prosecute people not of indigenous descent, in a way still consistent with *Oliphant*, by legally categorizing them as Indians. To be sure, categorizing these people as "Indians" departs significantly from modern jurisprudence, and is therefore properly the subject of an entirely separate analysis. In addition, there are sound reasons to incorporate a descent requirement in other contexts, especially given the centrality of ancestral tracing to determining whether a group is indigenous to a particular area. Criminal jurisdiction is unique because, to the extent that Congress and the Court have determined that it must be limited, the factors that seem to matter most are community connection, obligation, and familiarity, none if which strictly require that a person be of Indian descent. Nevertheless, it is important to recognize that, in addition to presenting an alternative to citizenship based classifications, a community recognition standard potentially offers an alternative to descent-based Indian classifications.

III. Community Recognition Versus Citizenship

As a legal term, Indianness designates an individual who is sufficiently affiliated with a tribal community such that he or she is properly subjected to the special federal laws governing the relationship between the United States government and Indian nations. Most federal laws passed since the 1970s simply equate Indianness with tribal citizenship eligibility: a person is an Indian for federal purposes if he or she is an enrolled member of, or eligible for enrollment in, a federally recognized Indian tribe.[363] It is tempting to assume, as the *Duro* Court did, that formal citizenship is the best (or only) way to determine the proper limits on tribal criminal jurisdiction. The citizenship standard is consistent with a larger trend in federal law to define the boundaries of legal Indianness through reference to formal citizenship in a federally recognized tribe. The community recognition standard employed by some tribal courts, however, presents an alternative way to understand membership in and affiliation with a tribal community, and it invites a comparison between the two. A close examination of the most common rationales for preferring the citizenship standard shows why community recognition is a better standard for criminal jurisdiction and suggests that it could work in other contexts as well.

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363. Margo Brownell, *Who Is an Indian? Searching for an Answer at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 281 (2001); *see, e.g.*, 25 U.S.C. § 450b(d)-(e) (2012); 50 C.F.R. § 22.22 (limiting eagle take permits under the Bald and Golden Eagle Protection Act to members of federally recognized tribes and requiring a permit application to be accompanied by an enrollment certificate).

A. A Critique of the Citizenship Standard

There are at least three advantages to an approach that equates tribal citizenship with legal Indianness. First, because citizenship criteria are governed by tribal law, this approach defers directly to tribal governments to say who is a member of the tribal community, and therefore a proper subject of the federal rules that apply to tribal nations. Second, affirmative enrollment is clearly a "political" classification, rather than a potentially "racial" one, and therefore is a safer basis for classifying a person as an Indian in an era when equal protection concerns haunt federal Indian law. This easily meshes with the idea that Indianness is a purely political designation because it emphasizes a form of voluntary citizenship in a tribal nation, a status that can be viewed as completely unrelated to race. Using tribal enrollment as the basis for Indianness thus helps insulate Indian rights against accusations that Indian laws provide illegal special rights to a racial minority group. Third, emphasizing formal enrollment as the proper test for legal Indianness reflects the view, expressed by the *Duro* Court, that consent-based citizenship is the only plausible justification for tribes' exercise of governmental powers.[364] The common desire to equate legal Indianness with tribal citizenship is likely a product of all these forces: respect for tribal self-governance, a desire to distance Indian classifications from racial ones, and a consent-based view of tribal power. Perhaps because of these coalescing interests, reliance on tribal citizenship is rarely questioned. However, comparing citizenship with a community recognition standard reveals several problems with relying on formal citizenship as the sole litmus test for Indianness under federal law.

1. A Complicated and Contested Category

The Indian legal category, in all its varied iterations, is supposed to refer to those people sufficiently affiliated with a recognized tribal government that they are fair objects of federal Indian law. It is a "political classification" because it hinges on an individual's relationship to an entity with which the United States has a political relationship. Deferring to tribal citizenship rules, rather than formulating an alternative definition, signals a powerful recognition of Indian tribal sovereignty in that it defers to tribes

364. Duro v. Reina, 495 U.S. 676, 693 (1990). As Alex Skibine has pointed out, "The use of a 'consent of the governed' theory confused Justice Brennan, who, in his dissent, remarked that no constitutional rule exists stating that one cannot be prosecuted unless one can vote, run for office, and sit on a jury." Skibine, *supra* note 106, at 775 (citing *Duro*, 495 U.S. at 707 (Brennan, J., dissenting)).

themselves to say how the "Indian" category should be constituted, and affirms exclusive tribal jurisdiction over questions of membership. On the surface, it gets the federal government out of the business of determining Indianness and instead permits tribes to make their own decisions about who their members are, with federal benefits and rules applying only to those people tribes choose to enroll.

The Supreme Court affirmed tribes' inherent power to determine membership rules free from federal interference the same year it decided *Oliphant*.[365] In so holding, the Court affirmed tribes' plenary authority over membership decisions as a core component of sovereignty and self-governance, even if those decisions are alleged to violate fundamental guarantees of liberty. A federal law defining Indianness solely in terms of tribally defined citizenship criteria affirms tribal authority over such matters. Deferring to tribal citizenship decisions in this way also advances the policy of self-determination,[366] a policy that rejects paternalism and supports tribal self-governance.

Even though it seems as if federal law simply defers to tribes' own determinations about community membership by incorporating enrollment as the definition of legal Indianness, characterizing enrollment rules this way actually obscures the pervasive influence federal law has on modern tribal enrollment rules, and fails to account for the shifting and contested nature of tribal enrollment rules today. Formal membership rolls are a relatively recent phenomenon; prior to their widespread usage, membership in a tribe was a matter of kinship, residence, community integration, and initiation in a religious or clan structure.[367] The practice of keeping formal

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

366. *See supra* note 62.

367. *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 459 (2001-2002) [hereinafter Goldberg, *Members Only?*]; Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1129-31 (1994); *see also* Jessica Bardill, *Tribal Sovereignty and Enrollment Determinations*, AM. INDIAN & ALASKA NATIVES GENETICS RES. CTR, NAT'L CONG. OF AM. INDIANS (NCAI), http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm (last visited Feb. 20, 2015) (launched June 2012); KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1983-1914, at 12 (1999) ("The accuracy of written rolls had never been a major issue [before allotment] because 'in a community as small and informal as the Indian republics, the recognition of citizenship rested more upon family and neighborhood knowledge than upon official registration[.]'"); Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 394 (2015) (discussing kinship-based rules of belonging during the post-contact, pre-constitutional era as "permanent" and not subject to revocation through disenrollment).

lists of enrolled members has roots in the allotment era, when the federal government pursued a policy of breaking up tribal landholdings with individual parcels assigned to each tribal members and opening the "surplus" lands for white settlement.[368] The first enrollment lists were compiled by federal agents tasked with counting and identifying tribal members for purposes of assigning allotments or paying annuities as the federal government sought to break up tribes and assimilate individual Indians.[369]

Today, citizenship criteria vary across tribes, but nearly all incorporate a descent requirement, such as the requirement that a person demonstrate that at least one ancestor appeared on the original tribal roll.[370] Many also incorporate a degree of ancestry (blood quantum) requirement, usually one-quarter.[371] For some tribes, any Indian ancestry is sufficient, but others require a minimum degree of ancestry from that tribe.[372] Some tribes require patrilineal descent,[373] whereas others require matrilineal descent.[374] A few tribes require something more than descent, such as parental residence on the reservation[375] or maintenance of contact with the tribe.[376] Naturalization is infrequent today,[377] and naturalization of people with no Indian heritage at all seems to be especially rare.[378]

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368. Goldberg, *Members Only?*, *supra* note 367, at 457-58.

369. *See* CARTER, *supra* note 367, at 12 (describing the connection between tribal citizenship rolls, federal control these rolls, and the policy of allotment).

370. Gover, *supra* note 355, at 271-72.

371. *Id.*

372. *Id.*

373. *See supra* note 169 (citing Santa Clara and Seneca ordinances).

374. *See supra* note 169.

375. Gover, *supra* note 355, at 272.

376. *E.g.*, LUMBEE CONST. art. II, § 2, *available at* http://media.wix.com/ugd/756e16_72e7de6efe2f40549c0c49fcc88c8ad3.pdf ("Notwithstanding eligibility otherwise, no person's application for enrollment shall be accepted if the applicant has not historically or does not presently maintain contact with the Tribe. Enrolled members may not be disenrolled for failure to maintain contact with the Tribe, in accordance with a tribal ordinance adopted under this Constitution."); *see also* Lumbee Tribe of N.C., An Act to Provide for Tribal Enrollment, No. CLLO-2010-0121-01 (Jan. 21, 2010), *available at* http://media.wix.com/ugd/269399_948d7896b8b248128c743a448d2365b8.pdf (enrollment ordinance providing that present-day contact may be demonstrated through frequent visits to tribal territory and "knowledge of Lumbee churches, schools, and communities, or [] knowledge of community-based and/or tribal leadership" and requiring that tribal members recertify their enrollment every seven years).

377. Constitutions adopted by tribes organized under the Indian Reorganization Act sometimes had naturalization provisions, which may have reflected historical practices of incorporating spouses and adopted children into the community as full members. Today,

It is difficult to tell whether tribes would have adopted these descent requirements if the federal government had not first refused to recognize anyone as Indian who did not have a sufficient degree of Indian blood.[379] To many scholars, tribal blood quantum rules cause particular concern because the federal government's use of blood quantum was linked to a policy vision in which successive generations of intermarriage between Indians and whites would eventually result in the wholesale disappearance of Indians as a separate people.[380] This history has likely influenced tribal law regarding citizenship.[381] On the other hand, descent plays an important role as a way to determine who belongs in a kinship-based society,[382] so it is incorrect to assume that descent is only a factor in tribal citizenship because of federal influences. Blood quantum, in this context, can also operate as a rough proxy for kinship obligations or degree of connection to the community.[383]

In either case, the idea that citizenship rules are a pure reflection of tribal notions of belonging deflects attention from the complicated evolution of the Indian legal category—a history shaped by racial stereotypes and a heavy federal hand.[384] Citizenship rules are undoubtedly influenced by federal criteria, which are in turn influenced by racist perceptions of Indians. When federal law refers to tribal citizenship rules to determine who

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these provisions appear to be used infrequently, and naturalization is sometimes explicitly prohibited. This is not to say that non-Indians and Indians from other tribes do not commonly integrate themselves into tribal communities. Rather, their integration is not accomplished through formal naturalization.

378. Although the subject of tribal naturalization laws requires further study, I am not aware of modern day examples of tribes naturalizing people who are not of Indian descent.

379. *But see* John P. LaVelle, *The General Allotment Act "Eligibility" Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 WICAZO SA REV. 251, 260-62 (1999) (refuting the argument that the federal government "imposed" blood quantum on tribes).

380. *See, e.g.*, Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 387-88 (2006); J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 12-25 (2008).

381. *See* Galanda & Dreveskracht, *supra* note 367, at 397.

382. Goldberg, *Descent into Race*, *supra* note 295, at 1390; *see also* Bethany Berger, Race, Descent, and Tribal Citizenship, 4 Cal. L. Rev. Circuit 23, 34 (2013) (pointing out that descent-based citizenship comports with international norms and that *jus sanguinis*, or decent-based determination of citizenship, was long the dominant rule outside of the United Kingdom and the United State).

383. *See* KIM TALLBEAR, NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE 64-65 (2013).

384. *See id.* at 66.

is Indian, it may appear as if the federal government has gotten out of the business of trying to decide who qualifies as an Indian, because any potentially objectionable limitation on membership—for example, a minimum blood quantum requirement—appear to be solely the responsibility of the tribal government. Unless and until tribes can refine their citizenship rules to weed out federal influences, however, the idea that citizenship-based definitions of Indianness are entirely reflective of tribal self-determination is little more than a fiction.[385]

Relying on citizenship to determine Indianness means according a highly contested and constantly shifting category paramount importance in determining all things relating to Indian rights and tribal power—including access to federal benefits, applicability of federal laws, and tribal jurisdiction. Assuming there is only one legitimate way to define Indianness for all purposes also avoids important questions about what is at stake with any particular classification, and what kind of analysis should guide the classification scheme in light of its purposes. The foregoing analysis of criminal jurisdiction standards is just one example.[386] The trend toward equating Indianness with tribal citizenship means that tribal enrollment rules have a far greater significance today than they ever have in the past.

Modern tribal citizenship rules serve specific purposes, and therefore may not provide a good measure of legal Indianness in other contexts. For example, in many tribes, formal enrollment determines which community members can vote in tribal elections, run for political office, and sometimes who can own tribal land.[387] Those rules may not say anything at all about who lives in the community, who has kinship obligations to the community, how religious leadership is determined, who can participate in certain events, or who can benefit from the protections and services provided by the tribal government. Criminal jurisdiction rules are another example of a classification with a specific purpose: criminal jurisdiction is usually

385. *See* Galanda & Dreveskracht, *supra* note 367, at 390 (contrasting "federally imposed notions of tribal 'membership' and 'enrollment' with "norms of indigenous belonging and kinship"); *see also* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 9, U.N. DOC. A/RES/61/295 (Sept. 13, 2007) ("Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.")

386. *See supra* Part II.D.

387. *See* JOANNE BARKER, NATIVE ACTS: LAW, RECOGNITION, AND CULTURAL AUTHENTICITY 82 (2011) ("specific rights that issue from [enrolled] membership include voting in tribal elections; holding tribal office; sharing in tribal revenue; the use of tribal lands and natural resources . . .; and housing, health care, and education") (citing Goldberg, *Members Only?*, *supra* note 367).

described in its own section of a tribal code, and it is unlikely that any tribe's citizenship rules were crafted with the question of criminal jurisdiction in mind. For this reason alone, formal citizenship—even in its ideal form—is an ill-suited classification to determine who is the appropriate subject of criminal power, and this mismatch should raise questions about whether it should be relied on in other contexts.

Over-reliance on formal citizenship rules also presents additional problems. For several reasons, tribal citizenship encompasses only a narrow subset of community members. First, some tribes prohibit dual citizenship, so a person with significant ties to more than one tribal community may not be enrolled in one because he or she has chosen to enroll in the other.[388] For those eligible to enroll in more than one tribe, the decision about where to enroll may be influenced by the relative financial resources of each tribe. Second, tribal enrollment criteria are heavily contested, because they determine access to financial resources and political power.[389] Enrollment lists grew out of the lists compiled by federal officials to determine who should be entitled to share in tribal money and property,[390] and they still serve that purpose today. Any standard that limits who can access tribal financial resources is bound to be contested because of concerns about limited resources. The same is true for any standard that limits who can hold and exercise political power in the tribe.

Superficially, tribal citizenship may seem like a clean categorical marker, especially because tribes keep and regularly update enrollment criteria and lists of enrolled members. Enrollment therefore presents an attractive option for defining legal Indianness in all contexts. But the reality of tribal community membership is much more complex than what is captured on membership rolls. If formal citizenship is to be the sole indicator of Indianness for all purposes, including eligibility for federal benefits, exercise of tribal jurisdiction, and enjoyment of tribal benefits, it has to become more than simply a list of Indian people compiled by federal officials for purposes of distributing land allotments or annuity payments (the historical basis of membership rolls), or a tightly guarded list of who can share in tribal money or inherit tribal land. The maintenance of

388. No federal law expressly prohibits dual enrollment, but the standards for federal recognition require that a petitioning tribe demonstrate that its members are not enrolled elsewhere. *See* KIRSTY GOVER, TRIBAL CONSTITUTIONALISM 95-96 (2010). Federal funding formulas may also count tribal members in a way that discourages dual citizenship.

389. *See generally* Galanda & Dreveskracht, *supra* note 367; *see also* BARKER, *supra* note 387, at 146-85.

390. *See* BARKER, *supra* note 387, at 88-93.

membership rolls and the use of formal enrollment procedures is a relatively new phenomenon for tribes when it comes to determining belonging, community participation, and eligibility for services. The limited purposes served by enrollment and the disputes surrounding it suggest that it is not the most reliable way to define the boundaries of a tribal community for all purposes.

2. Indianness and Equal Protection

The term "Indian" has always been a legal term of art, but its meaning has been shifting and inexact. At first, "Indians" simply meant the "numerous and warlike tribes" of "fierce savages" that inhabited North America prior to European arrival.[391] Indian was seen as the opposite of white,[392] and there was no need to define the term further, because relatively clear distinctions of phenotype, culture, language, and geography separated most Indians from most non-Indians. Federal policy focused on keeping Indians separate from settlers, so it probably seemed unnecessary to precisely define the edges of such a clear category. For indigenous peoples, tribal affiliation was more important than Indian identity.[393] Although some tribes were closely related to neighboring tribes and some even governed through formal confederations or alliances, tribes across North America were far more culturally diverse and geographically scattered than they are today.

Eventually, federal courts began to face questions about the boundaries of legal Indianness, and the Indian category was reshaped by perceptions about religion and culture.[394] Indian policy at the end of the nineteenth century was characterized by an effort to disempower tribal governments, forcibly assimilate Indians into American culture, and break up tribal landholding with the goal of eliminating the "Indian problem" by turning Indians into whites.[395] As Congress and the courts considered which groups and individuals would be the subject of the federal plenary power over Indian affairs, the answers tended to focus on whether the people in

391. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586, 589 (1823).

392. LAURA GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN-AMERICAN RACE 50 (2007) (describing the white/Indian duality).

393. *See* Goldberg, *Descent into Race*, *supra* note 295, at 1374, 1389; Rolnick, *supra* note 13, at 1007.

394. *See* Rolnick, *supra* note 13, at 1010-13.

395. *See id.* at 979-81 (describing assimilation policy); *see also* Charles F. Wilkinson & Eric R. Briggs, *The Evolution of Termination Policy*, 5 AM. INDIAN L. REV. 139, 143 (1977) (describing how assimilation was proposed as a "solution to the 'Indian problem'").

question practiced European or traditional religions, whether they were sedentary farmers or nomadic hunters or herders, and whether they had been educated in American school systems.[396]

When Congress passed the Indian Reorganization Act in 1934, which aimed to reestablish and support Indian tribal governments, after several decades of forced assimilation, and increase Indian control over Indian affairs, it had to define who would qualify as an "Indian." It did so by relying on three possible indicators: enrollment in a recognized tribe coupled with Indian descent, descent from a member of a recognized tribe coupled with residence on the reservation in 1934, or possession of "one-half or more Indian blood."[397] Federal law thus recognized that the Indian legal category is comprised of people who maintain ties with tribal communities, whether through enrollment or residence, as well as people who are descended from those communities. The blood quantum definition—uncoupled as it was from any requirement of tribal enrollment or reservation residence—may have been a way to account for the decimation of tribal governments and co-mingling of tribes that occurred as a result of federal removal and assimilation policies. It also enabled the federal government to extend its supervisory authority over communities of Indians not affiliated with any tribe by acquiring land for them and organizing them into sedentary communities.[398] The blood quantum definition reflected federal use of blood quantum to define Indian status in prior eras[399] and blood quantum and descent are still used in some federal laws to determine Indianness.[400] It is this aspect of the federal Indian category, which focuses on descent and percentage of ancestry, that creates

396. *See generally* United States v. Joseph, 94 U.S. 614, 616-18 (1877) (holding that Pueblo people are not Indian for federal purposes because they are civilized, pastoral, intelligent, Spanish-speaking and Catholic); *see also* United States v. Sandoval, 231 U.S. 28, 39-47 (1913) (holding that Pueblos are Indians under federal law because they are primitive, simple, and governed only by crude customs).

397. 25 U.S.C. § 479 (2012).

398. Gover, *supra* note 355, at 281.

399. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 9-45 (2006) (describing pre-IRA uses of blood quantum).

400. *See, e.g.*, 8 U.S.C. § 1359 (2012) (specifying that immigration exceptions only apply to American Indians "who possess at least 50 per centum of blood of the American Indian race"); *see also* Rolnick, *supra* note 13, at 1016-17 (describing descent-based laws and judicial resistance to them).

the most consternation among those who consider Indianness to be an illegal racial classification.[401]

Most of the time, people who qualify as legal Indians are the same people who make up the Indian racial category.[402] The racial dimension of the term "Indian" did not present a problem for courts until the late twentieth century, when courts began to interpret the Equal Protection Clause as barring race-based legal classifications in almost any circumstance.[403] If racial classifications were illegal, then how could Congress pass and the courts enforce special laws relating to Indians—a category that at least partly refers to race?

The Supreme Court first addressed this conundrum in *Morton v. Mancari*, a 1974 case that upheld a Bureau of Indian Affairs Indian employment preference against an equal protection challenge.[404] In the shadow of increasing debate over the constitutionality of race-based affirmative action programs, the policy was challenged as an illegal racial classification.[405] The Court had not yet determined the level of constitutional scrutiny that would be applied to benign racial classifications (those intended to benefit a minority group).[406]

Consequently, there were several options available to the Court to uphold the Indian preference law. First, the Court could have labeled the classification as at least partially racial and applied intermediate scrutiny because it was a program designed to benefit, rather than harm, a minority group. Alternatively, the Court could have applied strict scrutiny, but held that the government's interest in carrying out its unique trust responsibility was a sufficiently compelling interest, or that the Bureau's particular history of discrimination against Indians justified the modern preference in hiring and promotion. Finally, it could have recognized that the federal government's unique relationship with indigenous nations, which is

401. *See* Rolnick, *supra* note 13, at 997, 1016-17 (describing criticism of descent-based Indian classifications).

402. *See id.* at 1007-14 (explaining how the Indian racial and legal categories evolved together and influenced each other).

403. *See id.* at 989-90, 997.

404. 471 U.S. 535 (1974).

405. *See* Carole Goldberg, *What's Race Got to Do with It?: The Story of* Morton v. Mancari, *in* RACE LAW STORIES 237 (Rachel F. Moran & Devon W. Carbado eds., 2008) (describing how the case arose in the context of unanswered questions about the constitutionality of university affirmative action programs and how the plaintiffs and at least one *amicus* brief on the side of the BIA explicitly framed the dispute as one about race-conscious remedies).

406. *Id.*; Rolnick, *supra* note 13, at 989-90.

affirmed in treaties and in the text of the Constitution itself, means that Indian classifications are not subject to standard equal protection analysis, even if the classification is in part race-based.[407] Instead, the Court chose to avoid questions of race and equal protection entirely; it characterized the Indian classification as "political, rather than racial" and held that it was "rationally related" to the government's unique obligations towards Indian tribes.[408]

In the decades since *Mancari* was decided, the constitutional limits on race-based programs have hardened. Racial classifications are *always* subject to strict scrutiny, even if intended to benefit, rather than disadvantage, minorities. Moreover, the goal of rectifying generalized historical discrimination against a group is not a sufficiently compelling governmental interest to permit a race-based program to withstand strict scrutiny.[409] And even where a compelling interest is identified, the Court has carefully scrutinized the manner in which race is considered, striking down uses of race that it views as unnecessary to achieve the stated goal.[410] It has therefore become increasingly important to characterize laws singling out Indian people as involving political classifications as opposed to racial ones.

Formal citizenship in a federally recognized tribe provides an easy political demarcation. The *Mancari* Court referred to citizenship when describing Indian classifications as political.[411] Many federal statutes use citizenship to define Indianness.[412] Those that do not continue to be dogged by concerns that they may draw illegal race-based distinctions.[413] Several Supreme Court opinions preceding *Duro* also focused on citizenship as the

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407. *See* Rolnick, *supra* note 13, at 1015-25 (describing these options and explaining how the Court's choice to characterize the rule as "political, rather than racial" had important ramifications for how Indian status has been conceptualized by courts ever since).

408. *Mancari*, 471 U.S. at 553-54 n.24.

409. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); *id.* at 239 (Scalia, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 505-06 (opinion of the Court); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90, 307-10 (1978).

410. *E.g.*, Fisher v. University of Texas, 133 S. Ct. 2411, 2415 (2013) (remanding challenge to race-based university admissions policy and holding that strict scrutiny requires that such policies must be necessary to achieve the university's goal of diversity, which includes an inquiry into whether other measures might achieve the same goal, in order to be legal).

411. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

412. *See supra* note 363 (same point).

413. *See supra* note 401 (describing criticism of various laws singling out Indians but not defining Indianness in terms of enrollment).

basis for tribal power.[414] While the move towards citizenship-based definitions of Indianness in federal law has been gradual, it closely tracks the increasing judicial distaste for racial distinctions of any kind, and is undoubtedly driven in part by a desire to square the field of Indian law with the *Mancari* political classification framework. In other words, the *Duro* Court was following a trend in federal law of avoiding equal protection problems by attempting to define Indian status as correlated to citizenship in a federally recognized tribe. Yet, as Parts I and II of this article demonstrate, formal citizenship is not the only way to measure whether a person has a sufficient connection to an Indian tribe, and it is therefore not the sole constitutional option for defining the boundaries of the Indian legal category.

3. Consent and Shrinking Tribal Power

Although the *Duro* rule was superseded by statute, its reasoning that consent and political participation is the only permissible basis for subjecting someone to tribal jurisdiction remains influential. In cases concerning tribal power over non-Indians in Indian country decided in the years between *Oliphant* and *Duro*, the Court slowly moved from distinguishing between Indians and non-Indians to distinguishing between members and nonmembers. The Court's focus on consent as a basis for jurisdiction developed in tandem with this shift.

The Court first employed the member/nonmember language in *Wheeler*, a case that confirmed tribal criminal jurisdiction over an enrolled citzen of the tribe, and *Montana v. United States*, a case that prohibited tribes from regulating hunting and fishing by non-Indians living on private property within reservation boundaries.[415] In each case, the Court suggested a broad rule that tribes presumptively lacked jurisdiction over "nonmembers" within their territory.[416] In *Wheeler*, this rule limiting tribal jurisdiction was dicta because the case did not involve nonmembers;[417] *Oliphant*, decided the same year, limited tribal criminal jurisdiction over some people and explained the distinction as one between Indians and non-Indians.[418]

414. *See infra* Part III.A.3.

415. 450 U.S. 544, 566 (1984).

416. *See id.* This broadly stated rule was inconsistent with past decisions recognizing broad tribal power over all within the borders of a tribe's territory. It was also unnecessary to *Montana*'s holding that the tribe could not regulate hunting and fishing by a non-Indian on land he lived on and owned in fee simple within the boundaries of the reservation.

417. *See* United States v. Wheeler, 435 U.S. 313, 314 (1978).

418. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

Montana concerned a white person who was neither an Indian nor a tribal member, but the Court used the phrase "nonmember" instead of "non-Indian" and highlighted his lack of connection to the community, rather than his race, as the reason the tribe could not regulate his actions.[419]

In subsequent cases concerning the limits of tribal civil jurisdiction, the Court embraced and expanded upon this newly announced presumption, which turned prior assumptions about tribal governmental power inside out by moving from a territory-based vision of tribal sovereignty to a consent-based one.[420] Tribes are sovereigns with power over their members and their territory,[421] yet the increasing emphasis on tribal citizenship in federal law has fed the idea that tribes should only be able to exercise governmental power over those who consent to be governed, even within their territory. Over the past thirty years, the Court's jurisprudence on both civil and criminal jurisdiction has carved massive holes in tribes' control over their territory. In the criminal context, this has come in the form of categorical prohibitions against the exercise of criminal jurisdiction over certain groups of people. In the civil context, what began as a rule that exempted certain types of land within a reservation from certain forms of tribal jurisdiction[422] has evolved into a blanket presumption that tribes lack power over anyone who has not consented to be governed by them.[423]

The importance of consent shows up in the basic rule that tribes are presumed to lack power over the activities of nonmembers within their territory, as well as in one of the two exceptions to that rule, which recognizes tribal power over nonmembers who have consented (usually via

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419. *Montana*, 450 U.S. at 550.

420. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001); Nevada v. Hicks, 553 U.S. 353, 359 (2001); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008).

421. *Wheeler*, 435 U.S. at 323; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (describing territory sovereignty of Indian nations).

422. *Montana*, 450 U.S. at 566-67 (holding that tribe cannot regulate hunting and fishing by nonmembers on nonmember-owned fee land, but approving of lower court's holding that tribe can regulate same on tribal trust land); *Strate*, 520 U.S. at 454-55 (applying *Montana* to state highway right-of-way crossing tribal trust land); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 441-45 (1989) (holding that tribe can apply zoning regulations to nonmembers who live in "closed" portion of the reservation, where the vast majority of land was held in trust for the tribe and devoted to restricted tribal uses, but not to those who live in "open" portion, where tribal and member land was broken up by many tracts owned in fee by non-members).

423. *Hicks*, 553 U.S. at 359; *Plains Commerce Bank*, 554 U.S. at 328.

contractual agreement) to be governed by tribal law.[424] In *Plains Commerce Bank v. Long Family Land and Cattle Co.* (the Court's most recent case concerning tribal civil jurisdiction over nonmembers[425]) Chief Justice Roberts explicitly stated the Court's concerns about tribal jurisdiction over anyone but consenting members: "[N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented . . ."[426] The Court employs a very narrow understanding of consent in these cases to foreclose tribal power over everyone except those who affirmatively volunteer to be governed by tribal law: tribal members consent by enrolling, and non-members must consent to a specific exercise of jurisdiction in order for it to be valid. Formal citizenship, for example, measures a voluntary, active, and discardable form of community affiliation. Likewise, *Montana*'s consensual relations exception has been interpreted to cover mainly contractual agreements—another express, voluntary, and waivable form of consent. Implicit in the Court's formulation is the idea that if a tribal government acts unfairly, this consent can be withheld or withdrawn: a nonmember can avoid unfairness by not consenting to tribal jurisdiction, and a member can avoid it by disenrolling.[427] For a Court suspicious of the legitimacy and stability of tribes as governments, formal citizenship is a way to measure active, ongoing consent of certain people to be governed by tribes, thus easing concerns that tribes may be exercising governmental power over anyone except those who have voluntarily subjected themselves to tribal laws.

This view of consent-based governance made its way back into the Court's jurisprudence on tribal criminal jurisdiction in *Duro*. The *Duro* Court's view that consent provides the only defensible basis for tribal jurisdiction reflects the focus on consent in the civil jurisdiction cases.[428]

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424. *Montana*, 450 U.S. at 565 (establishing consent exception and collecting prior cases that exemplified its application).

425. As of the writing of this article, a lawsuit seeking to further restrict tribes' civil jurisdiction over nonmembers, even those who have arguably consented to jurisdiction, is pending before the Court. *See* Opening Brief for the Petitioners, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (Aug. 31, 2015).

426. *Plains Commerce Bank*, 554 U.S. at 337.

427. In *Plains Commerce Bank*, the Court expressed particular concern about non-Indians because, even if they wanted to consent to governance, they could not enroll and thus could never participate in the local tribal government. *Plains Commerce Bank*, 554 U.S. at 337.

428. Skibine, *supra* note 106, at 776-777.

After *Duro* was overturned, the consent theme became less prevalent in criminal jurisdiction cases. However, the Court has continued to refine and explain the consent theme in its civil jurisdiction cases,[429] suggesting that the idea of consent still holds significant weight as a theoretical basis for modern tribal jurisdiction.

By invoking a special theory of consent-based jurisdiction for tribal courts, the Court has re-imagined tribal governments as membership associations held together by nothing more than the voluntary assemblage and active participation of their members.[430] According to this vision, tribes may exercise power over their members because those members are free to renounce their tribal citizenship and abandon their tribal ties at any time. This vision belies the reality of tribal cultures built on kinship and clan-based obligations, on fundamental ties among community members, and on the relationship between the people and the particular territory they inhabit. The community recognition standard that some tribes employ in the criminal jurisdiction context, on the other hand, better reflects these complex ties.

B. Subjects Without Rights

If formal citizenship carries with it certain rights, such as the right to vote and the right to run for political office, the use of different standards for citizenship and for the exercise of criminal jurisdiction may raise concerns because it effectively creates a category of people who are subject to tribal power but prohibited from participating in civic life via voting or running for political office. Citizens are subject to tribal jurisdiction and can exercise political rights. A larger class of secondary members are subject to tribal jurisdiction, but are not eligible to enroll and so may lack those political rights. This arrangement may seem to raise serious fairness questions because the secondary members are subject to sovereign power of a government in which they have no political voice. In such a structure, a core group of enrolled individuals have the power to govern, while an additional group of individuals remain subject to the government's power but are prohibited from participating. When the power at issue is criminal jurisdiction, including the power to deprive a person of liberty, the concerns raised by a two-tiered structure may be especially acute.

Resistance to the possibility of criminal jurisdiction without political participation was an important part of Justice Kennedy's opinion in *Duro*,

429. *See supra* text accompanying notes 426-427 (discussing *Plains Commerce Bank*).
430. *See* Rolnick, *supra* note 13, at 1023-24.

but jurisdictional rules that encompass non-citizens are not unique to Indian law. The United States has historically exercised criminal jurisdiction over many classes of people who could not exercise full citizenship rights, or who were not citizens at all, including African Americans until 1868 and women until 1920. Today nationals, permanent residents, disenfranchised felons, undocumented immigrants, and children under the age of eighteen all comprise part of the national community, and are certainly subject to the criminal jurisdiction of the federal and state governments[431] even though these classes of people lack a formal voice in the country's political process. But no one would suggest that the federal and state governments lack criminal jurisdiction over them. This is partly because sovereigns typically enjoy full territorial jurisdiction. Even when criminal jurisdiction is tied to the relationship between individual and nation, as in the extraterritorial context, however, it is not limited to citizens. At minimum, extraterritorial jurisdiction extends to all "nationals."[432]

Two-tiered membership structures already exist informally in most tribes.[433] Many people who live on reservations and participate in tribal communities are ineligible for enrollment.[434] Those community members may live on tribal land or in tribal housing. They may attend tribal schools, receive services at tribal clinics, enjoy the protection of tribal emergency response personnel, and receive a range of other services from the tribe. They may also have familial, community, and religious obligations. Many participate actively in ceremonial life (which in some tribes is closely connected to formal political life). They are members of the tribal community in all senses except for the right of direct political participation.

Before formal enrollment rules, membership in a tribal community was based on kinship, residence, and sometimes choice of affiliation. Kinship sometimes included non-blood ties such as those gained via marriage, adoption, or naturalization.[435] For example, an outsider who was adopted or married into the tribe may have become a tribal member for social purposes, but may not have been permitted to participate in a clan-based religious system.[436] Because of the close link in many tribal communities

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431. *See* Duro v. Reina, 495 U.S. 676, 707 (1990) (Brennan, J., dissenting).

432. *See supra* note 3 (describing extra-territorial criminal jurisdiction).

433. *See, e.g., supra* text accompanying notes 271-282 (describing EBCI law).

434. *See supra* text accompanying notes 168-170 (describing people who may live in community without being enrolled).

435. Galanda & Dreveskracht, supra note 367, at 394.

436. Spruhan, *supra* note 67, at 82-85; *see also* COLIN CALLOWAY, NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE REMAKING OF EARLY AMERICA 152-164 (1998).

between religious leadership and political governance, outsiders without clan status may have been excluded from political participation as well.

Some tribes today have formalized the two-tiered structure in their constitutions or enrollment ordinances. These laws describe a category of people who are subject to tribal power and may access certain tribal services, but are expressly excluded from full membership. For example, the Blackfeet Tribal Code recognizes a category of descendant members who are eligible for certain tribal services and subject to criminal jurisdiction, but who do not have the full political rights of enrolled citizens.[437] The Assiniboine and Sioux Tribes of the Fort Peck Reservation have created a class of "associate members" with a similar status.[438] Some may view this status as a form of second-class citizenship.[439] A better analogue, however, might be nationality or permanent resident status. Nearly all nations have some form of recognized affiliation short of citizenship. Like nationality laws, the two-tiered membership structure employed by Blackfeet, Fort Peck, and others has the advantage of providing clear notice to community members about their status, the rights they do and do not enjoy, and whether they are subject to tribal jurisdiction.

There is certainly a strong argument that a society is better off if all people who are subject to governmental power have an equal voice in that government, but the appropriate place for that discussion is on the context of debates about citizenship criteria, not in the context of rules that narrow

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(describing varying levels of community integration experienced by captives and others adopted into Indian tribes).

437. BLACKFEET CONST. amend. III; *see supra* note 210 (describing federal determinations of Indian status in cases where defendants qualified as descendants under Blackfeet tribal law).

438. FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE tit. 4, ch. 1, § 101(e) (1988), *available at* http://www.fptc.org/ccoj/title_4/chapters/chapter1.pdf; *see also* Bailey, *supra* note 215.

439. Because the key difference between a full member and a descendant is often one of blood quantum (descendants are people whose blood quantum is not sufficient for enrollment), this category may appear even more troubling. While I advocate here for a more flexible conception of community membership for criminal jurisdiction purposes, I am mindful of the potential problems created by such a two-tiered citizenship structure. Criticism of such systems is one of the reasons tribal membership criteria are sites of contestation as many Indian people (formally enrolled members and nonmembers) lobby tribal governments to jettison restrictive membership rules. *See, e.g.*, BLACKFEET ENROLLMENT AMENDMENT REFORM (B.E.A.R.), http://blackfeetenrollmentamendmentreform.blogspot.com/ (last updated Jan. 8, 2015) (blog authored by Robert Juneau) (dedicated to changing the Blackfeet enrollment ordinance by eliminating the blood quantum requirement).

tribal governmental power. When this contestation takes place in the context of tribal enrollment rules, it is an example of tribal communities exercising healthy self-governance, which often entails a process of dissent and political change.[440]

A mismatch between the standards for citizenship and jurisdiction may also be a reason for tribal courts to restrict a particular exercise of governmental power. This article is primarily concerned with countering the common assumption that *federal* law requires tribes to limit their jurisdiction to people enrolled in a tribe, but a *tribe* could also choose to limit its criminal jurisdiction to enrolled citizens for reasons related to how it conceives of its own social and political community and how it chooses to allocate rights among members. This is a legitimate approach and should not be confused with a tribe assuming that federal law requires it to limit jurisdiction to enrolled citizens.

The *Phebus* case illustrates the difference between these two approaches. When the tribal appellate court ruled that the tribe could not prosecute a former citizen who had been involuntarily disenrolled, it (incorrectly) cited federal law as the reason for this limitation. However, the court may well have had its own concerns about whether the tribe could fairly prosecute a person in tribal court after revoking that person's tribal citizenship. The court could have reasoned that, as a matter of Las Vegas Paiute tribal law, such a prosecution was inconsistent with principles of fairness, due process, or inclusive citizenship rules. On the other hand, the court could have determined, as the Navajo and EBCI tribal courts have done, that a person who remains in the community and maintains certain ties to the community can fairly be prosecuted for any crimes committed in that community, regardless of the person's formal citizenship status. In either case, the question of what constitutes a sufficient connection to the tribal community to make prosecution fair is a question of tribal law.

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440. Addie C. Rolnick, *Rewriting the End of a Sovereignty Story*, PRAWFSBLAWG (June 18, 2012, 5:58 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/06/rewriting-the-end-of-a-sovereignty-story-santa-clara-pueblo-members-vote-to-change-patrilineal-membe.html (describing decades-long internal struggle by Santa Clara Pueblo community members to change their membership rules); *see also* Jill Doerfler, *A Citizen's Guide to the White Earth Constitution: Highlights and Reflections*, *in* GERALD VIZENOR & JILL DOERFLER, THE WHITE EARTH NATION: RATIFICATION OF A NATIVE DEMOCRATIC CONSTITUTION 81, 83-86 (2013) (describing successful effort to eliminate blood quantum floor from enrollment rules).

C. Strangers Enrolled in Other Tribes: Respecting Sovereignty by Narrowing Jurisdiction?

The community recognition standard could in some cases narrow tribal jurisdiction. The *Duro* fix has been interpreted as confirming tribal power to prosecute and punish citizens of other tribes, regardless of their relationship to the prosecuting tribe.[441] Indeed, there is evidence that Congress, recognizing that Indian people frequently live and work in other tribal communities, was primarily concerned with closing a jurisdictional gap over those people created by the *Duro* decision.[442] The community recognition standards articulated by tribes incorporate this idea: most of those laws authorize prosecution of a person who is recognized as a community member by *any* tribe, not just the prosecuting one.[443]

The standard outlined here, however, does not provide a justification for prosecuting strangers to one community on the basis of their connection to another. Under a principled approach to community recognition, it is difficult to explain why a tribe should be able to extend criminal jurisdiction over a complete stranger to its community just because that stranger is affiliated with another tribe. Under the enrollment-based interpretation of the *Duro* fix, any tribe could prosecute that person upon proof of citizenship in another tribe. Under the community recognition standard as expressed in most of the tribal codes described in Part II, a tribe could also prosecute someone based on evidence (not necessarily enrollment) of his affiliation with any other tribe. Under a strict interpretation of community recognition, by contrast, a tribe could not prosecute a nonmember Indian in the absence of a sufficient connection to the prosecuting tribe. For strangers to the community who are members of other tribes, the community recognition standard would result in narrower tribal jurisdiction.

This may not be a significant contraction of tribal jurisdiction in practice because most Indians from one tribe who come within the territory of another tribe have some affiliation that likely would be sufficient under a community recognition standard.[444] Jurisdiction over these people would be based on their connection to that community, rather than their status as enrolled members of another tribe, but no net change in tribal jurisdiction

441. *See supra* Part I.C.1.

442. *See supra* Part I.B.2.

443. *See supra* note 289.

444. *See supra* text accompanying notes 346-348 (analyzing *Means* and *Lara* under community recognition standard).

would result. In the case of a stranger to the community who happens to be enrolled in another tribe, the result could change.[445]

Federal courts have upheld Congress' plenary power to restore jurisdiction over Indians enrolled in other tribes, but have done so under the mantle of rational basis scrutiny, assuming that any government classification based on Indianness is reasonable as long as it is related to Indian affairs—an explanation that is unsatisfying to some critics.[446] The courts are correct that Congress has the power to restore inter-tribal jurisdiction, and this was likely an important goal of the *Duro* fix. Extension of tribal criminal jurisdiction over Indians from other tribes (enrolled or not) who are strangers to the prosecuting tribal community may be independently justifiable for reasons not explored here, and merits a separate inquiry.[447] The community recognition standard, however, would address the practical concerns regarding the large number of nonmember Indians living and working in tribal communities described in the legislative history of the *Duro* fix.[448] To the extent that Congress intends that tribes be able to exercise jurisdiction over strangers from other tribes, the best approach would be to clarify the need for such jurisdiction and, if jurisdiction is not also restored over all outsiders, explain why Indians and non-Indians are treated differently. This jurisdiction would be based on a separate theory, and would supplement the community recognition theory. This is the approach embraced by most tribes who include a community recognition standard in their codes.

Even in the absence of an independent justification for inter-tribal jurisdiction over strangers, there are ways for tribes to ensure that inter-tribal jurisdiction continues. For example, tribes could easily enter into cooperative agreements allowing for reciprocal criminal jurisdiction. Such agreements are already used by many tribes to facilitate inter-jurisdictional policing, prosecution, and detention between tribes and state and local

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445. *Morris v. Tanner*, 288 F. Supp. 2d 1133 (D. Mont. 2003), is a case in which a community recognition standard could potentially result in no tribal jurisdiction. The court discussed the thousands of nonmember Indians living on the Fort Berthold Reservation, but the opinion does not clarify Morris's connection, or lack of connection, to the tribe. *Id.* at 1135. If he were just passing through, a community recognition standard would not permit him to be prosecuted just because other nonmember Indians lived in the community.

446. *See supra* Part I.C.1 (discussing *Lara*, *Means*, and *Morris*). *But see* Skibine, *supra* note 106 (arguing that federal plenary power permits Congress to restore tribal jurisdiction over Indians enrolled in other tribes even under a strict scrutiny framework).

447. *See, e.g..,* GOVER, *supra* note 388, at 11 (describing "inter-indigenous recognition").

448. *See* Newton, *supra* note 112, at 109 n.7.

governments.[449] While it may require more effort than a simple federal rule permitting inter-tribal jurisdiction, this approach would be more respectful of tribal sovereign authority.

Conclusion

The Supreme Court has twice attempted to draw a line defining the scope of tribal criminal jurisdiction, and has twice been partially rejected by Congress. In *Oliphant*, the Court drew a racial line,[450] preserving tribal jurisdiction over "Indians" but not over "non-Indians."[451] The Court's reasoning, however, focused on fairness and failed to provide much of an explanation for why the Indian/non-Indian line answered those concerns. Excluding all non-Indians from tribal jurisdiction while including all Indians is both overly broad (it permits jurisdiction over complete strangers who have Indian ancestry) and unduly narrow (it prohibits jurisdiction over anyone lacking Indian ancestry, regardless of that person's relationship to the tribal community). The *Oliphant* Court's racial line is better understood as an imperfect proxy for cultural and social integration into a community. This interpretation is bolstered by the 2013 VAWA amendments, which provide that tribes may appropriately exercise jurisdiction over some non-Indians provided they have sufficient ties to the community.[452] This partial repeal of *Oliphant* suggests that Congress disagrees with the Court's overbroad assumption that all non-Indians will categorically lack sufficient community ties.

Perhaps recognizing the inexactness of the racial line, the Court tried a second time to draw this line in *Duro* by adopting a member/nonmember

449. *See* INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 104-05; David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes*, 1 REV. OF CONST. STUD. 120, 152 (1993). Testifying in support of the *Duro* fix, Representative George Miller invoked the rationale of inter-tribal consent, interpreting widespread tribal support of the bill to mean that tribes "support letting other tribes have jurisdiction over their people." *See supra* note 110.

450. I use the term "racial" here to mean "based solely on ancestry," which is the way the Court most often defines the term in the context of Indian law. I have previously written about how both "Indian" and "race" have many different meanings (both social and legal) and the confusion that can result from overlapping meanings. *See generally* Rolnick, *supra* note 13. While the *Oliphant* Court did not further define what it meant by "Indian" and "non-Indian," the decision is usually interpreted to at least bar tribal jurisdiction over people without Indian ancestry.

451. Oliphant v. Suquamish Tribe, 435 U.S. 191, 211-12 (1978).

452. 25 U.S.C. § 1304(b)(4)(B) (2012).

distinction.[453] Membership in this context correlates to formal citizenship in the prosecuting tribe.[454] Because almost all tribes have clear enrollment criteria, maintain lists of enrolled citizens, and issue certificates or identification cards to verify a person's enrollment, it is relatively easy to determine whether a person is a citizen or not, so the *Duro* line is easy to implement. But citizenship is also a poor proxy for community ties and fairness. It is too narrow, as it excludes many different groups of people who may be part of that tribe's community: non-Indian people, Indians from other tribes, Indians from that tribe who do not meet the tribe's enrollment criteria, people eligible to enroll who have not done so, people who have chosen to disenroll but remain in the community, and people who have been involuntarily disenrolled but remain in the community. Moreover, Congress has clearly indicated its disagreement with the Court's attempt to draw the line at enrolled citizenship by legislatively reversing the Court's holding almost immediately.

This article has presented a third option for determining the scope of tribal criminal jurisdiction by defining who is sufficiently affiliated with a tribal community such that he or she is a fair subject of criminal prosecution. This standard, which asks whether a defendant is recognized by the tribal community as a member, is already employed by some tribes seeking to balance acknowledgement of federal law limitations on tribal jurisdiction with careful analysis of the proper scope of tribal criminal powers. This standard also tracks the one used by Congress in VAWA. Compared to other possible standards, the community recognition standard protects sovereignty better, is more closely aligned with the functions of criminal jurisdiction, and better reflects the current rules governing tribal jurisdiction. It is also a way to make sense of the *Oliphant* prohibition on jurisdiction over non-Indian outsiders, Congress' confirmation of jurisdiction over the many nonmember Indians living on reservations, and Congress' recent restoration of jurisdiction over non-Indian domestic violence offenders with ties to the tribe.

Because the community recognition standard avoids the citizenship-versus-blood dichotomy, it provides a new potential answer to the equal

453. Duro v. Reina, 495 U.S. 676, 697 (1990).

454. The term "member" also has no static definition, but the *Duro* court described membership in terms of consent and political participation, suggesting that membership in this context means enrollment. Since the decision, tribal membership has often been equated with formal enrollment in a tribe. While I argue here for a broader understanding of what constitutes membership in a tribal community, I assume that others who use the term "membership" mean to refer to formal citizenship (also called enrollment) unless they specifically note otherwise.

protection questions haunting Indian law. It does so by demonstrating that legal Indianness is a political classification in the sense that it denotes individuals who are affiliated with modern tribal governments, but that the contours of individual affiliation with a political community are varied, context-dependent, and not reducible to either ancestry or to a rigid consent-based view of tribal citizenship. While this article has examined the particular context of criminal jurisdiction, its critique of the over-reliance on citizenship and its suggestion of an alternative way to define the boundaries of tribes as political communities should encourage a reevaluation of citizenship-based standards in all contexts.

Using community recognition as the federal standard for tribal jurisdiction will not solve all the problems faced by tribes seeking to build strong justice systems, protect their communities, and ensure law and order within their territory. There is no doubt that when the Supreme Court carved a gaping hole in tribes' territorial jurisdiction, and Congress failed to fully restore that jurisdiction, tribal sovereignty, tribal justice systems, and tribal people were deeply affected. For this reason, a federal commission appointed to study criminal justice in Indian country has rightly recommended that tribes be given the option of reassuming exclusive criminal jurisdiction over all offenders in their territory—a legislative *Oliphant* fix.[455]

The standard proposed here is not a fix, but a reexamination and reinterpretation of the existing limits. Like much of Indian law, modern criminal jurisdiction rules may seem to be the result of policy shifts and inconsistent decisions. The community recognition standard is an attempt to identify the organizing principles that underlie what is commonly perceived as a set of disconnected rules, and to do so by centering tribal law and tribal courts.

This article is a call for tribal courts to examine their own jurisdiction via tribal law, and for federal courts to follow their lead when reviewing their jurisdiction—to recognize that the scope of tribal criminal jurisdiction may be different than the scope of federal criminal jurisdiction. It is also a plea to tribal courts not to cede any more of their inherent jurisdiction than is absolutely required by federal law, and for federal courts to recognize this as the correct approach. It is a long overdue attempt to examine tribal criminal justice systems on their own terms, rather than treating them as half-formed institutions necessary only to fill in the gaps left by other governments.

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455. INDIAN LAW & ORDER COMM'N, A ROADMAP, *supra* note 16, at 23-27.