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A NEW CORRIDOR FOR THE MAZE: TRIBAL CRIMINAL JURISDICTION AND NONMEMBER INDIANS

William V. Vetter*

Introduction

Criminal jurisdiction in "Indian country"¹ is divided among federal, tribal, and state governments by an amalgam of statutes, court decisions, treaties, and administrative actions. Major crimes involving Indians are subject to federal jurisdiction.² Lesser crimes involving Indians and non-Indians are subject to federal jurisdiction.³ Crimes

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1. Title 18 U.S.C. § 1151 (1988) defines "Indian country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

2. The Major Crimes Act provides:

Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 U.S.C. §§ 2241-2245 (1988)], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Major Crimes Act, 18 U.S.C. § 1153 (1988).

3. The Indian Country Crimes Act provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place

involving only non-Indians are subject to state jurisdiction.⁴ In 1953, Congress adopted Public Law 280, which transferred to specified states all federal criminal jurisdiction over reservations within those states (with some exceptions) and enabled other states to assume the same jurisdiction.⁵ Public Law 280 was amended in 1968 to require tribal consent to state assumption of Public Law 280 jurisdiction.⁶ Crimes are subject to tribal jurisdiction if they involve only tribal members.⁷

In a 1976 article, Professor Robert N. Clinton dubbed criminal law in Indian country a "jurisdictional maze."⁸ The legal and ideological foundations of that maze were begun in Europe long before the United States began its political existence — even before Europeans "discovered" the American continents.⁹ Perhaps unfortunately, it is not the two-dimensional, Euclidian maze of King Minos; it is a three- or four-dimensional construct, often built with a hidden agenda and frequented by ghosts of ideologies past and present. When the first U.S. Congress enacted Indian-related legislation, it built on existing foundations. The ensuing 200 years has increased the complexity and confusion of Indian-related legislation. In 1990, another corridor of the maze was

within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

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

Indian Country Crimes Act, 18 U.S.C. § 1152 (1988).

4. See *Draper v. United States*, 164 U.S. 240, 242-43 (1896); *United States v. McBratney*, 104 U.S. 621, 623 (1881).

5. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), 28 U.S.C. § 1360 (1988)). Some states, such as Washington and Montana, have assumed jurisdiction over part of the reservations in the state, and, in the case of Washington, assumed only partial jurisdiction over some reservations.

6. Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-1341 (1988)). Public Law 90-284, except for title I, is commonly referred to as the Indian Civil Rights Act (ICRA).

7. See the exception to 18 U.S.C. § 1152, quoted *supra* note 3. However, administratively created Courts of Indian Offenses (also known as CFR courts) exercise misdemeanor jurisdiction over all intra-Indian crimes within some reservations, regardless of tribal membership. See discussion *infra* notes 481-88.

8. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 503 (1976).

9. See generally JAMES MULDOON, *POPPES, LAWYERS AND INFIDELS* (1977); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); FREDERICK TURNER, *BEYOND GEOGRAPHY: THE WESTERN SPIRIT AGAINST THE WILDERNESS* (1980).

illuminated. The United States Supreme Court ruled in *Duro v. Reina*¹⁰ that Indian tribal courts do not have jurisdiction over crimes committed by Indians not members of the local tribe.¹¹ The Court held that nonmember Indians and non-Indians have identical standing insofar as Indian tribal court criminal jurisdiction is concerned.¹² A few months later, in the frenetic dying moments of the 1990 Congress, a measure slipped through purporting to reverse the Supreme Court's decision and eliminate the newly discovered corridor.¹³

While constructing *Duro's* new corridor in the maze, the Supreme Court encountered problems similar to those confronted by anyone modernizing any historic edifice. The old walls and foundations presented more obstacles than support; corners and infrastructures were not in convenient places; the old blueprints did not include relevant information; compromises had to be made. This newly lit corridor of the maze begins between the fixed walls of *Oliphant v. Suquamish Indian Tribe*¹⁴ and *United States v. Wheeler*¹⁵ and on the bedrock of *Cherokee Nation v. Georgia*,¹⁶ viz., the dependent nature of tribal sovereignty precludes independent exercise of external relations. But a short way down this new corridor, the way appeared blocked by a wall of decisions laid on foundations fixed by the likes of *Montana v. United States*¹⁷ and *Merrion v. Jicarilla Apache Tribe*,¹⁸ viz. nonmembers (external) are subject to tribal civil jurisdiction. Examining that wall revealed what looked like an opening; nonmembers supply the basis for tribal civil jurisdiction by voluntarily entering into some relationship with the tribe or its members. Working toward that opening, the new corridor was blocked by an opposing wall; not all tribal jurisdiction resulted from nonmembers' voluntary acts. Just a year before, the *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*¹⁹ patchwork ("protection of tribal values and customs") was

10. 495 U.S. 676 (1990).

11. *Id.* at 679.

12. *Id.* at 695. The *Duro* decision has been hailed as a "devastating blow to Indian tribes" in an article by the Director and an attorney for the Indian Law Support Center. Steve Moore & Jerilyn DeCoteau, *1990 Decisions of the United States Supreme Court: Erosion of Native Tribal and Religious Rights*, 24 CLEARINGHOUSE REV. 991, 991 (1991).

13. Department of Defense Appropriations Act for Fiscal 1991, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990).

14. 435 U.S. 191 (1978).

15. 435 U.S. 313 (1978).

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

17. 450 U.S. 544 (1981).

18. 455 U.S. 130 (1982). *Merrion* was followed, legally and chronologically, by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 209 (1989).

19. 492 U.S. 408 (1989). *Brendale's* consent to tribal authority was, like *Duro's*, nonexistent, but both acted within reservation boundaries; their actions threatening tribal values. *Brendale* had not sought or forged connection with the Yakima Nation, but the Court held him subject to some degree of tribal civil regulation. Only experience will tell if *Brendale* increased or decreased the acknowledged scope of tribal jurisdiction.

papered to the partial wall of tribal jurisdiction. In addition, cases such as *Merrion* hold that the power to tax nonmembers' on-reservation activities is a matter of inherent sovereignty, not consent.²⁰

Thus, the "external relations" foundation acquired a swiss-cheese appearance. Support was sought in a new direction, i.e., the Constitution protects United States citizens from unwarranted intrusions on personal liberty. The new direction was itself confounded. All Indians, not just nonmembers, are United States citizens. The key to this obstacle was posited to be in the hands of Congress. But Congress' key was not used for the *Wheeler*-approved tribal jurisdiction over members. The Court turned to another key already at hand, one akin to the *Montana* key of consent, forged from the very source of the Constitution, i.e., the power of participation by the governed.

Through the governed's consent door, the *Duro* majority arrived at its destination, an area of uncertain size and character at a yet unfixed location in the maze. From this vantage, the majority reached back to block some false corridors started by the lower courts and to adorn the walls with proposed but rejected plans. The *Duro* dissent approached the destination unwillingly and nailed alternate proposals to the door; some were countered by the majority's elaborations but others remain as challenges for further exploration.

Short months after the Court's decision, Congress attempted to obliterate the *Duro* corridor. Starting from the same place and based upon the same historic plans, the legislation's sponsors and supporters avowed a diametrically opposed conclusion, primarily by alleging that *Duro* read the plans wrong.²¹ It was rumored that the enactment stands on venerable foundations, but nothing concrete was revealed.

At least one aspect of the illumination of these allegorical corridors appears inadequate — the search for a historic foundation. To say that federal Indian law is history-dependent is to understate the obvious. Every inquiry concerning jurisdiction and Indians must start from politico-ideological constructs begun before the United States came into being and (passing through numerous and contradictory modifications and embellishments of court decisions, legislation, and politics) proceed to the present time. Concerning the *Duro* question, neither the parties, the courts, nor congresspersons seem to have given more than selective, perfunctory consideration to historic facts or documents. The practice was, instead, to make broad conclusory statements with only vague references to ostensible supporting information. Part III.B of this article presents a more detailed look at historical sources.

20. *Merrion*, 455 U.S. at 147.

21. See *infra* part IV.

Duro, on its face and especially in conjunction with *Oliphant*, presents a significant problem. How can day-to-day, routine reservation law enforcement be handled? The argument that the *Duro* result left a jurisdictional void is, perhaps, theoretically incorrect, but it is not practically incorrect. The advocates of Congress' "solution" apparently think the problem is solved. However *Duro* itself makes that belief highly questionable. Possibilities for resolving that problem are discussed in the final portion of this article.

I. The Corridor's Beginning

A. The Setting

1. The Facts²² — Duro v. Reina

On June 15, 1984, Albert Duro (a Cahuilla Indian from California) participated in a confrontation between two carloads of youths, within the Pima-Maricopa Indian Reservation, which is just east of Scottsdale, Arizona. Duro allegedly discharged two shots from a lever-action rifle. One of those shots allegedly struck and killed Phillip Brown, a fourteen-year-old member of the Gila River Indian Community who was about two blocks away and not involved in the confrontation.²³ About June 19th, Duro was arrested by federal agents in California. On the prosecutor's motion, a first-degree murder indictment was dismissed without prejudice. Two days after that, Duro was turned over to the Salt River Department of Public Safety (tribal police) and charged with unlawfully discharging a firearm, a misdemeanor.

Albert Duro, born in California in 1958, is a U.S. citizen and an enrolled member of the Torrez-Martinez Band of Mission Indians, a federally recognized Indian tribe.²⁴ During most of his twenty-six years preceding the incident, Duro lived in California not on an Indian reservation.²⁵ He met Debbie Lackey, a member of the Salt River

22. The facts before the federal courts were limited to Duro's membership in a tribe other than the Pima-Maricopa Indian Community and that he was charged in the Pima-Maricopa Indian Community Court with the criminal discharge of a firearm on the community's reservation. The other facts mentioned in the following discussion are disclosed in the various court opinions, briefs filed with the U.S. Supreme Court, and a telephone interview with John Trebon, Esq., Attorney for Albert Duro. See also *Hearing [Apr. 11, 1991] on H.R. 972 Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs*, 102d Cong., 1st Sess. (1991) (written testimony of Prof. N.J. Newton).

23. Brown resided on the Salt-River Indian Reservation, even though he was not a member of that community.

24. The Torrez-Martinez Band of Mission Indians is small; it has never had a tribal court and exercises no criminal jurisdiction over its members.

25. California, a "Public Law 280" state (see *supra* note 5 and accompanying text) has criminal jurisdiction over in-state reservations.

Pima-Maricopa Indian Community who was raised in California, and the two lived together intermittently during 1980-83, primarily in California. In March 1984, Duro moved onto the Salt River Reservation to live with Lackey and her family. While living on the reservation, Duro was employed by the PiCopa Construction Company, which is owned by the Community. PiCopa does not limit employment to Indians or Community members. Shortly after the shooting incident, Duro left the Pima-Maricopa Reservation.

Duro moved to dismiss the tribal court charges on the ground that he was not a member of the Community and therefore not subject to its criminal jurisdiction. That motion was denied.²⁶ No tribal appeal was available.²⁷ Duro petitioned the U.S. district court for a writ of habeas corpus. That petition was granted.²⁸

On appeal, a divided Ninth Circuit panel vacated the district court decision.²⁹ Almost a year after its initial decision, the same panel issued amended opinions, reaching the same result for essentially the same reasons.³⁰ Later, a majority of the Ninth Circuit judges did not vote to grant Duro's request for rehearing en banc, over a strenuous three-judge dissent.³¹ When he petitioned the U.S. Supreme Court for certiorari, Duro was in the anomalous position of having lost before the Ninth Circuit despite the fact that four of the six circuit judges who expressed their opinion disagreed with that result. In *Greywater v. Joshua*,³² a case similar to *Duro*, the Court of Appeals for the Eighth Circuit did not experience a divergence of opinion — the court unanimously reached the same conclusion as the Ninth Circuit's dissenters.

2. The Facts — *Greywater v. Joshua*

Mary Jo Greywater, Anthony Charboneau, Jr., and Raymond Buckles, members of the Turtle Mountain Band of Chippewa Indians who resided on that tribe's reservation, were arrested by Sioux Tribal Police

26. Salt River Pima-Maricopa Indian Community v. Duro, Cause No. CR-84-0256 (Salt-River Pima-Maricopa Indian Community Ct. Oct. 19, 1984), reprinted in Exhibit K, Petition for Writ of Cert., in Joint Appendix, Duro v. Reina, 495 U.S. 676 (1990) (No. 88-6546).

27. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY LAW AND ORDER CODE § 4-32 (n.d.) [hereinafter SALT RIVER CODE], reprinted in Exhibits L, M, Petition for Writ of Habeas Corpus, in Joint Appendix, Duro v. Reina, 495 U.S. 676 (1990) (No. 88-6546). See *infra* part III.A.

28. The parties' Stipulation of Fact and the District Court's Memorandum and Order in: Duro v. Reina, Cause No. CIV 84-2107 PHX WPC (D. Ariz. 1985), are reproduced in the Joint Appendix, Duro v. Reina, 495 U.S. 676 (1990) (No. 88-6546).

29. Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987).

30. Duro v. Reina, 851 F.2d 1136 (9th Cir. 1988) (amended decision).

31. Duro v. Reina, 860 F.2d 1463, 1463 (9th Cir. 1988) (order denying rehearing en banc); *id.* (Kozinski, J., joined by Leavy, J. and Trott, J., dissenting).

32. 346 F.2d 486 (8th Cir. 1988).

on the Devils Lake Indian Reservation.³³ All three were charged, under the Devils Lake Sioux Tribal Code, with possession of alcohol in a motor vehicle, public intoxication, and disorderly conduct.³⁴ The automobile's driver, a member of the Devils Lake Sioux Tribe, was not charged. The three Chippewa moved for dismissal contending that, as nonmembers, they were not subject to the tribe's criminal jurisdiction. The Sioux Tribal Court denied the motion without a hearing and without a record.³⁵ The U.S. District Court for North Dakota dismissed habeas corpus petitions without prejudice, pending exhaustion of tribal court remedies.³⁶ A unanimous Eighth Circuit panel reversed and directed the district court to issue writs of habeas corpus, declaring the Devils Lake Sioux Tribe to be without jurisdiction over nonmember Indians.³⁷

3. *The Precedent*

Though other authorities were discussed in the *Greywater* and *Duro* opinions, the primary precedents considered were *Oliphant* and *Wheeler*. *Oliphant* and *Wheeler* were both decided during the Supreme Court's October 1977 Term; they were argued two days apart and the opinions released sixteen days apart. The *Wheeler* decision was unanimous, but Chief Justice Burger and Justice Marshall dissented in *Oliphant*. Justice Brennan did not participate in either case.

Oliphant involved tribal prosecutions for misdemeanor offenses allegedly committed on the Port Madison Indian Reservation in Washington State. The Suquamish Indian Tribe is the resident tribe of that reservation. Mark David Oliphant was charged in the Suquamish Indian Provisional Court with assaulting a tribal officer and resisting arrest. Daniel B. Belgarde was arrested after a high-speed chase through the reservation and charged with recklessly endangering another person and damaging tribal property. Both were non-Indians who lived on the Port Madison Indian Reservation.³⁸ Oliphant and Belgarde separately petitioned the U.S. district court for a writ of habeas corpus, alleging that the tribal court had no criminal jurisdiction over non-

33. The Devils Lake Sioux Indian reservation is about 95 miles southeast of the Turtle Mountain Chippewa Indian Reservation. Both are in North Dakota.

34. Charboneau was also charged with resisting arrest.

35. The tribal judge allegedly told the three that they would not receive a fair trial because only Sioux would be on the jury. *Greywater*, 846 F.2d at 489.

36. *Id.* at 487.

37. *Id.* at 488.

38. The Port Madison Indian Reservation is a "checkerboard" of tribal land. The district court found that approximately 63% of the land within the reservation boundaries was owned in fee simple by non-Indians. The remaining land was "trust" land (primarily unoccupied) held by the U.S. for the benefit of the Suquamish Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978). Of the approximately 2980 reservation residents, only about 50 were members of the Suquamish Tribe. *Id.*

Indians.³⁹ The district court disagreed and denied both petitions.⁴⁰ The Ninth Circuit affirmed the district court's decision concerning *Oliphant*.⁴¹

In *Oliphant*, the Supreme Court reviewed the legislative, administrative, and judicial history of Indian tribal criminal jurisdiction vis-à-vis non-Indians. The majority concluded that criminal jurisdiction over non-Indians was a matter of external relations and, therefore, inconsistent with the dependent status of Indian tribes.⁴² The two-justice dissent was based upon the theory that the retained sovereignty of Indian tribes was sufficient to allow criminal jurisdiction over all persons within the reservation, subject only to express, affirmative withdrawal by statute or treaty.⁴³ Consistent with the facts, both *Oliphant* opinions were couched in "Indian" versus "non-Indian" terms.

Wheeler involved sequential prosecutions in the Navajo Tribal Court and the U.S. district court. Wheeler was an enrolled member of the Navajo Tribe and lived on the Navajo Reservation. In tribal court, Wheeler was charged with and pled guilty to misdemeanor disorderly conduct and contributing to the delinquency of a minor (a fifteen-year-old Navajo girl) within the reservation.⁴⁴ More than a year later, Wheeler was charged in federal court with statutory rape, based on the same facts. Wheeler moved to dismiss the federal charges on double jeopardy grounds. The district court agreed and dismissed the indictment. On appeal, the Ninth Circuit affirmed, holding that Indian tribal courts and federal courts are not arms of separate sovereigns and, therefore, federal prosecution was barred by the prior tribal prosecution.⁴⁵ The Supreme Court reversed the Ninth Circuit's decision, holding that Indian tribes and the United States are separate sovereigns and therefore the Fifth Amendment does not bar successive tribal and federal prosecution.⁴⁶ Key to that decision was that tribal criminal jurisdiction *over its own members* was never expressly surrendered,

39. *Id.* at 194-95.

40. *Id.*

41. *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976). Belgarde's appeal to the Ninth Circuit was held in abeyance while the petition for certiorari was heard by the Supreme Court. See *Oliphant*, 435 U.S. at 195 n.5.

42. *Oliphant*, 495 U.S. at 208-11.

43. *Id.* at 212 (Marshall, J., dissenting).

44. *Id.* at 314-15 & nn.1-3.

45. *United States v. Wheeler*, 545 F.2d 1255, 1258 (9th Cir. 1976), *rev'd.*, 435 U.S. 313 (1978). The Supreme Court granted certiorari to resolve the conflict between that decision and *United States v. Walking Crow*, 560 F.2d 386 (8th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978).

46. *Wheeler*, 435 U.S. at 331-32.

was not inconsistent with the tribe's "dependent" status, and was not delegated federal power.⁴⁷ In contrast to *Oliphant*, *Wheeler* was couched in terms of "tribal member" versus "nonmember." Significantly (at least for *Duro*), *Wheeler* stated, "And, as we have recently held [*in Oliphant*] they [Indian tribes] cannot try nonmembers in tribal courts."⁴⁸

B. The Lower Court Opinions

1. Pima-Maricopa Community Court

In the Pima-Maricopa Community Court (the tribal court), Albert Duro contended that he was not within that court's criminal jurisdiction because he was not a member of the Pima-Maricopa Indian Community.⁴⁹ The Community Code's criminal jurisdiction provision provides for jurisdiction over offenses committed by "persons otherwise subject to" the tribal court's jurisdiction.⁵⁰ The Code does not elaborate on "otherwise subject to." The tribal court concluded that the Supreme Court's statement in *Wheeler* that *Oliphant* held that

47. *Id.* at 328.

48. *Id.* at 326. In both *Duro* and *Greywater*, the United States argued that the *Wheeler* decision did not mean what it said. While two judges of the Ninth Circuit were apparently convinced, the Supreme Court was not.

There was apparently no contention that *Wheeler*'s federal prosecution was barred by the proviso in 18 U.S.C. § 1152 that Indians punished by the local law of the tribe are not subject to federal prosecution, perhaps because *Wheeler* was prosecuted under 18 U.S.C. § 1153 (the Major Crimes Act) rather than § 1152 (the federal enclaves extension).

49. *Salt River Pima-Maricopa Indian Community v. Duro*, Cause No. CR-84-0256 (Salt-River Pima-Maricopa Indian Community Court Oct. 19, 1984), reprinted in Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

50. Section 4-1(c) of the Salt River Pima-Maricopa Indian Community Law & Order Code provides:

(c) Criminal jurisdiction over persons.

(1) The court of the Salt River Pima-Maricopa Indian Community shall have jurisdiction over all offenses enumerated in the Code of Ordinances when committed by any person otherwise subject to the jurisdiction of the Salt River Court.

(2) Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the community court.

SALT RIVER CODE, *supra* note 27, § 4-1(c), reprinted in Exhibit J, Petition for Writ of Cert., in Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546). The Salt River Code takes an encompassing position on territorial jurisdiction, including jurisdiction over "all territory within the reservation boundaries, fee-patented lands, rights-of-way, roads, water, bridges, and land used for schools, churches, or agency purposes." SALT RIVER CODE, *supra* note 27, § 4-1(c)(3), reprinted in Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

Indian tribes had no jurisdiction to try "nonmembers" could not be understood literally since *Oliphant* dealt only with "non-Indians."⁵¹ The tribal court held that Duro was subject to its jurisdiction because he was not "non-Indian."⁵²

2. *Duro* — U.S. District Court

The district court's decision on Duro's petition was based on stipulated facts.⁵³ In its memorandum decision, the district court stated that the Community Code allows tribal prosecution of all nonmembers but that the tribe exercises that jurisdiction only over Indian nonmembers.⁵⁴ The district court acknowledged the controversy over *Oliphant* but held that it was not crucial because the tribal court's exercise of jurisdiction over Duro violated the equal protection provision of the Indian Civil Rights Act (ICRA).⁵⁵ The district court held that under either the "strict scrutiny" or the "rational basis" test, exercising jurisdiction over nonmember Indians while not exercising it over nonmember non-Indians violated equal protection rules, stating, "Respon-

51. Stipulation of Fact, *reprinted in* Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

52. Salt River Pima-Maricopa Indian Community v. Duro, No. CR-84-0256 (Salt River Pima-Maricopa Community Ct. Oct. 19, 1984), *reprinted in* Exhibit J, Petition for Writ of Habeas Corpus, *in* Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546). There was never a contention that Duro did not exhaust tribal remedies. The Salt River Code limits the right to appeal to the appellate division to "[a]ny party aggrieved by the verdict or judgment in a civil action and any defendant found guilty in a criminal action" SALT RIVER CODE, *supra* note 27, § 4-32, *reprinted in* Petition for Writ of Cert., *in* Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

53. See *supra* note 28.

54. *Duro v. Reina*, 821 F.2d 1358, 1363 (9th Cir. 1987).

The Salt River Code provides:

Any person not a member of the Salt River Pima-Maricopa Indian Community who within the community commits any act which is a crime under community, federal or state law may be prosecuted under community law, forcibly ejected from the community . . . , and/or may be turned over to the custody of the United States . . . or the State of Arizona for prosecution under federal or state law.

SALT RIVER CODE, *supra* note 27, § 2-5 (emphasis added), *reprinted in* Exhibit A, Petition for Writ of Cert., *in* Joint Appendix, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546). It is not reasonable to construe § 2-5 as defining the phrase "persons otherwise subject to" in § 4-1(c). Section 2-5 of the Salt River Code, on initial examination, appears more restricted than § 4-1(c). The two sections are reconcilable by interpreting § 2-5 as providing an additional power (expulsion) exercisable against nonmembers. That, however, says nothing about prosecutorial jurisdiction. Section 2-5 does not distinguish between nonmember Indians and nonmember non-Indians.

55. 25 U.S.C. § 1302(8) (1988).

dents have failed to articulate any valid reason to justify the differential treatment of nonmembers solely on the basis of race.”⁵⁶

3. *Duro — U.S. Court of Appeals for the Ninth Circuit*

The appeal to the Ninth Circuit produced five opinions. The final result was that the district court’s decision was reversed, even though the majority of judges who expressed their opinions would have sustained that decision. The panel to which the case was assigned split 2-1; the panel majority and the dissent each published an original and an amended opinion.⁵⁷ The petition for rehearing en banc was denied, but three judges dissented, agreeing with the panel dissent.⁵⁸

(a) *Panel Majority*

The panel majority characterized the issue as “one of the uncharted reaches of tribal jurisdiction,”⁵⁹ opining that the exercise of tribal jurisdiction over nonmember Indians was “virtually without historical precedent.”⁶⁰ The panel majority lamented that the resolution was made more difficult “by the indiscriminate use by Congress and the courts of the terms ‘Indian’ and ‘non-Indian’ — ‘Indian’ frequently has been used to denote ‘tribal member,’ while ‘non-Indian’ has served as a synonym for ‘nonmember.’”⁶¹

The panel majority looked first to *Oliphant*. After noting that *Oliphant* dealt only with non-Indians, the panel majority interpreted subsequent Supreme Court decisions as indicating both that *Oliphant*

56. *Duro v. Reina*, Cause No. CIV 84-2107 PHX WPC (D. Ariz. 1985), in Joint Appendix at 41, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

57. *Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987) (Brunetti, J., and Choy, J., joined in the majority opinion; Sneed, J., dissented); *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988) (amended decision).

58. *Duro v. Reina*, 860 F.2d 1463 (9th Cir. 1988) (order denying rehearing en banc).

59. *Duro*, 821 F.2d at 1359. The panel majority stated the issue as “whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member.” *Id.*

60. *Id.* at 1360. The majority went on to state:

This [lack of precedent] is not because such power did not theoretically reside in the tribes, but rather *because circumstances . . . did not give rise to its exercise*. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts.

Id. (emphasis added). These statements are directly contrary to the congressional advocacy employed to obtain passage of the anti-*Duro* legislation, despite the fact that those advocates argued that the Ninth Circuit’s decision was correct. See *infra* part IV.

61. *Duro*, 821 F.2d at 1360.

did,⁶² and did not,⁶³ apply to nonmember Indians. A similar lack of verbal consistency was found in Ninth Circuit opinions.⁶⁴ Because of that asserted ambiguity, the panel majority concluded that *Oliphant* was not mandatory precedent for *Duro* but that *Oliphant's* rationale might be employed.⁶⁵

The panel majority stated that the *Oliphant* conclusion was based on three factors: (1) a historical federal government presumption that tribal governments had no jurisdiction over non-Indians; (2) a specific treaty provision for federal criminal jurisdiction over non-Indians; and (3) the fact that tribal criminal jurisdiction over non-Indians was inconsistent with the tribes' "dependent status."⁶⁶

Considering the first factor, the panel majority found historical ambiguity concerning nonmember Indians. The executive and judicial branches, per the panel majority, apparently presumed Indian tribes had jurisdiction over all Indians, without regard to membership.⁶⁷ On the other hand, the panel majority said, historical executive and congressional pronouncements appear to have used "Indian" to mean "tribal member," implying that nonmembers and non-Indians had the same status.⁶⁸ The historical record, then, was of little assistance.

The panel majority did not discuss *Oliphant's* second factor, an underlying treaty; no party contended that a determinative treaty existed. On the third *Oliphant* factor, which it characterized as the most significant, the panel majority again found ambiguity. It noted that on one hand, the theory of overriding sovereignty (that the Indian tribes by treaty subordinated themselves to the United States) suggested that the subordination applied only to non-Indians.⁶⁹ On the other hand, the panel majority stated, all Indians are now United States citizens and, therefore, can claim exemption from tribal jurisdiction on the same grounds as non-Indians.⁷⁰ Reserving the last consideration for its equal protection discussion, the panel majority held that neither *Oliphant's* reasoning nor language disposed of the *Duro* issue.⁷¹

62. *Id.* (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 173 (1982); *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

63. *Id.* (citing *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 853-55 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 135, 153 (1980)).

64. *See id.* at 1361 n.1.

65. *Id.* at 1361.

66. *Id.*

67. *Id.* (citing Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 & n.5 (1979)).

68. *Id.* (citing Karl J. Erhart, Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L.J. 727, 746-48).

69. *Id.* at 1362.

70. *Id.*

71. *Id.*

In its amended opinion,⁷² the majority expanded on its *Oliphant* discussion, with greater attention paid to later cases that mentioned *Oliphant*. The first addition to the majority's opinion expressed its reasons for not following the statements (that *Oliphant* applies to nonmembers) in *Merrion* and *Wheeler*. The panel majority found three reasons why *Merrion* did not control *Duro*:

(1) the characterization of *Oliphant* as applying to nonmembers was in Justice Stevens' *Merrion* dissent, not in the majority opinion.

(2) the *Merrion* issue was the tribe's power to tax non-Indians, not nonmembers.

(3) the majority and dissenting opinions in *Merrion* used the terms "non-Indian" and "nonmember" interchangeably, without apparent reason.⁷³

The panel majority dismissed *Wheeler* by characterizing its discussion of *Oliphant* as dictum.⁷⁴ In its amended opinion, the panel majority acknowledged that *Wheeler* consistently used the term "nonmember" but noted that membership was not an issue because the defendant was a member of the prosecuting tribe. The *Wheeler* decision's use of the term "nonmember" when referring to *Oliphant* was characterized as "indiscriminate."⁷⁵

In its original decision, the panel majority also addressed the equal protection claim.⁷⁶ The panel majority disagreed with the district court's "conclusion" that the tribal court's decision concerning nonmember Indians was based upon race. The panel majority found that determining who is an "Indian" for federal criminal jurisdiction purposes is based upon the defendant's degree of Indian blood *and* tribal or federal recognition of status.⁷⁷ "For the purpose of federal jurisdiction,

72. *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988).

73. *Id.* at 1140. The panel's amended opinion states: "This change in terms has no relevance to the [*Merrion*] decision. It is clear that the Court is discussing the tribe's authority to tax 'non-Indian' miners not 'nonmembers.'" *Id.*

74. *Id.*

75. *Id.* The panel majority also made some minor changes to the text and added a long footnote where its initial opinion had merely mentioned that a commentator had concluded that non-Indians and nonmembers had the same status under *Oliphant*. The panel majority examined the 1980 comment published in the *Arizona State Law Journal* rather minutely in its discussion of congressional intent. The panel's comments, after making the comment sound inconsistent, conclude: "The problem is that it is indeed too difficult to get a finger on the pulse of Congress' intent in this area." *Id.* at 1141 n.4 (construing Erhart, *supra* note 68).

76. In a footnote, the panel majority engaged in a somewhat unfocused discussion comparing the Fifth Amendment's equal protection provision and that of the ICRA (25 U.S.C. §§ 1301-1303 (1988)). *Duro v. Reina*, 821 F.2d 1358, 1362 n.4 (9th Cir. 1987). That note concludes that a determination that the tribal court's action is valid under the Fifth Amendment necessarily means that the action is valid under the ICRA.

77. *Duro*, 821 F.2d at 1363 (citing 18 U.S.C. §§ 1152, 1153; United States v.

Indian status is 'based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive.'"⁷⁸ The panel majority justified tribal jurisdiction on similar grounds, i.e., not solely on Duro's race, but that combined with his enrollment in a recognized tribe and his association with the Pima-Maricopa Community through his member-girlfriend and his employment by a tribally owned construction company.⁷⁹ In its amended opinion, the panel majority concluded that "extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification."⁸⁰ The panel majority's "nonracial" classification was tested under the "rational basis" equal protection analysis. The necessary rational basis was found in the community's need for adequate law enforcement and the desire to treat all resident Indians, member or nonmember, equally.⁸¹

As an additional basis for its initial decision, the panel majority opined that the district court's decision created a "jurisdictional void."⁸² To reach that conclusion, the panel majority characterized the decision as being that nonmember Indians must be treated as non-Indians for all tribal, state, and federal jurisdictional purposes. That treatment, the panel majority argued, would preclude both tribal and federal criminal jurisdiction if the crime were "victimless," or both perpetrator and victim were nonmembers.⁸³ The found "void" is based upon the asserted fact that states do not (at least in Duro's case), or cannot, exercise jurisdiction.⁸⁴ Therefore, the panel majority's initial opinion

Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979), *cert. denied* 444 U.S. 859 (1979)). The same theory was used to support the definition of "Indian" used in the post-Duro legislation. See *infra* part IV.

The discussion acknowledged that, at least in theory, federal Indian legislation is based upon the political, rather than racial, character of Indian tribes. *Duro*, 821 F.2d at 1362-63. The Supreme Court's exposition of the political nature of Indian tribes is found, at least in significant part, in *United States v. Antelope*, 430 U.S. 641 (1977), and *Morton v. Mancari*, 417 U.S. 535 (1974).

78. *Duro*, 821 F.2d at 1363 (quoting Clinton, *supra* note 8, at 518).

79. *Id.*

80. *Id.* at 1364.

81. *Id.* at 1363. This portion of the panel majority's opinion was not changed in the amended opinion.

82. *Id.* at 1364. This argument was strenuously made by the United States at all levels in *Duro*, before the Eighth Circuit, in *Greywater*, and to Congress. The argument succeeded only with two Ninth Circuit judges and some members of Congress.

83. *Id.* at 1364 & n.5.

84. *Id.* (citing *State v. Allen*, 607 P.2d 426, 429 (1980)). The majority also noted that extending state jurisdiction to nonmember reservation resident Indians would have its own disadvantages. *Id.* (citing Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434, 445-46 (1981)).

concluded that finding in Duro's favor would create a void where no government could exercise criminal jurisdiction.⁸⁵ The panel majority did not acknowledge that its "significant contacts" limitation resulted in a similar void — possibly smaller but also more vague.

In its amended opinion, the panel majority added the assertion that the "federal criminal statutory scheme and its treatment of crimes committed by Indians" was "more dispositive" than *Oliphant*.⁸⁶ That "statutory scheme" is keyed to the term "Indian."⁸⁷ Based primarily on Ninth Circuit precedent, the panel majority concluded that "Indian," as used in those sections, has never been interpreted to be limited to "an Indian member of the local tribe."⁸⁸ The panel majority's amended opinion stated:

The structure of criminal jurisdiction in Indian country, as far as it is relevant here, is easily discerned. Tribal courts generally handle petty crimes by Indians against Indians and victimless crimes by Indians. However, certain "major" crimes by Indians are dealt with in federal court pursuant to the Major Crimes Act, 18 U.S.C. § 1153. That statute punishes "Indians" who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation "and the fair inference is that the offending Indian shall belong to *that or some other tribe* . . . [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagama*, 118 U.S. 375, 383, 6 S. Ct. 1109, 1113, 30 L. Ed. 228 (1886) (emphasis added). That statute has *never* been restricted in its application to Indians who are members of the "host" tribe.⁸⁹

This added discussion concluded:

The cases discussing the federal criminal statutory scheme clearly indicate that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they [sic] would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.⁹⁰

85. *Id.*

86. *Duro v. Reina*, 851 F.2d 1136, 1142-43 (9th Cir. 1988) (amended decision) (footnote omitted).

87. See 18 U.S.C. §§ 1152, 1153 (1988).

88. *Duro*, 851 F.2d at 1143.

89. *Id.*

90. *Id.* The panel did not cite any cases that expressly state this holding and in

The fact that this argument is subject to criticism is proven in the dissenting opinions and the Supreme Court's decision.

(b) *Panel Dissent*

In the initial dissent, Judge Sneed argued that *Wheeler* made explicit that *Oliphant* applied equally to non-Indians and nonmember Indians.⁹¹ The amended dissenting opinion focuses on *Wheeler*.⁹² Judge Sneed argued that *Wheeler*'s use of "Indian," "non-Indian," and "nonmember" was precise and purposeful. The question in *Wheeler* was the nature of an Indian tribes' "retained sovereignty," similar to the issue in *Oliphant*. *Wheeler* delineated that jurisdiction in terms of "nonmembers," clearly consistent with *Oliphant* and inconsistent with the panel majority's position.⁹³

Judge Sneed's original opinion posited that the "unique sovereignty" of Indian tribes does not justify differing treatment for Indian and non-Indian nonmembers. As a racial distinction, that differential treatment would have to survive strict scrutiny; Judge Sneed argued that it does not because the arguments supporting tribal jurisdiction over nonmember Indians applies with at least equal force to non-Indians.⁹⁴

The revised dissent took the position that a potential discrimination (equal protection) claim is not so much a separate basis for decision as a means to "inform" interpretation.⁹⁵ Judge Sneed suggested that under the panel majority's approach, "nonmember Indian" is the only

none of the cases it discussed was the "non-Indian"/"nonmember Indian" question an issue.

The panel majority also noted that the Department of the Interior's regulations establishing Courts of Indian Offenses, see 25 C.F.R. § 11.2 (1990), bases those courts' jurisdiction on a defendant's Indian descent and membership in any recognized Indian tribe, without distinguishing nonmember Indians. *Duro*, 851 F.2d at 1142 n.6.

91. *Duro v. Reina*, 821 F.2d 1358, 1364-65 (9th Cir. 1988) (Sneed, J., dissenting). Judge Sneed also pointed out that two commentators (both of whom had been favorably cited by the majority), had concluded that *Oliphant* suggests equal treatment for non-Indians and nonmember Indians. *Id.* (citing Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1022 n.251 (1981) (cited by the majority at *Duro*, 821 F.2d at 1363); Erhart, *supra* note 68, at 737-49 (cited by the majority at *Duro*, 821 F.2d at 1361-62)).

92. At the beginning of the amended dissent, Judge Sneed concedes that *Oliphant* need not control the decision in *Duro*. The basic stated reason for that concession is that *Oliphant* was based, in significant part, on the conclusion that Indian tribes had not historically exercised jurisdiction over non-Indians. Judge Sneed states that a similar statement cannot be made concerning the exercise of tribal jurisdiction over nonmember Indians. *Duro*, 851 F.2d at 1146 (Sneed, J., dissenting).

93. *Id.*

94. *Duro*, 821 F.2d at 1365.

95. *Duro*, 851 F.2d at 1151-52.

category potentially subject to a biased tribunal and it is proper judicial behavior to employ an interpretation that avoids that potential discrimination.⁹⁶

The revised dissent also added a "federal statutory scheme" discussion, primarily to refute the panel majority's addition. That additional discussion concludes that neither federal statutes nor cases *require* that nonmember Indians be subject to tribal court jurisdiction.⁹⁷ The amended dissent proposed that a proper interpretation of federal jurisdictional statutes would result in nonmember Indians being subject to federal jurisdiction, not state jurisdiction as feared by the panel majority.⁹⁸

(c) Dissent from Order Denying Rehearing En Banc

After the amended panel opinions were issued, a majority of the Ninth Circuit judges did not vote to grant the request for en banc review, over a three-judge dissent.⁹⁹ The dissent did not mince words:

In attempting to navigate what it calls "the uncharted reaches of tribal jurisdiction," . . . a panel of our court has cast

96. *Id.* at 1151. The member Indian is tried in his or her tribe's court; the non-Indian is tried in his or her state (or federal) court; the nonmember Indian is subject to trial by a tribal tribunal possibly prejudiced by his or her membership in another tribe. In the "federal statutory scheme" discussion, Judge Sneed states:

To disregard membership in construing the broad reach of 18 U.S.C. § 1152 *protects* Indians from possible discrimination by state courts; to disregard it construing the exception to its broad reach serves only to *enhance* the possibility of discrimination by the tribal court against a nonmember Indian. Only an incurable romantic would argue that only discrimination by state courts can exist.

Id. at 1150.

97. *Id.* at 1148-51.

98. *Id.* at 1150-51. Both "statutory scheme" discussions appear aimed at a presumed "void" left if nonmember Indians are not subject to tribal jurisdiction. The panel majority argues that if tribal courts do not have jurisdiction, then state courts and law enforcement will necessarily become more involved in reservation affairs or those crimes will go unpunished. *Id.* at 1145-46. Judge Sneed's dissent argues that no "void" would exist because a "non-Indian" crime committed in "Indian country" is subject to federal jurisdiction under 18 U.S.C. § 1152. *Id.* at 1150-51. This argument may, however, run afoul of *United States v. McBratney*, which held that a crime by a non-Indian against a non-Indian is subject to state law, even if it occurred on a reservation. *United States v. McBratney*, 104 U.S. 621, 623 (1881). If a nonmember perpetrator acted against a nonmember victim, equal non-Indian/nonmember treatment would result in state jurisdiction under *McBratney*. Judge Sneed's argument requires that a nonmember Indian be treated as an Indian for general 18 U.S.C. § 1152 purposes but as a non-Indian under the Indian-against-Indian exception to that section. That distinction may be supportable based on the "special relationship" between Indians generally and the federal government and the limited "inherent" powers of Indian tribes. It does, however, seem to strain the bounds of statutory construction.

99. *Duro v. Reina*, 860 F.2d 1463 (9th Cir. 1988) (Kozinski, J., joined by Leavy, J. and Trott, J., dissenting).

off the map and the compass. The panel's holding — that a tribal court may exercise criminal jurisdiction over Indians who are not members of the tribe — overlooks clear Supreme Court pronouncements to the contrary, is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals.¹⁰⁰

The Kozinski dissent argued that the panel majority's "perplexity" was of its own making, pointing out that the Eighth Circuit, in *Greywater*, found no similar confusion.¹⁰¹ While *Oliphant* may have left open the issue of tribal court criminal jurisdiction over nonmember Indians, subsequent decisions have not. *Wheeler, Washington v. Confederated Tribes of the Colville Indian Reservation*,¹⁰² and *Montana v. United States*¹⁰³ are identified as controlling cases. In each, according to the Kozinski dissent, the primary issue was the nature and extent of inherent tribal sovereignty, and in each, that sovereignty was expressly found to relate only to tribal members.¹⁰⁴ Nonmember Indians were identified with non-Indians.

Significantly, the [Supreme] Court viewed its conclusion [in *Montana*] as flowing from the rationale of *Oliphant*: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.*"¹⁰⁵

The panel majority's opinion on the equal protection issue came under similarly strong criticism. The Kozinski dissent acknowledged that Congress may avoid the equal protection restrictions when legislating matters concerning Indians. That ability is, however, based upon Congress' exclusive power to deal with Indian problems.¹⁰⁶ Congress'

100. *Id.* at 1463. The dissent later states: "[The panel's] one-Indian-is-just-like-another-Indian approach is seriously misguided." *Id.* at 1464.

101. *Id.*

102. 447 U.S. 134 (1980).

103. 450 U.S. 544 (1981).

104. *Duro*, 860 F.2d at 1464-66.

105. *Id.* at 1466 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added)).

106. *Id.* at 1467 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Congress, per Kozinski, has a unique position:

When Congress acts, it must reconcile two somewhat inconsistent constitutional provisions: the fifth amendment's implicit guarantee of equal protection and article I, section 8's grant of power to legislate with respect to Indians. The more specific constitutional authorization as to Indians must temper the application of equal protection principles, lest the whole body of federal Indian law be wiped off the books.

Id.

position is unique; states cannot enact special legislation concerning Indians.¹⁰⁷ "Indian tribes may no more discriminate on the basis of race than may a state."¹⁰⁸

The panel majority's justification of a tribe's use of "Indian" as a jurisdictional category (because race is only one factor in determining "Indian-ness") was also rejected by the Kozinski dissent.¹⁰⁹ In the context of other races, it has been established that so long as race is a factor, the classification is subject to "strict scrutiny," even though other factors may be involved.¹¹⁰ To survive strict scrutiny, there must be a compelling state or tribal interest and the Kozinski dissent found no tribal interest sufficiently compelling to force nonmember Indians, but not non-Indians, to submit to a tribe's criminal jurisdiction.¹¹¹

After all of the Ninth Circuit's opinions are tabulated, six judges expressed their opinions — four voted against tribal jurisdiction while two voted for jurisdiction; because of panel assignments, the two-judge vote won.

6. *Greywater v. Joshua* — U.S. Court of Appeals for the Eighth Circuit

In *Greywater*, the Eighth Circuit unanimously held that an Indian tribe does not have criminal jurisdiction over nonmember Indians.¹¹² The Eighth Circuit's decision was issued between the initial and amended Ninth Circuit opinions in *Duro*.¹¹³ The Eighth Circuit acknowledged and rejected the Ninth Circuit's decision.

107. See *Washington v. Confederated Bands & Tribes of Yakima Indian Reservation*, 439 U.S. 463, 500-01 (1979).

108. *Duro*, 860 F.2d at 1468 (Kozinski, J., dissenting).

109. *Id.*

110. *Id.* (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977)).

111. *Id.* The Kozinski dissent also criticizes the panel majority's failure to address the potential problem of biased tribunals. *Id.* at 1468-69. This criticism is in substantially the same terms as Judge Sneed's dissent and includes a long quotation from testimony before the Civil Rights Commission concerning tribal judicial prejudice in the Hopi-Navajo relationship. *Id.* at 1469 (quoting U.S. COMM'N ON CIVIL RIGHTS, ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT: HEARING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS 219-20 (1987) (testimony of Lee Brook Phillips, attorney)).

112. *Greywater v. Joshua*, 846 F.2d 486, 490 (8th Cir. 1988). The facts are discussed *supra* part I.A.

113. The Eighth Circuit had to deal with an exhaustion-of-remedies issue not present in *Duro*. In *Greywater*, the district court had dismissed the petitions for habeas corpus pending exhaustion of tribal court remedies. In *Duro*, the petitioner had no right to appeal within the tribal court; in *Greywater*, the petitioners apparently had a right to, but did not, appeal within the tribal court system. The Eighth Circuit held that *Oliphant* "is direct authority that exhaustion of tribal remedies is not required." *Greywater*, 846 F.2d at 488. The Eighth Circuit also noted that *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 191 (1985), was not applicable because that was a civil case and, even if it were applicable, the record indicated that further proceedings in tribal court would be futile, an express exception to the *National Farmers* general rule. *Greywater*, 846 F.2d at 488-89.

The Eighth Circuit framed the issue in retained inherent tribal sovereignty terms, similar to *Oliphant*.¹¹⁴ Supported by a lengthy discussion of *Wheeler*, the Eighth Circuit concluded: "Although we believe the Devils Lake Sioux Tribe retains inherent power to protect tribal self-government and control internal relations, these powers of self-governance clearly focus inward and govern the internal rules and social relations by which tribal *members* live."¹¹⁵ The Eighth Circuit noted that relevant 1825 treaties allocated to the United States jurisdiction over crimes committed by an Indian of one tribe against an Indian of another.¹¹⁶ This allocation, said the circuit court, exemplifies the historic lack of tribal authority to punish nonmember Indians and was necessary to satisfy one of the purposes of the treaties, i.e., to maintain peace among the various tribes.¹¹⁷

The "jurisdictional void" argument that impressed the *Duro* panel majority was also made in *Greywater*. The Eighth Circuit was not impressed and disposed of the argument in a footnote stating in effect that the argument had little relevance to the principles of retained tribal sovereignty that governed the decision.¹¹⁸ In *Greywater*, the "jurisdictional void" argument was rather feeble since the state prosecuted the petitioners based on the same events.¹¹⁹

The Eighth Circuit also considered the fact that the nonmember Indians were not able to participate in tribal government. However, rather than considering this in equal protection terms, the Eighth Circuit related it to the inherent nature of tribal government. An Indian tribe's power to govern internal affairs, the circuit court said, is consistent with the fundamental principle of United States government that each sovereign governs only with the consent of the governed.¹²⁰ On the Devils Lake Reservation, neither non-Indians nor

114. *Greywater*, 846 F.2d at 489. As in *Duro*, the United States (supporting the Devils Lake Sioux Tribe) argued that *Wheeler* does not mean what it says. See *id.* at 488.

115. *Id.* at 490-91 (footnote omitted). The Eighth Circuit also found support for its position in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

116. *Greywater*, 846 F.2d at 493 (citing Treaty with the Sioune and Ogallala Tribes, July 5, 1825, 7 Stat. 252; Treaty with the Sioux et al., Aug. 19, 1825, 7 Stat. 272).

117. *Id.* How the treaty provisions may indicate a lack of tribal power to deal with nonmember crimes is unclear. The implication that allocation of jurisdiction over intertribal crimes to the United States was an integral part of the treaty is, however, undoubtedly accurate. It was in the interest of the United States to preserve peace between all groups on the frontier. Similarly, it was in the interest of an Indian tribe that was agreeing to change its way of life and become settled to request, and expect, protection from tribes which had not made similar agreements.

118. *Id.* at 490 n.3.

119. *Id.*

120. *Id.* at 493 (citing *Nevada v. Hall*, 440 U.S. 410, 426 (1979)).

nonmember Indians (resident or not) can vote in tribal elections, hold tribal office, sit on tribal juries, become members of the tribe, or share directly in tribal disbursements. Thus, the Eighth Circuit held, there is no significant difference between the position of non-Indians and nonmember Indians.¹²¹ In addition, both groups face the potential discrimination the court found significant in *Oliphant*: “[T]hey would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.”¹²²

II. *Constructing the Corridor: Duro v. Reina in the Supreme Court*

A. *The Majority Opinion*

The United States Supreme Court granted certiorari¹²³ to resolve the conflict between *Duro* and *Greywater*, stating the issue as “whether an Indian tribe may assert criminal jurisdiction over a defendant who is an Indian but not a tribal member.”¹²⁴ The Court’s conclusion was:

We hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.

....

... For purposes of criminal jurisdiction, petitioner’s [Duro’s] relations with this Tribe [the Pima-Maricopa Indian Community] are the same as the non-Indian’s [sic] in *Oliphant*. We hold that the Tribe’s powers over him are subject to the same limitations.¹²⁵

1. *Remaining Inherent Tribal Sovereignty Does Not Include Power over External Relations*

The Court’s decision was based upon limitations inherent in the “dependent nature” of Indian tribal sovereignty. The Court stated that *Duro* falls between *Wheeler* (retained jurisdiction and tribal mem-

121. *Id.*

122. *Id.* This conclusion resulted, in part, from the Eighth Circuit’s decision, based upon the record before it, that significant “racial, cultural, and legal differences” exist between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. In contrast, the Ninth Circuit panel majority’s opinions effectively treats all “Indians” as a single polity which, while consistent with historical non-Indian ideology, is not consistent with either historical or current facts.

123. 490 U.S. 1034 (1989).

124. *Duro v. Reina*, 495 U.S. 676, 679 (1990) (Brennan, J. joined by Marshall, J., dissenting).

125. *Id.* at 679, 688.

bers) and *Oliphant* (retained jurisdiction and non-Indians) because Albert Duro is an Indian but not a member of the prosecuting tribe. Tribal sovereignty, as described in *Wheeler*, is of a "unique and limited character,"¹²⁶ that is needed to control internal relations and to preserve unique customs and social orders. The primary aspect of full sovereignty which Indian tribes lack is the power to determine independently external relations.¹²⁷ As determined by the Court, prosecution of "outsiders" is a part of "external relations" and, therefore, can be exercised by Indian tribes only through congressional delegation.¹²⁸

The propriety of a nonmember's subjection to tribal court must, said the Court, be considered in light of his or her status as a United States citizen, not in terms of categorization as an "Indian" for federal jurisdiction purposes.¹²⁹ Indians, like all other citizens, have constitutional protection against unwarranted intrusions into personal liberty. While that does not prevent Congress from imposing burdens on Indians as members of a political class, it does preclude Indian tribes from imposing burdens on citizens who have not consented to tribal membership.¹³⁰ The Court focused on this "consent" factor as the source of Indian tribal authority. Because tribal authority is based upon consent, membership is the touchstone of tribal criminal jurisdiction.¹³¹ The fact that Duro is an Indian and he had some contact with the tribe was rejected as a basis for jurisdiction. According to

126. *Id.* at 685 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

127. *Id.*

128. *Id.* at 686.

129. *Id.* at 692. Before 1924, some Indians had become U.S. citizens pursuant to the Allotment Acts or other particular circumstances. In 1924, all Indians became citizens, regardless of tribal status. See Act of June 24, 1924, ch. 233, 43 Stat. 253 (originally codified at 8 U.S.C. § 3).

130. *Duro*, 495 U.S. at 693. The Court noted that a jurisdictional distinction has been made between members and nonmembers in other areas of Indian law, including state taxation (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (resident nonmember Indians not exempt from state taxation)); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (state taxation of tribal members would interfere with internal self-governance and self-determination)); and civil regulation (citing *Montana v. United States*, 450 U.S. 544 (1981) (tribe has no power to regulate activities of nonmembers on fee lands within reservation boundaries)). But the Court also acknowledged that it previously held that Indian tribes have some authority to deal with nonmembers "outside the criminal context," typically involving situations arising from property ownership within the reservation or a "consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 687 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)); see also *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (inconclusively discussing tribal power to zone fee land to protect tribal integrity and self-determination).

131. *Duro*, 495 U.S. at 693. The Court expressly declined comment on the effect of a formal acquiescence to tribal jurisdiction (e.g., in exchange for the tribe's agreement not to exercise exclusionary powers). *Id.* at 697.

the Court, the argument that those facts support jurisdiction treats Indian tribes as "mere fungible groups of homogenous persons among whom any Indian would feel at home"¹³² and is merely a slight revision of the rejected contention that any person coming on a reservation impliedly consents to tribal jurisdiction. Significantly, the Court held that with respect to consent to, and participation in, tribal government, nonmember Indians are indistinguishable from non-Indians.¹³³

2. *Other Arguments Rejected*

(a) *Historical Argument*

The tribe and supporting amici argued that the historical record supports tribal jurisdiction. These arguments relied primarily on sources used in *Oliphant*. The trend in the legislation *Oliphant* noted was toward increasingly broader federal jurisdiction. The United States and other amici argued that the scope of tribal sovereignty must be determined through a process of elimination and the tribes lost only jurisdiction that was expressly allocated to non-Indian governments. The argument was that, through treaties and statutes, the United States first took jurisdiction over selected crimes by or against citizens within Indian country. Later, United States jurisdiction was extended to all intra-non-Indian crimes, then to major intra-Indian crimes. The argument continued that since, for all Indian-related jurisdictional questions, Congress consistently distinguished only between non-Indians and Indians, Congress consciously intended that tribes exercise jurisdiction over all Indians.¹³⁴ The Court disposed of that argument somewhat summarily: "Congressional and administrative provisions such as those cited above^[135] reflect the Government's treatment of Indians as a single large class with respect to federal jurisdiction and programs. Those references are not dispositive of a question of tribal power to treat Indians by the same broad classification."¹³⁶ The Court pointed out that it reached an analogous conclusion in *Colville*.¹³⁷ In addition,

132. *Id.* at 695.

133. *Id.* at 696.

134. The arguments based on the use of the term "Indian" in federal statutes and programs recall the Ninth Circuit panel majority's discussion of the federal statutory scheme in its amended opinion. See discussion *supra* notes 86-90.

135. 18 U.S.C. §§ 1152-1153 (1988); Act of June 30, 1834, ch. 161, 4 Stat. 733 (predecessor to various 18 U.S.C. sections); 25 C.F.R. § 11.2(a) (1989) (current Department of the Interior regulation concerning Courts of Indian Offenses (CFR courts), first established by regulation in 1882 and not significantly changed thereafter).

136. *Duro*, 495 U.S. at 689.

137. *Id.* (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980)) (discussing "Indian" as used in the Indian Reorganization Act of 1934, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1988))).

the Court stated that the record from times before creation of modern tribal courts is of little value, but the relatively brief history of those courts is somewhat more informative.¹³⁸ Modern tribal courts, the Court stated, were established under the Indian Reorganization Act of 1934 (IRA), which required Department of the Interior approval of tribal codes.¹³⁹ The Court cited five opinions of the Department's Solicitor that touch upon tribal jurisdiction over nonmember Indians,¹⁴⁰ two of which are characterized as equivocal. The other three (including the most recent two) state that the only way tribal courts could obtain jurisdiction over nonmember Indians was by congressional delegation, i.e., that jurisdiction is not part of the tribe's retained jurisdiction.¹⁴¹

(b) "Jurisdictional Void"

The Court did not accept the "jurisdictional void" argument as a sufficient basis for "extending" tribal jurisdiction to nonmember Indians.¹⁴² The Court noted that a similar, and probably more significant, argument to that effect was rejected in *Oliphant*.¹⁴³ The Court also noted that the Ninth Circuit panel majority's "significant contacts" test does not solve the perceived problem because it would not permit jurisdiction over nonmember Indians who are present on, but have no significant contact with, a reservation.¹⁴⁴ While the Court mentioned a number of suggestions that had previously been made to alleviate the perceived problem, it ultimately concludes that if a void does exist, filling this void is a matter for Congress, not the Court.¹⁴⁵

138. The Court noted that "scholars" who found those sources illuminating have reached differing conclusions, citing two student-written law review articles: Erhart, *supra* note 68, at 740 (treaties suggest no jurisdiction); Patricia Owen, Note, *Who Is an Indian?: Duro v. Reina's Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians*, 1988 B.Y.U. L. Rev. 161, 170-71 (treaties suggest jurisdiction). *Duro*, 495 U.S. at 690.

139. *Duro*, 495 U.S. at 690-91 (citing Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 476 (1988))).

140. *Id.* at 691-92. The cited documents are found in 1 U.S. DEP'T OF INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974 (1979), at 445 [hereinafter OP. SOLIC. DEP'T INTERIOR] (opinion dated Oct. 25, 1934) (citing in turn 55 Interior Dec. 14 (Oct. 25, 1934)); OP. SOLIC. DEP'T INTERIOR, *supra*, at 699 (opinion dated Nov. 17, 1936); *id.* at 736 (opinion dated Mar. 17, 1937); *id.* at 849 (opinion dated Aug. 26, 1938); *id.* at 872 (opinion dated Feb. 17, 1939).

141. *Duro*, 495 U.S. at 691-92.

142. *Id.* at 696.

143. *Id.* The Court notes that on many reservations, including the Salt River Pima-Maricopa Reservation, the number of resident non-Indians is significantly greater than the number of nonmember Indians. *Id.*

144. *Id.* at 696 n.3.

145. As to the suggestion in Judge Sneed's dissent that 18 U.S.C. § 1152 could be

The Court did note that even if the tribes cannot impose criminal penalties, they have power to deal with nonmembers. The tribes, explained the Court, can exclude undesirable persons from tribal lands. In addition, the Court said:

Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.¹⁴⁶

To the contention that states may not have the power to prosecute on-reservation crimes, the Court responded that Congress, through Public Law 280, provided a method for establishing state jurisdiction.¹⁴⁷ The argument that states are unwilling to exercise jurisdiction over reservation-based crime is rebutted, at least in part, by the fact that the *Greywater* defendants were prosecuted in state court.¹⁴⁸

B. The Dissenting Opinion

The dissent disagreed with the majority's reading of *Oliphant*.¹⁴⁹ While the majority emphasized implicit divestiture, the dissent empha-

construed to fill the void, the Court stated: "That statute is not before us and we express no views on the question." *Duro*, 495 U.S. at 697. The Court also expressly declined to address the ability of neighboring tribes to enter into some type of reciprocal agreement concerning jurisdiction. *Id.*

The jurisdictional void argument was presented to Congress with much greater success. See *infra* part IV.

146. *Duro*, 495 U.S. at 696 (citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 434 (1989); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). This is consistent with the provisions of § 2-5 of the Salt River Code. See *supra* note 54. Not expressed in that statement is, however, the limitation that a tribe's power to exclude does not apply to nontrust lands within the reservation. See *Montana v. United States*, 450 U.S. 544 (1981).

147. *Duro*, 495 U.S. at 697. Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360)) allows states, with the consent of the involved tribe, to assume complete or partial civil or criminal jurisdiction in any part of Indian country within the state's boundaries and includes the power, if necessary, to repeal any Indian country-jurisdiction disclaimers in the state constitution. The existence of Public Law 280 may effectively rebut the dissent's argument that *Duro* creates a jurisdictional void while *Oliphant* merely created a potential discretionary void. Under Public Law 280, states and tribes acting jointly have the power to provide for state jurisdiction over nonmember Indians. The failure to exercise that power is only politically different from a prosecutor's failure to exercise jurisdiction per *Oliphant*.

148. See *supra* note 32.

149. *Duro*, 495 U.S. at 700-01 (Brennan, J., dissenting).

sized *Oliphant's* historical analysis, i.e., that Congress historically provided for non-Indian jurisdiction over only non-Indian criminals, withdrawing only that same jurisdiction from Indian tribes.¹⁵⁰ Therefore, the dissent argued, *Oliphant's* reasoning and the congressional acts there considered require an opposite conclusion in *Duro*. Jurisdictional acts distinguished between Indians and other persons by excepting crimes by one Indian against another.¹⁵¹ The dissent argued that because federal legislation dealt with Indians as an undifferentiated class, the presumption was, and the logical conclusion must be, that tribes retain jurisdiction over all Indians, regardless of membership. Thus, the dissent concluded, that statutory history compels the conclusion that tribes continuously retained jurisdiction over offenses involving only Indians.¹⁵² To support that conclusion, the dissent turned to the "jurisdictional void" "created" by the majority. The dissent argued that any "practical" jurisdictional void after *Oliphant* results from a "discretionary decision" to not exercise federal criminal jurisdiction over non-Indian wrongdoers.¹⁵³ That, said the dissent, is significantly different from the "legal" jurisdictional void that results from the majority opinion, under which no sovereign has jurisdiction.¹⁵⁴ The existence of a void is not, according to the dissent, an independent reason for finding tribal court jurisdiction but, instead, supports the argument that Congress did not assume that tribal criminal authority was limited to tribal members.¹⁵⁵

The dissent also took issue with the majority's arguments based upon Indian citizenship.¹⁵⁶ The dissent recast the majority opinion into the assertion that no matter what the historical record, tribal courts lost criminal jurisdiction over nonmember Indians when those people became United States citizens.¹⁵⁷ The dissent contended that citizenship is irrelevant because tribal criminal jurisdiction (per *Oliphant*) depends

150. *Id.* at 701-02.

151. *Id.* at 702. The primary statute so providing was originally enacted in 1817. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (1988)). However, the first act mentioned by the dissent (Act of July 20, 1790, ch. 33, 1 Stat. 137) does not make that same distinction. See discussion *infra* notes 181-91.

152. *Duro*, 495 U.S. at 703. The implicit assumption is that divestment of any portion of pre-Columbian tribal sovereignty can occur only through express federal action.

153. *Id.* at 706.

154. *Id.*

155. *Id.* at 703. That assertion does not appear to be consistent with the structure of the Ninth Circuit panel majority's opinion or the content of that opinion's discussion of the "jurisdictional void" issue. In both substance and form, the panel majority indicated that it was an independent reason for finding tribal court jurisdiction.

156. *Id.* at 706.

157. *Id.*

upon congressional intent.¹⁵⁸ That argument doubles back to the preceding historical discussion that concludes Congress never affirmatively withdrew tribal jurisdiction over nonmembers.¹⁵⁹ The dissent took the position that the majority's citizenship analysis is also inconsistent with allowing tribal court jurisdiction over nonmembers in civil actions.¹⁶⁰ Perhaps more significantly, the dissent pointed out that participation in government is not a prerequisite to a sovereign's exercise of criminal jurisdiction; if it were, neither states nor the federal government could try nonresidents or aliens.¹⁶¹

The dissent minimized the majority's concern about possible tribal court prejudice against nonmember Indians. That possibility, the dissent explained, is substantially alleviated by the fact that tribal courts and their processes are subject to the ICRA, including its federal habeas corpus remedy.¹⁶²

As a final note, the dissent described the federal Indian policy since 1934 as promoting the independence and self-government of Indian tribes and the dissent charged the majority's decision as being inconsistent with that policy.¹⁶³

III. *A Corridor Construction Review*

A. *In General*

More was at stake in *Duro* than a single misdemeanor charge. The fundamental aspects of tribal sovereignty, while not necessarily involved, were a potential basis for decision. The Court might have decided the case on statutory equal protection grounds. That was the district court's conclusion and would have resolved the presented problem.¹⁶⁴ However, the Court addressed the nature of tribal authority.

158. *Id.*

159. *Id.* at 707.

160. *Id.* (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

161. *Id.* The dissent also argued that the "consent" theory is inconsistent with an underlying premise of Indian law, i.e., that Congress could grant tribal courts criminal jurisdiction over non-Indians, obviating the need for any consent. *Id.* at 707-08. That argument overlooks the fact that the non-Indians are U.S. citizens and thereby, presumably, "consent" to the laws constitutionally adopted by Congress.

162. *Duro*, 495 U.S. at 708-09 (citing Indian Civil Rights Act, 25 U.S.C. §§ 1301-1325 (1988); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

163. *Id.* at 709. That statement overlooks the 20- to 25-year period (1940s through early 1960s) during which the primary thrust of congressional policy was to "terminate" any and all federal-tribal relationships and fully integrate Indian individuals into the general American population.

164. *Id.* at 682. The district court held that the community's exercise of jurisdiction over Albert Duro violated the ICRA (25 U.S.C. § 1302(8) (1988)). The dissent labeled the ICRA argument as "begging the question" because the ICRA precludes tribes from

The parties and the Court treated *Duro* as a particularized application of the analyses expressed in *Oliphant* and *Wheeler*. Whether the result was clarification or confusion remains to be seen. Those decisions establish that Indian tribal sovereignty retains all of its pre-Columbian plentitude unless: (a) surrendered by treaty; (b) restricted by Congress; or (c) exercised inconsistently with tribal status. While these are listed as independent factors, they become intertwined in application. In *Duro*, tribal authorities did not claim jurisdiction under treaty or affirmative legislation; Albert Duro did not contend that any statute or treaty expressly precluded jurisdiction. Therefore, of the three potential sovereignty limitations, only the inherent tribal sovereignty one remained.

Although the "dependent" nature of the tribes' status was imposed by European "international law" (i.e., political and military power), United States-Indian treaties normally included language indicating that the signatory tribe acknowledged dependence on the United States.¹⁶⁵

discriminating between persons who are within tribal jurisdiction while the question in *Duro* is who is within tribal jurisdiction. If that criticism is accepted, it does not completely resolve the equal protection issue. The jurisdiction of tribes and their courts has been held to be a matter of federal law. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). While it is not unconstitutional for Congress to discriminate between Indians and non-Indians, see, e.g., *Moe v. Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974), that does not necessarily approve a federal-law distinction between Albert Duro and non-Indian nonmembers absent specific congressional action. By sustaining tribal court jurisdiction over Albert Duro, might the Court itself have been violating equal protection limitations? Further, the Court has held that states are precluded from providing different treatment for Indians by the Fourteenth Amendment. The Fourteenth Amendment is in the same words as the ICRA; both preclude each affected government from denying "to any person within its jurisdiction" equal protection of the laws. Compare 25 U.S.C. § 1302(8) (1988) with U.S. CONST. amend. XIV, § 1. If the ICRA does not preclude tribes from distinguishing between nonmember Indians and other nonmembers, insofar as criminal jurisdiction is concerned, should the Fourteenth Amendment not bar a similar state distinction? There, too, the issue is who is within the state's jurisdiction.

165. A number of the earlier treaties are more logically read as indicating that the tribes agreed to trade exclusively with U.S. traders. It is unlikely that the tribes understood the "dependence" language to make them legally, politically, or militarily subservient to the United States. During the American Revolution, it is extremely unlikely that the Indians were under that impression. If the Indians had understood or were told that by signing treaties they would become the rebels' subjects, they probably would have refused to sign and immediately joined the British cause. Revolutionary officials sought, by gifts and persuasion, to dissuade the tribes from supporting the British. A major effort was made to convince the tribes that the British lied when they told the Indians that the colonists intended, if successful, to take over Indian lands. Though the Indians were repeatedly assured of the colonials' honorable intentions, the British assertion contained more than a modicum of truth. See GREGORY SCHAAP, WAMPUM

That language has been construed as the tribes' acknowledgement that they were subordinate to the overriding sovereignty of the United States.¹⁶⁶ Thus, limited tribal sovereignty could be attributed either to the status unilaterally imposed or to treaties. While the *Duro* decision mentions these various sources of limitation on tribal sovereignty, the decision's precise basis remains somewhat obscure.

In *Wheeler*, the problem of inherent sovereignty was not very difficult; the defendant was a member of the prosecuting tribe. Congressional and executive reports demonstrated a consistent understanding that Indian tribes had power over tribal members and were responsible for their members' actions. Since that authority was not delegated federal authority, it had to be inherent. In *Oliphant*, the situation was not so obvious. There the Court discussed legislative and administrative history related to tribal jurisdiction over non-Indians and concluded that both the executive branch and Congress shared the "presumption" that "tribal courts do not have the power to try non-Indians"¹⁶⁷ However, the Court went on to state:

[E]ven ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status."¹⁶⁸

The Court's discussion of congressional and executive actions in *Oliphant* was summarized by the statement that the *presumption* that Indian tribes did not have jurisdiction is entitled to weight.¹⁶⁹ That is, *the actions of Congress and the executive branch merely confirm the legal conclusion that the exercise of criminal jurisdiction over non-Indians is inconsistent with the inherent nature of tribal sovereignty*. That understanding of *Oliphant* is supported by language in *Wheeler* to the effect that the tribes' inability to control external relations is a function of their status.¹⁷⁰ However, *Wheeler* also contains this state-

BELTS & PEACE TREES: GEORGE MORGAN, NATIVE AMERICANS AND REVOLUTIONARY DIPLOMACY (1990). It was not until after the War of 1812 that the Indians east of the Mississippi could be considered actually dependent upon the United States; more than half a century would pass before the tribes west of the Mississippi were reduced to the same circumstances.

166. See *United States v. Wheeler*, 435 U.S. 313, 323, 326 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

167. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-206 (1978).

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

169. *Id.* at 206.

170. *Wheeler*, 435 U.S. at 326.

ment: "But until Congress acts, the tribes retain their existing sovereign powers."¹⁷¹ That statement creates confusion because it can be read to mean that congressional action is necessary to place even the slightest limitation on plenary tribal sovereignty, which is substantially the position taken by the *Duro* dissent. However, it is equally likely that the quoted sentence may be read as referring to Congress' power to further restrict the tribes' "existing [limited] sovereign powers," which appears to be the Court's understanding in *Duro*.

Duro attempted to demonstrate that the following propositions are not irreconcilable:

- (1) Indian tribes are sovereign entities with the power to govern.
- (2) The United States Constitution requires zealous protection of the individual rights it guarantees.
- (3) Tribal governments are not required to provide full constitutional protection of individual rights.

A very real problem is how tribal criminal jurisdiction can be recognized over any person, given the second and third propositions. The majority (without so stating) mixes the legal rule that an individual can waive his or her rights with the political theory that a government's authority comes from the consent of the people it governs. Tribal governments, the argument posits, derive their power from tribal members and, therefore, members implicitly consent to that government's jurisdiction, a fully reciprocal relationship. Even if the problem of waiver by implication is passed over, *Duro*'s solution appears inconsistent with decisions allowing tribal civil jurisdiction over nonmembers; tribal governments derive both civil and criminal powers from the same source.¹⁷²

The *Duro* majority's primary holding appears to be based on the rule that inherent tribal sovereignty does not include power over external relations. The Court characterizes nonmember relationships as external relations. However, prior decisions have held that tribal governments have jurisdiction over nonmembers in a number of situations.¹⁷³ A leading factor in those cases has been the nonmember's consensual interaction with the tribe, a tribal entity, or tribal members.¹⁷⁴ In that sense, *Duro*'s membership/consent theory is consistent

171. *Id.* at 323.

172. It is also inconsistent with any geographic component in tribal jurisdiction, unless geography is considered as only establishing the boundaries within which tribes' limited jurisdiction over nonmembers can operate.

173. See *infra* part III.D.

174. See *infra* part III.D. Albert Duro's relationship with at least one tribal member and a tribal entity is probably sufficient to allow the tribe to exercise civil jurisdiction over him in some situations. For example, there should be little doubt that the tribe could impose a tax on Duro's income from PiCopa Construction or the tribal court could exercise jurisdiction over an action by his girlfriend's parents for room and board. See generally *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Williams v. Lee*, 358 U.S. 217 (1959).

with prior cases concerning civil jurisdiction. However, in some situations, tribal civil jurisdiction has been recognized even though no consensual relationship existed.¹⁷⁵ To resolve this apparent inconsistency, *Duro* distinguished between the degree of government intrusion resulting from exercising civil jurisdiction and that resulting from exercising criminal jurisdiction and stated that the latter is a more serious intrusion than the former.¹⁷⁶ The power to participate in tribal government, said the majority, balances the lesser tribal protection of individual rights.

It is difficult to determine *Duro's* precise chain of logic. The opinion intermixes explanation with refutation and is not particularly convincing; a number of questions remain. The principal problem is, perhaps, that the majority opinion does not directly address the question of how the parameters of the "inherent" limitations on tribal sovereignty are determined. The *Duro* dissent and prior cases such as *Oliphant* and *Wheeler* suggest that the only limitations on tribal plenary sovereignty are those Congress imposes, expressly or by necessary implication. By silence, the majority rejected that test but provided no substitute.

Even though the *Duro* dissent stated a basis for determining the "inherent" limits of tribal jurisdiction, its arguments are not compelling. If the nineteenth-century legislation cited by the dissent had been adopted within the past ten to fifteen years, the conclusions drawn might have been more convincing. But the dissent's major premise depends upon the *historical* nature of the legislation. When placed in historical context, the cited congressional and executive actions provide little support for, and in some instances contradict, the conclusions drawn by the dissent.

It is fairly obvious that the majority's discussion of congressional and executive actions is merely a refutation of the respondents' contentions, not a separate (or even interrelated) basis for decision. Despite its acknowledged power to do so, Congress has not made any general declaration of the attributes of inherent tribal sovereignty.¹⁷⁷ Even

175. See *infra* part III.D.

176. *Duro*, 495 U.S. 676, 688 (1990). This particular proposition is generally supported by the Constitution's (and the Court's) emphasis of personal rights relating to criminal prosecution. It is not supported, however, by the proposition that a government's power comes from those entitled to participate in that government. In *Duro*, it is the power to act at all that is in question, not the intrusiveness of the act.

177. There are two acts that might be considered general declarations of tribal government status. In 1871, Congress decreed that no Indian tribe could thereafter be "acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566. That declaration, however, was not really the result of any protracted discussion of tribal government theory; it was more a result of internal congressional politics. In

though *Duro* relegated them to secondary importance, congressional and executive records remain a significant repository of objective information concerning the status of Indian tribes. The Court has frequently acknowledged the political nature of the relationship and the Court's secondary position in political matters.¹⁷⁸

The various acts, proposals, and actions mentioned in the *Duro* dissent (and in *Oliphant* and *Wheeler*), particularly when taken in historical context, do not support the dissent's conclusion or the *Duro* respondents' contentions. When it comes to tribal authority over non-member Indians, express congressional and administrative guidance is essentially nonexistent.

B. Congressional and Administrative Perspectives on Indian Country Criminal Jurisdiction

Even before the Colonies won the Revolutionary War, rebel officials were concerned with controlling events that might alarm or alienate Indians on or beyond the Western frontier. Unauthorized homesteading and the accompanying violence pushed the Indians toward becoming British partisans. If the Indians were to actively support the British, the possibility of a successful rebellion would be substantially reduced. Even though there were numerous people who desired peace and friendship with the Indians for their own sake, the primary concern

addition, as a practical matter, the act was innocuous. The Western Indian tribes continued to act upon their own initiative. The clashes between the plains tribes and the U.S. Cavalry continued; the battles on Rosebud Creek and at the Little Bighorn loomed in the future. Even Congress continued to use the same language for interpolity negotiations. See, e.g., Deficiency Appropriation Act of May 1, 1876, ch. 88, 19 Stat. 41, 45 (authorizing payment for commissioners to "treat with" the Sioux Indians). The Court has treated tribal-U.S. "agreements" as having the same status and effect as treaties. See, e.g., *Antoine v. Washington*, 420 U.S. 194 (1975); *United States v. Winans*, 198 U.S. 371 (1905).

The 1934 IRA might also be seen as a general declaration. However, one of its more obscure and important provisions decreed that Indian tribes organized under the IRA could exercise specified powers *in addition to* those "vested" by "existing law." Indian Reorganization Act of 1934, ch. 576, § 16, 48 Stat. 984, 986 (codified at 25 U.S.C. § 476(e) (1988)). The Act did not make any statement concerning what those existing powers were. The staff of the Department of the Interior (who advocated more tribal power and autonomy than Congress was then willing to concede) undertook to identify those "vested" powers as broadly as possible. See *Powers of Indian Tribes*, 55 Interior Dec. 14, reprinted in OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 445 (decision of Oct. 25, 1934). There listed is the power to "administer justice with respect to . . . offenses of or among the members of the tribe. . . ." 15 Interior Dec. at 17, reprinted in OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 446. See discussion *infra* notes 320-28.

178. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 39-45 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903); *Blue Jacket v. Commissioner* (The Kansas Indians), 72 U.S. (5 Wall.) 737, 755-57 (1867); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865).

of the Continental Congress was not losing to the British — both the British and the inchoate United States treated the Indians more as pawns than as nations with their own interests.¹⁷⁹ The successful conclusion of the Revolutionary War did not resolve the problems the government faced concerning Indians. A major problem, if not the primary one, was the continuing encroachment of white settlers on unceded Indian lands. The United States hoped that peace and goodwill could be maintained by regulating the persons allowed into Indian territory and punishing non-Indians who committed crimes against Indians.¹⁸⁰ To those ends, Congress adopted a series of "Trade and Intercourse Acts" starting in 1790.¹⁸¹ Despite the hopes of officials, unrest continued all along the western front. Indian wars in the Northwest (Ohio, Indiana, etc.) became increasingly severe until General Anthony Wayne's victory at Fallen Timbers in 1794.¹⁸²

A major component of the Trade and Intercourse Acts was the attempt to regulate trade with the Indians, both to prevent less scrupulous United States citizens from dealing with the Indians and (ineffectually) to preclude trading by persons from other countries, particularly Britain and Spain. The acts included a trader-licensing scheme similar to that used by the British officials before the Revolution,¹⁸³ and prohibited unlicensed persons' entry into Indian areas, providing for their removal by the military. In addition, the acts made

179. See generally SCHAAF, *supra* note 165; cf. 1 FRANCIS P. PRUCHA, *THE GREAT FATHER* 37-44 (1984) [hereinafter *GREAT FATHER*].

180. See, e.g., President George Washington, Message to Congress (Oct. 25, 1791), in *HOUSE JOURNAL*, 2d Cong., 1st Sess. 445.

181. See, e.g., Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1834).

182. The British, who maintained military and commercial establishments in the territory awarded to the United States in the treaty following the Revolution, continued to encourage the Indian tribes to resist encroachment. See generally JAMES L. WRIGHT, *BRITAIN AND THE AMERICAN FRONTIER, 1783-1815* (1975). However, at a crucial moment, the British refused to open the gates of Ft. Miami to protect Indians retreating before General Wayne. The British did not relinquish all of their posts in what was acknowledged U.S. territory until after the War of 1812. See generally COLIN G. CALLOWAY, *CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783-1815* (1987); Henry Horsemann, *The British Indian Department and the Resistance to General Anthony Wayne, 1793-1795*, 49 *MISS. VALLEY HIST. REV.* 269 (1962); Lewis Cass, *Remarks on the Policy and Practice of the United States and Great Britain in Their Treatment of the Indians*, 24 *NORTH AMERICAN REV.* (Apr. 1827). On the military situation of the area, see generally FRANCIS P. PRUCHA, *THE SWORD OF THE REPUBLIC: THE UNITED STATES ARMY ON THE FRONTIER, 1783-1846* (1969).

183. See, e.g., Proclamation of 1763 (Oct. 7, 1763), in 3 WILCOMB E. WASHBURN, *THE AMERICAN INDIANS AND THE UNITED STATES: A DOCUMENTARY HISTORY* 2135 (1973). The Continental Congress had adopted a similar licensing system. See Ordinance for the Regulation of Indian Affairs, 31 *J. OF CONTINENTAL CONGRESS* 490-93 (1786), excerpted in *DOCUMENTS OF UNITED STATES INDIAN POLICY* 8-9 (Francis P. Prucha ed., 2d ed. 1990).

it a federal or state crime to commit crimes against Indians. The last provision, just as the others, was aimed at diminishing the possibility of Indian wars, not particularly at protecting the Indians.

The 1790 Act granted states or organized territories jurisdiction over "any citizen or inhabitant of the United States" who commits a crime against "the person or property of any peaceable and friendly Indian or Indians" within any town, settlement, or territory belonging to any Indian or Indian tribe.¹⁸⁴ The Act did not preclude state or federal jurisdiction over Indians who were citizens or inhabitants of the United States.¹⁸⁵ The Act (as all similar acts before 1802) was "temporary." When renewed by Congress in 1793, the provisions intended to control non-Indian criminal activity were substantially enlarged.¹⁸⁶ However, most of the added language was aimed at the same problems, namely, unauthorized appropriation of Indian land and criminal attacks against Indians. Despite the law, unrest continued. The 1796 Trade and Intercourse Act provided for federal or state jurisdiction over "any citizen or other person" committing an enumerated crime (including murder) against an Indian or Indians.¹⁸⁷ Section 14 of the Act made it a federal crime for any Indian to come out of Indian country and commit a crime against the person or property of a "citizen or inhabitant" of the United States.¹⁸⁸ State and federal courts were given jurisdiction over Indians who violated that provision.¹⁸⁹ Those provisions were renewed in the 1799 Act¹⁹⁰ and the 1802 Act.¹⁹¹ Even though they were the major component of federal Indian policy, none of the Trade and Intercourse Acts adopted after 1790 were mentioned in the *Duro* dissent.

The *Duro* dissent concluded that the 1790 Act, and, by implication, the other pre-1817 acts, "implicitly" (but purposefully) exempted all Indian-against-Indian crimes.¹⁹² Neither the acts' language nor the

184. Act of July 20, 1790, ch. 33, § 5, 1 Stat. 137, 138. Apparently, it was not considered a crime to commit otherwise criminal acts against Indians who were not "peaceable and friendly."

185. Some might argue that "citizen or inhabitant" was intended to exclude Indians. However, the final portion of that section provides for non-Indian criminal jurisdiction over Indians who come out of Indian country and perpetrate a crime "against a citizen or white inhabitant thereof." *Id.* (emphasis added). Apparently, it was not considered criminal for an Indian to take similar action against a nonwhite inhabitant. In 1793, the language concerning Indian crimes outside Indian country was amended, deleting "or white inhabitant," thus proscribing Indian crimes against all citizens.

186. Act of Mar. 1, 1793, ch. 19, § 4, 1 Stat. 329.

187. Act of May 19, 1796, ch. 30, §§ 4, 6, 15, 17, 1 Stat. 469, 470-71, 473.

188. *Id.* § 14, 1 Stat. at 469, 472-73.

189. *Id.* §§ 16, 17, 1 Stat. at 474-75.

190. Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

191. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

192. *Duro v. Reina*, 495 U.S. 676, 702-03 (1990).

surrounding circumstances strongly support that conclusion. The acts do not expressly preclude prosecution of an Indian for a crime against another Indian. Grammatically, the only way to construe those enactments as "implicitly" exempting Indian-against-Indian crimes is to conclude that Congress did not intend the terms "citizen," "inhabitant," or "other person" to include Indians.

The surrounding circumstances show that any attempt to unilaterally regulate intra-Indian matters would have been futile; its only effect would have been to antagonize the western tribes and provide substance to British propaganda. A major object of the Trade and Intercourse Acts was to lessen the possibility of Indian wars.¹⁹³ Hoping to retain the goodwill of the then unconquered tribes, the acts demarked "Indian country"¹⁹⁴ and provided for punishment of non-Indians who committed crimes there. Realistically, the acts were more a political gesture than anything else; the meager power of the infant Union was not sufficient to impose its laws on anyone on or beyond the frontier. The United States was intent on its political survival, which was far from certain. The Trade and Intercourse Acts, at least through the War of 1812, had that as their primary, almost exclusive, objective. In some respects those acts were wishful thinking. One must ignore contemporary reality to infer from these enactments that Congress had any sovereignty-related intent concerning intertribal crime in Indian country.

Even though Britain had conceded the area by treaty, it exercised significant influence over trans-Appalachian Indians until after the War of 1812. British traders were not controlled despite the Trade and Intercourse Acts, and federal officials conceded that control was not possible and probably not desirable, even after the war. Not only did the United States not have the coercive power to control the British traders, it did not have the trade goods needed to supply the Indians. It was the considered opinion of federal officials that the continuation of British trade in United States territory was necessary for peace with the Indians.¹⁹⁵ The repeated prohibition of non-United States traders was not enforced.

193. See GREAT FATHER, *supra* note 179, at 89-114 (chapter 3).

194. The 1796 Act was the first United States law to specifically describe a boundary between Indian and non-Indian country. The earlier acts merely identified Indian country as towns, villages, or territories of the Indians. In effect, the 1796 Act renewed a practice established in King George's Proclamation of 1763 which precluded non-Indian settlement beyond the watersheds of the rivers that flow into the Atlantic, despite the fact that non-Indian settlement already existed in the proscribed area.

195. See, e.g., Report of Secretary of War (Mar. 14, 1816), in 2 AM. STATE PAPERS — INDIAN AFFAIRS No. 142, at 26 (1834). The Secretary of War reported to the Senate: The great distance of some of the tribes in the Northwest Territory, and in the northern regions of Louisiana, from the settled parts of the United

To infer solely from the enacted words (without any reference to context) that Congress had any "presumption" or intent concerning the Indians' internal affairs is unwarranted. United States Indian policy of the time was driven by foreign policy, primarily concerned with European powers, and the desire to avoid Indian wars through any means. To maintain and enhance its image in "civilized" Christian Europe, the United States attempted to project an "enlightened" policy toward the "less fortunate" Native Americans.¹⁹⁶ At the same time, however, federal authorities were committed to paying the Revolutionary War veterans with land in "Indian Country" that the possessing tribes had no interest in relinquishing. The Indians with whom federal officials were dealing in that era were not uninformed or politically unaware.¹⁹⁷ Any federal enactment that even impliedly claimed jurisdiction over intertribal or intratribal affairs would have eventually become known to the Indians. Indian reaction would have been detrimental to the United States, particularly before 1815, on both the North American and European scenes.

The *Duro* dissent stated that the 1817 Federal Enclave Extension Act¹⁹⁸ amended the 1790 Trade and Intercourse Act and "withdrew" state criminal jurisdiction.¹⁹⁹ The 1817 Act does not expressly amend any Trade and Intercourse Act. Had Congress intended specific amendment to the Trade and Intercourse Acts, it would have mentioned them, as it had in the preceding session.²⁰⁰ The 1817 Act's language

States, will probably make it necessary to permit the British merchants from Canada to participate in the commerce of those tribes, until more accurate information is obtained as to their [the tribes'] situation and numbers, their wants, and their capacity to pay for articles of the first necessity. As this knowledge is gradually acquired, and the mode of conducting the trade better understood, the exclusion of foreigners from all participation in it may be safely effected.

Id. at 27; see also Report of Ninian Edwards (Superintendent and Treaty Commissioner, Illinois Terr.) (Nov. 1815), in 2 AM. STATE PAPERS — INDIAN AFFAIRS No. 142, at 63 (1834) (exhibit R).

196. See Cass, *supra* note 182. Lewis Cass' lengthy article in the April 1827 *North American Review* was written and published solely to refute an article which had been published in the English *Quarterly Review* and circulated throughout Europe. The English article made derogatory statements about the treatment of Indians by both individual Americans and governmental officials. From some accounts, it might be inferred that federal Indian policy was driven more by world public opinion than by internal politics or concern for Native Americans.

197. See Schaaf, *supra* note 165.

198. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383.

199. *Duro v. Reina*, 495 U.S. 676, 702 (1990).

200. See Act of Apr. 29, 1816, ch. 165, 3 Stat. 332 (titled "An act supplementary to the act passed the thirtieth of March, one thousand eight hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the

does, however, appear to be the first to obviously prohibit crimes by Indians in Indian country.²⁰¹ Section 1 of the 1817 Act proscribes all crimes in Indian country, by whomever, against whomever. However, section 2 (vesting jurisdiction in the territorial and federal courts) contains the proviso: "[N]othing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary."²⁰²

The political and military positions of the Indian tribes were significantly altered by the War of 1812. The death of Tecumseh and the defeat of the allied tribes in the Old Northwest, together with Andrew Jackson's victories in the South, effectively ended European and Indian power east of the Mississippi.²⁰³ That fact, along with the United States' inflated confidence, eliminated the perceived need for caution in claiming jurisdiction over Indian country. Though little congressional history is available, the most likely purpose of the 1817 Federal Enclaves Extension Act was to make general provisions for uniform federal criminal law throughout United States territory where no state or territorial government had been established, which included a very

frontiers"). The Act again prohibited Indian trade by any persons not United States citizens and provided for forfeiture of violators' trade goods and the use of military forces to apprehend them. Jurisdiction was granted exclusively to federal courts. *See also* Act of May 6, 1822, ch. 58, 3 Stat. 682 (continuing the practice of expressly mentioning the Trade and Intercourse Act when the intention was to amend that act).

The 1817 Act does mention the 1802 Trade and Intercourse Act, not to amend that act but to incorporate the enforcement powers of its sections 14 and 15 into the 1817 Act. *See* Act of Mar. 3, 1817, ch. 92, § 3, 3 Stat. 383.

201. The fact that the 1817 Congress felt it necessary to include the Indian-against-Indian exemption lends some support to the *Duro* dissent's contention that prior acts did not proscribe those crimes. The 1817 enactment does not, however, support any implied exemption in the prior acts. It does support an inference that pre-1817 Congresses intended to proscribe only interracial crimes; they were not concerned with what Indians did to each other.

202. Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383. Other contemporaneous legislation also provided special benefits to Indians as a racial group. For example, an 1822 statute provides:

[I]n all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burthen of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Act of May 6, 1822, ch. 58, § 4, 3 Stat. 682, 683. That provision was reenacted in the 1834 Trade and Intercourse Act, which consolidated prior Indian-related legislation. Act of June 30, 1834, ch. 161, § 22, 4 Stat. 729, 733. *See discussion infra* part III.C.

203. *See* DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 303-09 (1989); HENRY BEERS, *THE WESTERN MILITARY FRONTIER 1815-1846 passim* (1935).

large geographic area.²⁰⁴ The Trade and Intercourse Acts had more limited purposes and were not intended to provide general governmental control over the area beyond established states and territories.²⁰⁵ In fact, the 1817 Act was quite pretentious. The United States had the military and political power to enforce its laws in only a small portion of the unorganized territory.

Despite probable inability on the domestic scene, in the international arena, the United States unequivocally took the position that the relationship between the United States and the Indians within its claimed boundaries was a purely domestic matter. In the negotiations leading to the Treaty of Ghent, ending the War of 1812, one significant subject was Indian tribes and a British-proposed buffer zone between Canada and the United States (entirely within United States territory). In one exchange, the American negotiators informed the British:

The United States claim, of right, with respect to all European nations, and particularly with respect to Great Britain, the entire sovereignty over the whole territory, and all the persons embraced within the boundaries of their dominions; Great Britain has no right to take cognizance of the relations subsisting between the several communities or persons living therein; they form, as to her, only parts of the dominions of the United States, and it is altogether immaterial whether, or how far, under their political institutions and policy, these communities or persons are independent States, allies, or subjects. With respect to her, and all other foreign nations, they are parts of a whole, of which the United States are the sole and absolute sovereigns.²⁰⁶

204. The 1817 Act may have grown out of a short comment in President Madison's annual message to Congress on December 3, 1816:

Occurrences having taken place which show that the statutory provisions for the dispensation of criminal justice are deficient, in relation to both places and to persons, under the exclusive cognizance of the national authority, an amendment to the law, embracing such cases, will merit the earliest attention of the Legislature.

President James Madison's Annual Message to Congress (Dec. 3, 1816), in 30 ANNALS OF CONG. 11, 14 (1816), in 1 RICHARDSON'S COMPILATIONS OF PRESIDENTS MESSAGES, reprinted in H.R. Misc. Doc. No. 37, 53d Cong., 2d Sess. 573 (1895) (U.S. Ser. Set vol. 3265, vol. 1). The available legislative journal indicates there were some unidentified amendment(s) but that the final proposal passed, essentially without debate. See 30 ANNALS OF CONG. 33, 82, 85, 92, 103, 143, 1025, 1040, 1044 (1817).

205. The extension of the federal enclaves law may have also been intended to provide greater coercive authority to frontier officials trying to deal with British traders and their unsettling effect on U.S.-Indian relations.

206. Note from the American to the British Ministers (Sept. 26, 1814), reprinted in AMERICAN STATE PAPERS, 3 Foreign Affairs, No. 269, at 695, 720 (1832).

The position taken vis-à-vis Britain was that the Indians within United States boundaries were entirely subject to United States sovereignty but that the United States' "benign and enlightened" policy was to allow Indians to continue their internal practices until such time as they were "civilized."²⁰⁷ That policy, said the negotiators, had produced a longer period of peace than at any previous time since British colonization began and, more emphatically, that the United States policy concerning Indians was strictly an internal affair.²⁰⁸

The next frequently mentioned legislation was enacted in 1834. By then, United States-Indian relations had expanded into a much larger geographic area and encompassed many more tribes. Just one aspect of federal policy, "removal" of Indians to locations west of the Mississippi, required initiating formal relations with the tribes in the target area. In 1834, a legislative package was proposed by the House Committee on Indian Affairs, with the goal of modernizing Indian-related legislation and combining it into a comprehensive, consistent whole. The package contained three interdependent measures: one to rationalize the administration of Indian affairs, one to consolidate and update prior Trade and Intercourse Acts and their amendments, and one to establish a territorial government for a "Western Territory" composed of the removed tribes.²⁰⁹

The proposed 1834 Trade and Intercourse Act, *inter alia*, incorporated the substance of and repealed the 1802 Act and the 1817 Federal Enclave Extension Act. Sections 2 through 15 made various provisions concerning trade and travel in Indian country, primarily prohibitions subjecting the violator to civil forfeiture of goods, money, or both. Section 16 proscribed crimes "by a white person . . . within the Indian country" against an Indian.²¹⁰ Section 17 provided a method for obtaining compensation from any Indian of a friendly tribe who destroyed or damaged property "of any person lawfully within" Indian

207. *Id.*

208. *Id.*; see PAUL JOHNSON, *THE BIRTH OF THE MODERN — WORLD SOCIETY 1815-1830*, at 37-38 (1991); cf. COLIN G. CALLOWAY, *CROWN AND CALUMET — BRITISH-INDIAN RELATIONS, 1783-1815*, at 240-57 (1987).

209. H.R. REP. NO. 474, 23d Cong., 1st Sess. (1834). Though introduced a month earlier, the committee proposals were not considered until a few days before adjournment. The proposals concerning the Department of Indian Affairs and Trade and Intercourse passed essentially as proposed. The proposed act "to provide for the establishment of the Western Territory, and for the security and protection of emigrant and other Indian tribes therein" was the subject of strenuous objection and set over to the next session, when it was permanently tabled. The proposal may have been developed, in part, from a proposal submitted by the Secretary of War in 1826. See Secretary of War Barbour, *Preservation and Civilization of the Indians*, H.R. Doc. 102, 19th Cong., 1st Sess. (1826) (U.S. Ser. Set vol. 135).

210. Act of June 30, 1834, ch. 161, § 16, 4 Stat. 729, 731.

country or of any "citizen or inhabitant" outside of Indian country.²¹¹ Section 19 provided for the arrest of an Indian accused of a crime outside a reservation who later fled to a reservation.²¹² Sections 20 and 21 prohibited the transfer of "spirituous liquor or wine" to an Indian in Indian country and the operation of a still in Indian country.²¹³ Section 25 incorporated the 1817 Federal Enclave Extension Act into congressional Indian policy:

[S]o much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.²¹⁴

The reason for including section 25 was stated in the accompanying report:

In consequence of the change in our Indian relations, the laws relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the act of 3d March, 1817, the criminal laws of the United States were extended to *all persons* in the Indian country, *without exception*, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, *consistently with the provisions of some [of] our treaties*, and

211. *Id.* § 17, 4 Stat. at 731-32. As originally proposed, the section only proscribed actions by Indians outside of Indian country. See H.R. REP. NO. 474, *supra* note 209, at 31. As adopted, the section also proscribed actions taken by an Indian, in Indian country, against the property of "any person lawfully within such country . . ." Act of June 30, 1834, § 17, 4 Stat. at 731. However, the operative provisions of that section provide only for remuneration to "such citizens or inhabitants." *Id.* This section effectively makes the perpetrator's tribe responsible for restitution. There is no indication that any other tribe may have authority over the offender. Section 19 also implies that only an offender's tribe could be required to surrender the offender. *Id.* § 19, 4 Stat. at 732.

212. Act of June 30, 1834, § 19, 4 Stat. at 732.

213. *Id.* §§ 20, 21, 4 Stat. at 732-33.

214. *Id.* § 25, 4 Stat. at 733. The 1817 Act was expressly repealed. *Id.* § 29, 4 Stat. at 734. It seems that the contemporary administration was not particularly impressed with the exception. The Commissioner's 1835 report relates that the Choctaws had recently executed two members of their tribe, pursuant to tribal tradition, for being witches. The federal agent called the Choctaw chiefs to council and instructed them to abolish that custom, subject to a federally imposed penalty of death for persons participating in an execution and "the lash" for anyone preferring witchcraft charges. The Commissioner praised the agent's actions. *Report of Commissioner of Indian Affairs Elbert Herring* (Nov. 24, 1835), in 1 WASHBURN, *supra* note 183, at 28, 28-29.

of the [proposed] territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, *at any place* within their own limits.²¹⁵

The report misstated the 1817 Act. It did not mention the 1817 proviso so prominent in *Duro* and *Oliphant*; in fact the report asserted there was no exception in that Act. The "change in our Indian relations" mentioned as the impetus for revision was twofold: (1) the change from the previous essentially political relationship based on fear of Indian wars to a relationship "of the strong to the weak, and [which] demands at our hands a more liberal policy, as well directed to promote their welfare as our political interests;"²¹⁶ and (2) the then almost completed removal policy. The treaties to which the report refers as possibly precluding federal criminal jurisdiction over Indian-against-Indian crimes were those providing for removal; among those specifically mentioned in the report are the Choctaw treaty of September 27, 1830, and the Creek treaty of March 24, 1832.²¹⁷ Those treaties obligated the United States to secure to the signatory tribes "the jurisdiction and Government of all the persons and property that may be within their limits" in the West.²¹⁸ The limitation on federal jurisdiction is attributed in the report to treaty limitations, not a general theory of tribal sovereignty.

The 1834 report's description of the Indian-against-Indian exception is connected with the Trade and Intercourse Act revisions, but the reasons for that exception were discussed in connection with the pro-

215. H.R. REP. NO. 474, *supra* note 209, at 13 (second and third emphasis added).

216. *Id.* at 11.

217. *Id.* at 16; see Choctaw Treaty of Sept. 27, 1830, 7 Stat. 333, reprinted in CHARLES J. KAPPLER, INDIAN TREATIES 1778-1883, at 310 (reprint 1972) (popularly known as the "Treaty of Dancing Rabbit Creek"); Creek Treaty of Mar. 24, 1832, 7 Stat. 366, reprinted in KAPPLER, *supra*, at 341. Before the House, Rep. Horace Everett (Whig-Vt.), urging passage, remarked: "It [the tribal self-government provision, § 3] was drawn in conformity with the provisions of various treaties, nor did it go beyond them." 10 CONG. DEB. 4764 (1834).

218. *Id.* The quoted language makes it sound as if the tribe was given jurisdiction over non-Indians. However, in a later clause, the Choctaw treaty expresses "a wish" that Congress grant the tribe the power to punish any white man who comes into their territory and violates tribal law. *Id.*

posed Western Territory Act, which found prominence in *Oliphant* and in the *Duro* dissent. In *Oliphant*, the report supporting the Western Territory Bill was used to illustrate Congress' intention to preclude tribal jurisdiction over non-Indians temporarily within Indian country.²¹⁹ In the *Duro* dissent, however, the proposal was cited as supporting the proposition that Congress presumed that Indians would police intertribal disputes.²²⁰ That assertion is not supported by the proposed bill or the accompanying report. As quoted in *Oliphant*, the report stated:

The want of fixed [tribal] laws, of competent [tribal] tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection [of "officers," "persons" in federal service, "persons" required by treaty to reside in Indian country, and "persons merely travelling through the Indian country"] should be extended.²²¹

The "want of fixed tribunals" does not characterize a tribal government capable of acceptably dealing with intertribal crimes. Any interpretation of the 1834 Trade and Intercourse Act, or of the report accompanying it, must recognize that the Act was part of a package; some portions appear to have a different meaning when read in isolation.

In the years immediately preceding 1834, the executive branch and Congress shared the opinion that policing intertribal crime was a *federal* responsibility. In an 1829 message to Congress, President Andrew Jackson proposed an Indian-controlled government in Indian country. "There they may be secured in Governments of their own choice, subject to no other control from the United States than such

219. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201-22 (1978).

220. *Duro v. Reina*, 495 U.S. 676, 704 n.2 (1990) (Brennan, J., dissenting).

221. *Oliphant*, 435 U.S. at 202 (quoting H.R. REP. No. 474, *supra* note 209, at 18). The "protection extended" was that the identified persons (not identified by race) remained subject to United States jurisdiction and bound by United States laws. Protected persons violating tribal law were to be removed from the offended tribe's territory by the territorial governor. Proposed Western Territory Act, § 8, H.R. REP. No. 474, *supra* note 209, at 37.

As justification for the appointed governor's veto power over the general council's legislation, Representative Everett remarked:

Suppose the council, acting according to Indian notions, should think it fit to enact retaliation by [as?] law; the consequence would soon be war among themselves; and so soon as the torch of civil discord was thus lighted, the United States Government must act; it was bound to act; the treaty and the law require it. We had, therefore, a direct interest in the enactments of this new Indian government.

10 CONG. DEB. 4766 (1834).

as may be necessary to preserve peace on the frontier, *and between the several tribes.*"²²² A law adopted shortly after President Jackson's message authorized treaties with the various tribes for land exchanges and removal west of the Mississippi, and "[t]hat it shall and may be lawful for the President to cause such tribe or nation to be protected, at their new residence, against all interruption and disturbance *from any other tribe or nation of Indians, or from any other person or persons whatever.*"²²³

The 1834 Western Territory proposal was politically contemporaneous with the 1829-1830 executive and congressional acts. The 1834 proposal was developed from a 1829 report by then-Governor Lewis Cass and General William Clark, prepared at the request of the Secretary of War.²²⁴ The Cass-Clark report was supplemented and supported by an 1834 report of the Commissioners of Indian Affairs, West, which expressly supported the three-bill proposal.²²⁵

The 1829 Clark-Cass report included proposed legislation, section 48 thereof providing that federal Indian agents be responsible for procuring the arrest of any Indian committing a crime.²²⁶ The accompanying commentary by two recognized and influential "experts" (one of whom had become the Secretary of War in the interim) explained the necessity for that proposal:

The Indians are broken into little independent communities, jealous, vindictive, and warlike. Occupying the same general regions, engaged in the same pursuits, and with territorial claims, ill defined, or not defined at all, it is not surprising that dissensions should frequently arise, nor that they should sometimes lead to hostilities.

222. H.R. REP. No. 474, *supra* note 209, at 15 (quoting President Andrew Jackson's Message to Congress of Dec. 8, 1829 (emphasis added)).

223. Act of May 30, 1830, ch. 148, § 6, 21st Cong., 1st Sess., 4 Stat. 411, 412 (emphasis added).

224. S. Doc. No. 72, 20th Cong., 2d Sess. (1829) (U.S. Ser. Set vol. 181). A "western territory" bill was also introduced in 1829. That bill would have established a territory in Indian country very similar to those established elsewhere, run by the U.S. government, not the Indians. See H.R. REP. No. 474, *supra* note 209, at 76-78 (exhibit S). The Commissioner of Indian Affairs, in his 1830 report, recommended the 1829 Cass-Clark report as a basis for updating the 1802 Trade and Intercourse Act. See *Report of Commissioner of Indian Affairs Samuel S. Hamilton* (Nov. 26, 1830), in 1 WASHBURN, *supra* note 183, at 16-17.

When the 1834 proposal was introduced, Lewis Cass was Secretary of War and thus in charge of the Indian Affairs Department. Despite a political change of heart on Indian removal, Cass gave no indication that he had changed his view of Indian society or character between 1829 and 1834.

225. See H.R. REP. No. 474, *supra* note 209, at 78-105 (exhibit T).

226. S. Doc. No. 72, 20th Cong., 2d Sess. 44 (1829).

But these difficulties, whether real or imaginary, are not the most prominent causes of the hostilities in which the Indian tribes are so often involved. Many of their wars are as ceaseless as they are causeless, originating they know not why, and terminating they care not when. They result, in fact, from the spirit of their institutions. Until a young man has been engaged with an enemy, and can boast of his prowess, he is held in no estimation, and is considered little better than a woman.²²⁷

The 1834 Western Territory proposal was intended to replace traditional intertribal war with a deliberative body. Various portions of the proposal dealt with an all-tribe Council which would pass laws of general application, including "all necessary regulations respecting the intercourse among the various tribes, to preserve peace, to put a stop to hostilities, . . . to arrest and punish all Indians who may commit offenses within the district of one tribe, and who may flee to another"²²⁸ The proposal specifically dealt with intertribal crimes, providing for a five-chief court (none from the offender's or victim's tribe), subject to review by the governor, who was to be appointed by the President.²²⁹ Nothing in the proposal intimated that the committee was of the opinion that any tribe had or could exercise criminal jurisdiction over nonmember Indians. The Western Commissioners' 1834 report stated outright what the committee only hinted:

Laws also will be necessary to define the rights and powers of the different Indian nations, and regulating their intercourse with each other.

With the exception of two or three tribes . . . the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint upon their people. . . . At present nothing is more common than for hunting parties to wander from their homes, visit the settlements of other tribes, and kill their stock and commit other depredations. . . . It is now quite common, too, for a chief or warrior who has influence enough to raise a war party, to attack some other tribe for the purpose of plunder, or taking scalps. This leads to retaliation and revenge, and thus wars have been carried on between several tribes from time im-

227. *Id.* at 44-45.

228. H.R. REP. NO. 474, *supra* note 209, at 36 (§ 7 of proposed Western Territory Act).

229. *Id.* at 36-37 (§ 9 of proposed Western Territory Act).

memorial. Humanity as well as due regard for the just rights of others, requires that these practices should cease. *And it remains for the Government of the United States alone to determine when they shall end.*²³⁰

In a passage that directly expresses the understanding (or assumptions) of Congress, the committee stated: concerning the proposal's provision for the non-Indian governor's review of capital cases:

The danger of leaving the punishment of death to the judgment of tribes who are not accustomed to measure degrees of guilt, *especially against others than members of the tribe*, is too obvious to need comment. . . . Each tribe will see that it is an important protection to its own members.²³¹

Again, with respect to the proposal allowing the governor to veto any legislation adopted by the intertribal council, the report stated:

The United States being bound to protect the several tribes from domestic strife, *each tribe from the aggression of the others*, and from all foreign force, are directly concerned that all the regulations made by the council should aid them [the United States] in the fulfillment of these obligations, at least that they [the Indians] should not obstruct or render them [the obligations] more burdensome. As the power of the several tribes is unequal, it will be necessary to protect the weak against the strong, and the strong against the combinations of the weak. And to secure these objects, it will be necessary that there should be some check against improvident or improper acts of the general council.²³²

230. *Id.* at 91. (emphasis added). A detailed report of continuing skirmishes between the Chippewa and the Sioux was submitted shortly before the 1834 legislation. *Henry R. Schoolcraft — Expedition into the Indian Country*, H.R. Doc. 152, 22d Cong., 1st Sess. (1832) (U.S. Ser. Set vol. 219).

231. H.R. REP. NO. 474, *supra* note 209, at 19 (emphasis added). Supporting the Western Territory proposal, Rep. Edward Everett (Whig-Mass.) remarked:

If the gentlemen [opposing the bill] would take into consideration the extensive intercourse of the Indian tribes with whites; that they are new to legislation; and, above all, that they were a people of deep passion, and bred from infancy to revenge, they must admit the propriety of putting some restriction on the power of inflicting death at pleasure upon whom they would. Otherwise, traders and travellers might be unjustly condemned and sacrificed before their case could be duly considered.

10 CONG. DEB. 4767 (1834). In other words, Indian tribes were not capable of "duly considered" judgments in criminal cases.

232. H.R. REP. NO. 474, *supra* note 209, at 34 (emphasis added).

The proposed legislation as a whole shows a similar understanding. Section 3 authorized each tribe to establish and maintain its own government for the management of "their own internal concerns."²³³ In addition, section 7 established a confederacy, governed by a general council of elected tribal representatives or chiefs.

It shall be their duty to make all necessary regulations respecting the intercourse among the various tribes, to preserve peace, to put a stop to hostilities, to settle any questions of dispute respecting boundaries, to arrest and punish all Indians who may commit offenses within the district of one tribe, and who may flee to another, and to take such measures as may be necessary to give effect to the intentions of this act.²³⁴

Given the state of affairs reported to Congress and the proposals made, the most that might be said about Congress' presumptions is that the 1834 Congress operated on the belief that any method of settling intertribal disputes and crimes, other than intertribal war, would have to be provided by Congress. The committee intended to *create* a method of handling intertribal crime because no acceptable method then existed.²³⁵ There was no assumption that any of the tribes had an acceptably civilized method of exercising jurisdiction over nonmember Indians.²³⁶ The Western Territory proposal was permanently tabled.²³⁷

233. *Id.* at 35.

234. *Id.* at 36 (§ 7 of proposed Western Territory Act).

235. Indicative of the federal executive's understanding of the time is the 1832 report of Commissioner of Indian Affairs Elbert Herring:

Some of the Indian tribes have proceeded to hostile acts, in the course of the year past, against each other, and conflicts have ensued, in which blood has been spilt in defiance of the obligation imposed by the guarantee of the United States, for the preservation of peace and tranquillity among them. The instigators of such unwarrantable proceedings, as well as the chief actors in every instance of ascertained outrage, are justly considered responsible to the [United States] Government for the transgression, and are invariably required to be given up to its authority to answer for their offences.

ELBERT HERRING, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1832, at 163-64 (1832), *reprinted in* 1 WASHBURN, *supra* note 183, at 22, 26.

236. During the House debate, it was asserted, repeatedly by proponents and opponents, that the tribes were not capable of creating or managing an acceptable type of government. *See* 10 CONG. DEB. 4764-80 (1834). The tribes most mentioned were those considered the most "civilized" of all Native American groups, some of which had adopted written constitutions and laws, and otherwise emulated Anglo-American forms.

237. 10 CONG. DEB. 4780 (1834). The proposal drew vigorous opposition from Representative (and ex-President) John Quincy Adams (Mass.), who saw the proposal

The *Duro* dissent asserted that the 1834 Congress understood that individual tribes "police[d]" intertribal disputes.²³⁸ Actually, Congress assumed that unless the federal government intervened, intertribal crimes would be revenged on the warpath rather than tried at the courthouse. It is doubtful that the *Duro* dissent or the 1834 Congress would equate "retaliation and revenge" or "ceaseless and causeless war" with exercising recognized criminal jurisdiction over nonmember Indians.

Chronologically the next congressional action that received attention in *Oliphant*, *Wheeler*, and *Duro* is an 1854 act²³⁹ that, in part, amended the 1834 Trade and Intercourse Act. To support its position that Congress intentionally left prosecution of intertribal crime to the tribes, the *Duro* dissent stated:

In 1854, Congress again amended the statute [²⁴⁰] to proscribe prosecution in federal court of an Indian who had already been tried in tribal court.

. . . .
. . . Moreover, the provision in the 1854 Act exempting from federal jurisdiction any Indian who had been previously punished by a tribal court amounts to an express acknowledgement by Congress of tribal jurisdiction over Indians who commit crimes in Indian country.²⁴¹

as a precursor to Indian statehood and objected to admitting an Indian state on equal footing with non-Indian states. *Id.* at 4770. Rep. William Archer (Whig-Va.) held similar views but expressed them in very racist terms, raising the "specter" of admitting the "states" of Cuba and "Hayti," even free blacks from Canada and Liberia, and urging all "southern men" to oppose the bill. *Id.* at 4777-78.

238. *Duro v. Reina*, 495 U.S. 676, 707 (1990).

239. Act of Mar. 27, 1854, ch. 26, 10 Stat. 269.

240. *Duro*, 495 U.S. at 702 (Brennan, J., dissenting). The implication in the opinion is that the 1854 measure amended the 1817 or 1790 enactments. However, the 1854 Act expressly amended the 1834 Trade and Intercourse Act, which had consolidated provisions of earlier statutes, including earlier Trade and Intercourse Acts and the 1817 Federal Enclaves Extension Act.

241. *Id.* at 703. The opinion's citation to "10 Stat. 270, ch. 30" is inaccurate. The proper citation is: Act of Mar. 27, 1854, ch. 26, § 3, 33d Cong., 1st Sess., 10 Stat. 269, 270.

Between 1834 and 1854, at least one situation in Indian country prompted a call for elimination of the Indian-against-Indian exception. Apparently in 1845-46, members of the dominant political group in the Cherokee Nation abused their governmental authority for their own aggrandizement and committed crimes including murder and robbery against members of the other tribal groups. *See* S. REP. NO. 461, 29th Cong., 1st Sess. (1846) (U.S. Ser. Set vol. 478). The result was a bill to extend federal criminal law to all persons in Indian country. That bill did not pass, but reports of the atrocities and injustices by the dominant party of the tribe considered most highly advanced would not be conducive to the belief that all tribes acceptably exercised jurisdiction over even

The characterization of the 1854 Act is misleading, particularly as to its scope, which has a direct impact on the associated congressional intent. The referenced portion of the 1854 Act was adopted in response to a specific contemporary problem and was intended to address only that problem. The relevant portion of the Act's section 3 stated:

[N]othing contained in the twentieth section of the said act [of 1834], which provides for the punishment of offenses therein specified, shall be construed to extend to any Indian committing said offenses in the Indian country, or to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or in any case where, by treaty stipulations the exclusive jurisdiction over such offenses may now or hereafter be secured to said Indian tribes, respectively²⁴²

Section 20, the only affected section of the 1834 Act, prohibited the sale of liquor to Indians and the introduction of liquor into Indian country (except to supply United States Army personnel).²⁴³ The 1817 Indian-against-Indian exception was carried forward in section 25 of the 1834 Act.²⁴⁴ The 1854 prior-tribal-punishment provision did not amend or affect that 1817/1834 exception.

The Senate Indian Affairs Committee appended section 3 to an 1854 House bill that amended an 1851 Act dividing Arkansas into two judicial districts.²⁴⁵ The amended measure passed the Senate without

their own members. In fact, the Commissioner of Indian Affairs expressed the opinion that the only powers exercised by Indian tribes concerned internal affairs and were given ("conceded") to them by the federal government.

242. Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 269, 270. The following sections of the Act provide punishment for both Indians and "white persons" committing the crimes of arson or assault with intent to kill or maim in Indian country. *Id.* §§ 4, 5. As enacted, those sections only proscribe such actions by Indians against "white persons," not against other Indians. These additional sections *do not exempt* Indians who have been punished by local tribal law. If section 3 had the encompassing meaning attributed by the *Duro* dissent, sections 4 and 5 would have to be exceptions to section 3. The Congress that adopted the measure must not have had the same understanding as the *Duro* dissent suggests because neither section 4 nor 5 is drafted as an exception.

243. Act of June 30, 1834, ch. 161, § 20, 4 Stat. 729, 732.

244. *Id.* § 25, 4 Stat. at 733.

245. 23 CONG. GLOBE 581 (1854). The committee amendment added sections 2 through 6 to the House-passed act. The 1851 Act resulted, at least in part, from the difficulty caused by the fact that the Indian Territory was part of the Arkansas judicial district and court was held at Little Rock, some 160 miles from the nearest border of the Indian Territory, thus requiring Indians and others to ride over 300 miles on horseback to appear as witnesses in a criminal trial of an alleged horse thief. See REPORT OF THE JUDICIARY COMMITTEE, S. REP. NO. 372, 29th Cong., 1st Sess. (1846) (U.S. Ser. Set vol. 476).

debate.²⁴⁶ When the bill came back to the House, a motion to send it to the Judiciary Committee to consider the amendments was resisted by Rep. Alfred B. Greenwood (D.-Ark.), based upon the urgency of the measure and the "simple and plain" nature of the amendments.²⁴⁷ To explain the simplicity of the added section 3, Representative Greenwood stated:

A case arose where a member of the Creek nation, who had engaged in selling spirituous liquors in the nation, in violation of its laws, was arrested *by the authorities of his own country*. The grand jury of the western district of Arkansas thought [it] proper to reindict [sic] him for the same offense. Thus a conflict of jurisdiction grew up, and the Senate thought [it] proper to make a provision to the effect that, when an individual *guilty of an offense of that character, and others similar*, had been tried and punished in the Creek or any other nation, such trial and conviction should be a bar to subsequent prosecution in the district court of the United States.²⁴⁸

The genesis of section 3 was a specific incident that almost started an Indian war, as reported in the November 1853 report of the Commissioner of Indian Affairs:²⁴⁹

I deem it incumbent upon me to call particular attention to that portion of the interesting report of Superintendent Drew referring to the question of the amenability of Indians to the penalties of the [federal] law prohibiting the introduction or sale of ardent spirits in the Indian country; a question which has recently caused great excitement among the Creeks, and may lead to serious difficulty. This, and the other semi-civilized tribes on that frontier within his superintendency, have adopted stringent laws upon the subject, which are regularly and rigidly enforced *against their own people* guilty of the offence; while, according to judicial interpretation in that quarter [the federal court in Arkansas], they are also amenable under our [federal] law. Thus, an Indian, though he may have been severely punished *by his*

246. 23 CONG. GLOBE 580-81 (1854).

247. *Id.* at 700-01. The urgency was that thirty to forty men who had been in jail for up to two years could not be sent to the penitentiary due to the new Western District of Arkansas' lack of legal authority to sentence persons to confinement in the Eastern District. *Id.* at 701.

248. *Id.* (emphasis added).

249. S. EXEC. DOC. NO. 1, 33d Cong., 1st Sess. 243-64 (1853).

tribe for introducing or disposing of liquor, is liable to arrest and punishment a second time for the same offence; a result certainly contrary to the spirit of our institutions, and as repugnant to the Indian as it would be to ourselves. It is one to which the Creeks appear determined not to submit. Individuals of their nation, seized by the United States marshal last summer, were rescued by them; and a second effort of that officer to arrest these persons has led to great excitement. A considerable number have banded together and armed themselves to resist the attempt at all hazards; and in the case of failure, they threaten the lives of those of their chiefs who have been instrumental and active in the adoption and enforcement of their own law

The enforcement against Indians, by criminal prosecution, of the law to prohibit the introduction or sale of liquor in the Indian country, is believed to be contrary, not only to the intention of the framers of that law [1834 Act, § 20], but also to the principle, uniformly acted on in respect to all of the tribes, of as little direct interference as possible in *their internal and domestic affairs*. Hence offences, and other matters of even greater concern, are left to be settled entirely by themselves.²⁵⁰

The Commissioner did not report that any tribe had attempted to punish members of other tribes or that any crimes other than those related to liquor prohibitions were at issue. The *Duro* dissent's reference to the 1854 Act used the phrase "tried in tribal court,"²⁵¹ which implies the existence of an Anglo-American-type court, an implication not supported by the Act or the circumstances. Even less does the 1854 Act, or its cause, support any inference that Indian tribes were exercising criminal jurisdiction over nonmembers or that Congress intended to allow them to so do.²⁵²

250. *Id.* at 254 (emphasis added).

251. *Duro v. Reina*, 495 U.S. 676, 702 (1990).

252. This understanding of the relevant portion of section 3 of the 1854 Act is strongly supported by the preceding portion of that enactment. Section 3 is one long sentence clearly divided into two parts. The first part expressly states that nothing in section 25 of the 1834 Act is to be construed to extend to Indian country any laws adopted for the District of Columbia, a provision continued into the analogous current statute. That part of the section has a purpose very distinct from the second part. The first provision of section 3 expressly refers to section 25 while the second provision expressly refers to section 20. It is not grammatically possible to give the second provision's final phrase an independent status broader than the clause of which it is but a part. The enacting Congress must be deemed aware of the distinction between the two sections it was amending. The *Duro* dissent's interpretation of the 1854 Act effectively treats both parts as referring to section 25 of the 1834 Act, ignoring the limiting reference to section 20 and the limited reason for the amendment.

The relevant part of the 1854 Act has a single purpose — to exempt from prosecution under federal liquor laws any Indian who had been punished by his or her tribe for violating tribal liquor laws.²⁵³ Interpreting that provision as a general exemption, as does the *Duro* dissent, is not supportable. Interpreting section 3 of the 1854 Act to apply to non-liquor offenses would result in two general exemptions from federal prosecution, one from 1817 exempting Indian-against-Indian crimes (regardless of tribal punishment), and one from 1854 exempting crimes punished under tribal law (regardless of the victim's identity). Interpreting the 1854 provision broadly renders its final phrase (the precise part referenced by the *Duro* dissent) surplusage, unless the 1854 provision is simultaneously interpreted to extend to Indian crimes against non-Indians. To make a broad interpretation of the 1854 provision meaningful without including Indian-against-non-Indian crimes would require interpreting the 1817/1834 exemption as not applying to "victimless" crimes, which is insupportable. Such a broad interpretation of the 1854 provision is not supported by the Act itself.²⁵⁴ In addition, if section 3 is construed as having general application, it is inconsistent with long-standing and often reenacted provisions for federal punishment of Indians committing crimes against non-Indians; merely by showing that he had been punished according to tribal law, any Indian would be exempt from federal prosecution. There is certainly nothing in the history of the 1854 Act or its surroundings to indicate Congress intended that result.

If the 1854 Act is interpreted as a general exemption for all Indians subjected to tribal punishment for intra-Indian crimes, it is pure surplusage. The preceding clause exempts Indians from liquor sales crimes; the 1817 Indian-against-Indian exemption covers all general federal crimes. The only logical interpretation is that Congress meant what it said, i.e., section 20 of the 1834 Act should not be used to impose criminal liability on an Indian previously sanctioned by his

253. There is also nothing in the 1854 Act that indicates tribal punishment must have been through a court. Both contemporary and subsequent materials show that Congress was aware that tribal social controls did not include Anglo-American-type punishment for "crimes."

254. Assume that an arsonist's tribal law required the arsonist to replace a burned home and supply food to the offended family for the following year. If an Indian set fire to a non-Indian's home within Indian country and had been held responsible by his tribal elders for the traditional penalty, section 3 of the 1854 Act (as interpreted by the *Duro* dissent) precludes federal prosecution. That result/interpretation is rendered implausible by the fact that section 4 of the Act expressly makes such a crime by an Indian a federal felony punishable by no less than two years' imprisonment at hard labor. Act of Mar. 27, 1854, ch. 26, § 4, 10 Stat. 269, 270. Section 5 of the Act provides federal penalties for an Indian who assaults a white man with a deadly weapon. *Id.* § 5. If section 3 had the meaning ascribed in the *Duro* dissent, both sections 4 and 5 would have merely proscribed the crime, without regard to race.

own tribe. That was the precise and only problem Congress intended to, and did, address.

The subsequent history of the 1854 Act is anomalous. In 1862, Congress replaced section 20 of the 1834 Trade and Intercourse Act.²⁵⁵ Rather than stating only the amendments to be made, the 1862 Act set out the entire section (section 20), as amended. The 1862 Act did not include the 1854 proviso, which has been held to have had the effect of repealing the 1854 exception.²⁵⁶ When the United States Revised Code was compiled in the early 1870s, the compilers overlooked the 1862 amendment and included an exemption to the liquor sale prohibition for sales by Indians, based on the previously repealed 1854 enactment.²⁵⁷ To remedy that particular oversight, Congress amended the Revised Statute in 1877 to eliminate the 1854 Indian liquor-sale exemption.²⁵⁸ The end result of that series of amendments has been a double affirmation of an intention to repeal the Indian exemption to the liquor sales prohibition.²⁵⁹

The same compilers that overlooked the rather obvious meaning of the 1862 amendment incorporated the then-repealed 1854 Act into at least three different sections. The final part of the second clause of the 1854 Act, section 3 (providing exemption from liquor crimes for tribally punished Indians), was erroneously treated as if it applied to the first clause of that section. As codified, section 2146 of the Revised Statutes provided that section 2145 (the Federal Enclave Extension) did not apply to "any Indian committing any offense in Indian county who has been punished by the local law of the tribe . . ."²⁶⁰ The compilers left out the Indian-against-Indian exception, an action that could be used to infer that the codifiers believed both exceptions covered all crimes and one was surplusage. Congress dispelled any such inference; the 1817 exception was restored by an 1875 amendment to the Revised Statutes.²⁶¹

255. Act of Feb. 13, 1862, ch. 24, 12 Stat. 338. The same amendment procedure was used again in 1864, when the provision was amended to add federal circuit courts as potential trial courts. Act of Mar. 15, 1864, ch. 33, 13 Stat. 29. Neither amendment included the 1854 language exempting Indians punished by their tribe.

256. *United States v. Shaw-Mux*, 27 F. Cas. 1049, 1049-50 (D. Or. 1873); *see also* *United States v. Cowboy*, 694 F.2d 1228, 1236 (10th Cir. 1982).

257. *See* U.S. REV. STAT. § 2139 (1875 ed.), 18 Stat. 375 (part I).

258. Act of Feb. 27, 1877, ch. 69, 19 Stat. 240, 244 (to correct errors and omissions in the Revised Statutes).

259. *United States v. Cowboy*, 694 F.2d 1228, 1236 (10th Cir. 1982).

260. U.S. REV. STAT. § 2146 (1875 ed.), 18 Stat. 376 (part I). The repealed 1854 Act is specifically identified in the marginal notes as the source for this provision.

261. Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318 (correcting errors and omissions in the 1873 Act adopting the Revised Statutes). As amended in 1875, the Revised Statutes provided: "The preceding section [federal enclave jurisdiction] shall not be construed to extend to crimes committed by one Indian against the person or property of another

There is a dearth of case authority discussing the effect of the 1854 tribal-punishment provision, even though that provision has been carried forward into current statute.²⁶² That section's tribal-punishment provision was raised as a defense in *United States v. Sosseur*,²⁶³ where the Indian defendant was charged with a gambling violation. The Seventh Circuit held the provision inapplicable because the defendant had not been punished by the tribe and the tribe had no law prohibiting gambling.²⁶⁴ The tribal punishment exception was also discussed in *United States v. LaPlant*.²⁶⁵ In that case, the defendants had been charged with assault in tribal court and then in federal court. Despite some confusing procedures, the defendants had pled guilty in tribal court before they were formally charged in federal court. Responding to the defendants' motion to dismiss, the United States Attorney conceded that the federal charge constituted double jeopardy. In dictum, the Montana District Court stated that the tribal-punishment exception "alone would appear sufficient . . . to warrant dismissal . . . absent any question of double jeopardy."²⁶⁶ The existence of the exception was noted in *United States v. Wheeler*, but the prosecution there was under the Major Crimes Act, to which, the Court said, the 1854 exception does not apply.²⁶⁷ In *Wheeler*, the Court did not say to what crimes the tribal-punishment exception does apply, but the implication is that the exception's scope is much less pervasive than implied by the *Duro* dissent.

The same Congresses that allegedly acknowledged tribal authority over nonmembers via the tribal-punishment exception (mid-1850s through early 1870s) also dealt with individual tribes and nations in other ways. Within months after introducing and approving the 1854 Act, the Senate approved a number of treaties with Indians in the Oregon Territory. A treaty signed on the Rogue River in November, 1854, with the Chasta and other tribes provided:

They [the signatory tribes] also pledge themselves to live peaceably with one another, and with other Indians, to abstain from war and private acts of revenge, and to submit

Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . ." Act of Feb. 18, 1875, ch. 80, 18 (pt. 3) Stat. 316, 318, *codified at* U.S. REV. STAT. § 2146, at 374 (2d ed. 1878) (italicized portion added in 1875).

262. 18 U.S.C. § 1152 (1988).

263. 181 F.2d 873 (7th Cir. 1950).

264. *Id.* at 876.

265. 156 F. Supp. 660 (D. Mont. 1957).

266. *Id.* at 662.

267. *United States v. Wheeler*, 435 U.S. 313, 325 & n.22. (1978). The exception was also noted and passed over by the Ninth Circuit in the same case. *United States v. Wheeler*, 545 F.2d 1255 & n.1 (1976), *rev'd*, 435 U.S. 313 (1978).

all matters of difference between themselves and Indians of other tribes and bands to the decision of the United States or the agent and abide thereby.²⁶⁸

Treaties with the Umpquas and Calapooias, the Nisquallys, and the Willamette Indians all had similar provisions.²⁶⁹ If the agreement was violated, the United States was obligated to treat it as a depredation against a "citizen," i.e., by forcing the return of property taken or payment via deduction from the perpetrator's annuity.²⁷⁰ That type of provision was not limited to Pacific Northwest tribes. An 1855 treaty with the Minnesota Chippewa contained an essentially identical provision,²⁷¹ as did an 1857 treaty with the Nebraska Pawnee.²⁷² These provisions do not support the conclusion that the Senate assumed that the tribes had previously, peacefully, exercised criminal jurisdiction over nonmember offenders. The more rational inference, particularly in light of the continuing intertribal and interracial wars, is that the Senate was of the opinion that without these provisions, Indians would settle intertribal matters through personal revenge or war.

Even treaties with the Five Civilized Tribes imposed provisions for peaceable settlement of intertribal matters. In an 1856 treaty providing for removal of the Seminole from Florida to the Creek area of Indian Territory, specific provision was made for jurisdiction of Creek and

268. Treaty with the Chastas & Other Tribes, Nov. 18, 1854, art. 8, 10 Stat. 1122, 1123.

269. Treaty with Umpquas and Calapooias, Nov. 18, 1854, art. 8, 10 Stat. 1125, 1127; Treaty with the Nisquallys, Dec. 26, 1854, art. VIII, 10 Stat. 1132, 1134; Treaty with the Willamette Indians, Jan. 22, 1855, art. 6, 10 Stat. 1143, 1145.

270. See, e.g., Treaty with Umpquas and Calapooias, Nov. 18, 1854, art. 8, 10 Stat. 1125, 1127. The treaty provided: "And if any of the said Indians commit any depredations on any other Indians, the same rule shall prevail as that prescribed in this article in case of depredations against citizens." *Id.*

271. Treaty with the Chippewas, Feb. 22, 1855, art. IX, 10 Stat. 1165, 1169. The treaty provided:

The said bands of Indians, jointly and severally, obligate and bind themselves not to commit any depredations or wrong upon other Indians, or upon citizens of the United States; to conduct themselves at all times in a peaceable and orderly manner; to submit all difficulties between them and other Indians to the President, and to abide by his decision . . .

Id.

272. Treaty with the Four Confederate Bands of the Pawnee Indians, Sept. 24, 1857, art. V, 11 Stat. 729, 731. The treaty provided: "The Pawnees . . . promise to be friendly with all of the citizens [of the United States], and pledge themselves to commit no depredations on the property of such citizens, nor on that of any other person belonging to any tribe or nation at peace with the United States." *Id.* If the Pawnee failed to return any property taken in violation of those pledges, the United States was authorized to deduct the value from annuities. The Pawnee agreed to submit all intertribal disputes to the U.S. government or its agent for resolution. *Id.*

Seminole courts over civil matters involving members of the other tribe.²⁷³ Those provisions would have been unnecessary if tribes had inherent, recognized jurisdiction over nonmember Indians.

At the other end of the spectrum, treaties signed in 1865 with Northern plains tribes, not then compliant with federal authority, contained somewhat similar provisions, taking into consideration the different standing of the signatory tribes. For example, a series of treaties with various tribes of the Sioux Nation include the tribes' agreements to submit to federal officials all controversies with other tribes that involved the question of peace and war and to abide by the official's decision.²⁷⁴ In those same treaties, the United States agreed to protect the settled Indians "against any annoyance or molestation on the part of whites or Indians, as an inducement to settle in one location to become farmers"²⁷⁵ Those provisions may not indicate an absence of tribal jurisdiction over nonmember Indians. However, the inference is that federal officials (executive branch negotiators and senators) believed that intertribal matters were not settled by peaceful means, and federal intervention was necessary. Once the Indians settled as the federal officials desired, federal power was promised to protect the settled Indians from those who remained "uncivilized." The sincerity of that promise, at least in hindsight, may have left something to be desired, but there is no question that the undertaking is not

273. Treaty with Creeks and Seminoles, Aug. 7, 1856, art. XIII, 11 Stat. 699, 703.

The treaty provided:

The officers and people of each of the tribes of Creeks and Seminoles shall . . . have the right of safe conduct and free passage through the lands and territory of the other. The members of each shall have the right freely to settle within the country of the other, and shall thereupon be entitled to all the rights, privileges, and immunities of members thereof, except that no member of either tribe shall be entitled to participate in any funds belonging to the other tribe. Members of each tribe shall have the right to institute and prosecute suits in the courts of the other, under such regulations as may, from time to time, be prescribed by their respective legislatures.

Id. Article XIV provided for extradition when a member of one tribe fled to the country of the other to escape apprehension. *Id.*

274. See Treaty with the Blackfeet, Oct. 19, 1865, art. III, 14 Stat. 727, 727; Treaty with the Sans Arcs Indians, Oct. 20, 1865, art. III, 14 Stat. 731, 731; Treaty with the Yanktonai Indians, Oct. 20, 1865, art. III, 14 Stat. 735, 735; Treaty with the Onkpahpah Indians, Oct. 20, 1865, art. III, 14 Stat. 739, 739; Treaty with the Upper Yanktonais Indians, Oct. 28, 1865, art. III, 14 Stat. 743, 743; Treaty with the O'Gallala Indians, Oct. 28, 1865, art. III, 14 Stat. 747, 747.

275. See Treaty with the Blackfeet, Oct. 19, 1865, art. V, 14 Stat. 727, 727; Treaty with the Sans Arcs Indians, Oct. 19, 1865, art. V, 14 Stat. 731, 731; Treaty with the Yanktonai Indians, Oct. 20, 1865, art. V, 14 Stat. 735, 735; Treaty with the Onkpahpah Indians, Oct. 20, 1865, art. V, 14 Stat. 739, 739; Treaty with the Upper Yanktonais Indians, Oct. 28, 1865, art. V, 14 Stat. 743, 743; Treaty with the O'Gallala Indians, Oct. 28, 1865, art. V, 14 Stat. 747, 747.

based on tacit recognition of established tribal criminal jurisdiction over nonmember Indians.

Following the Civil War (in which some tribes, or parts of tribes, fought for the Confederacy), new treaties were negotiated with the Five Civilized Tribes. In these treaties, the tribes agreed to remain at peace with all other tribes, and the United States guaranteed protection against any hostilities of other tribes.²⁷⁶ More significantly for current purposes, the tribes agreed to the establishment of a general council in Indian Territory,²⁷⁷ quite similar to the government that was proposed in the rejected 1834 Western Territory bill. The treaties provided:

Said general council shall have the power to legislate upon all rightful subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in said territory; the arrest and extradition of criminals and offenders escaping from one tribe to another; the administration of justice between members of the several tribes of said territory, and persons other than Indians and members of said tribes or nations All laws enacted by said council shall take effect at such time as may therein be provided, unless suspended by the direction of the Secretary of the Interior or the President of the United States.²⁷⁸

The Superintendent of Indian Affairs was to preside over the council.²⁷⁹ Taken alone, the general council provisions are possibly ambiguous concerning the nature of the individual tribes' jurisdiction over nonmembers. However, when the provisions are read as a whole, the reasonable interpretation is that each tribe's internal laws applied only to its members and general council laws applied to intertribal crimes

276. See, e.g., Treaty with the Seminole Nation, Mar. 21, 1866, art. I, 14 Stat. 755, 756. Similar treaties were entered into with the other tribes. See, e.g., Treaty with the Choctaw and Chickasaw Indians, Apr. 28, 1866, 14 Stat. 769; Treaty with the Creek Nation, June 14, 1866, 14 Stat. 785; Treaty with the Cherokee Nation, July 19, 1866, 14 Stat. 799. One purpose of these treaties was to require the tribes to free their slaves and grant the former slaves full citizenship in their respective tribes. See, e.g., Treaty with the Seminole Nation, art. II, 14 Stat. at 756. Some of the slaves' descendants feel that they have not been granted the rights required by the treaties. See *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989).

277. See, e.g., Treaty with the Seminole Nation, Mar. 21, 1866, art. VII, 14 Stat. 755, 758. Similar treaties were entered into with the other tribes. See, e.g., Treaty with the Choctaw and Chickasaw Indians, Apr. 28, 1866, 14 Stat. 769; Treaty with the Creek Nation, June 14, 1866, 14 Stat. 785; Treaty with the Cherokee Nation, July 19, 1866, 14 Stat. 799.

278. See, e.g., Treaty with the Seminole Nation, art. VII, para. 3, 14 Stat. at 759. The council could not legislate "upon matters pertaining to the organization, laws, or customs of the several tribes, except as herein provided for." *Id.*

279. *Id.* para. 4.

and concerns. Again, these treaty provisions would have been unnecessary if the tribes had recognized, accepted jurisdiction over nonmember Indians.

In May, 1890, Congress adopted the Oklahoma Territory Enabling Act and delineated federal jurisdiction in the remaining Indian Territory.²⁸⁰ Limiting the jurisdiction of the United States District Court for the Indian Territory, Congress preserved tribal jurisdiction: "*Provided, however, That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties . . .*"²⁸¹ Further, Congress provided:

The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising *wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils . . .*²⁸²

The 1890 Congress apparently had no doubt that the tribes' criminal jurisdiction was limited to members; this act specifically dealt with the tribes considered the most advanced.

The next piece of congressional history discussed in *Oliphant*, *Wheeler*, and the *Duro* dissent is the 1885 Major Crimes Act²⁸³ (which subjects to federal prosecution specified Indian-against-Indian crimes, without regard to tribal membership or prior tribal sanction). The *Duro* dissent gives no indication of how the 1885 Act implies any congressional assumption or intent concerning intertribal crimes. The notorious *Ex*

280. Act of May 2, 1890, ch. 182, 26 Stat. 81 (subtitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in Indian Territory, and for other purposes").

281. *Id.* § 30, 26 Stat. at 94 (emphasis added).

282. *Id.* § 31, 26 Stat. at 96 (emphasis added). This provision could easily be understood as an embodiment of the existing general law concerning criminal jurisdiction in Indian country. It is not unreasonable to construe this provision as stating Congress' understanding, as of 1890, of the extent of inherent tribal jurisdiction.

283. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.

*parte Crow Dog*²⁸⁴ decision that most directly prompted the enactment involved an *intratribal* crime. The 1885 Act's history does, however, indicate congressional beliefs about tribal law. Subjecting an Indian who killed another Indian to tribal-law punishment was deemed inadequate by Congress and apparently a large number of other non-Indians. Based upon congressional²⁸⁵ and administrative²⁸⁶ pronouncements, Indian tribal-, family-, or clan-level retribution was unacceptably barbarous while federal government-level retribution was not.²⁸⁷

The House debate concerning the Major Crimes Act included discussion of why the provision was included in an appropriations bill rather than presented as a separate act. Rep. James Budd (D.-Cal.) stated that a similar appropriations-bill amendment was rejected in 1884 because it included misdemeanors, and it was understood that a felonies-only measure in the 1885 appropriations bill would be acceptable.²⁸⁸ Representative Budd's 1884 proposal read:

Any act which when done by a citizen of the United States would be a crime shall be, and is hereby, declared equally a crime when done by any Indian upon or belonging to any Indian reservation; and such Indian committing such crime shall be subject to the same jurisdiction and amenable to the same process that any citizen would be in like case.²⁸⁹

284. 109 U.S. 556 (1883).

285. See 16 CONG. REC. 934 (Jan. 22, 1885) (remarks of Rep. Cutcheon, sponsor of the amendment that became the Major Crimes Act).

Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that of the "blood-avenger" — that is, the next of kin to the person murdered — shall pursue the one who has been guilty of the crime and commit a new murder upon him.

. . . .

. . . If, however, an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.

Id.

286. See 1884 REPORT OF COMMISSIONER OF INDIAN AFFAIRS, HOUSE EXEC. DOC. NO. 1, 48th Cong., 2d Sess. 10-12 [hereinafter 1884 REPORT] (U.S. Ser. Set vol. 2287); 1883 REPORT OF COMMISSIONER OF INDIAN AFFAIRS, HOUSE EXEC. DOC. NO. 1, 48th Cong., 1st Sess. 7-10 [hereinafter 1883 REPORT] (U.S. Ser. Set vol. 2287).

287. If the objective of punishment is to cause the perpetrator suffering, one might question which is most effective. There is a dearth of objective evidence of suffering after execution.

288. 16 CONG. REC. 935 (1885) (remarks of Rep. Budd).

289. 15 CONG. REC. 2577 (1884). The same result could have been accomplished by repealing the exceptions to existing statutes. The proposal also provided: "[N]o Department or officer of the United States of America shall have or exercise power or authority to shield or protect such Indian criminal from just punishment, nor shall any money herein or hereby appropriated be used for that purpose or to that end." *Id.*

Upon the recommendation of the Senate Appropriations Committee (chaired by Sen. Henry L. Dawes (R.-Mass.)), Representative Budd's amendment was stricken, without comment or debate.²⁹⁰ In reply to the request for an explanation of why the 1884 proposal was rejected, Rep. E. John Ellis (D.-La.) stated:

The conference committee concurred in the general direction of the amendment It was their thought, as well as the thought of all good men, that the courts should be extended to the Indian not only for his punishment when he shall commit a crime, but for his protection

The Indian is not up to the standard of Anglo-American civilization. There are many little offenses which in civilization amount to crimes that are committed by Indians by long habit and by toleration among themselves. It was deemed that if this provision should pass as it is the Indian would very often be arrested for petty offenses, taken very far away from his reservation, and subjected to great hardships; and it would be seized upon by unscrupulous officers as a means of accumulating fees against the Government. It was agreed when the next bill shall be reported some effort shall be made in the direction of the amendment²⁹¹

The 1885 measure apparently made "adequate provision" by limiting the number of Indian-against-Indian crimes that were made subject to federal jurisdiction.

Rep. Byron M. Cutcheon (R.-Mich.) in charge of the 1885 measure, agreed to strike "aggravated assault and battery" from the crimes included because "[w]e already have among the Indians the court of Indian offenses for the punishment of trivial violations of the law. That court can take care of assault and battery."²⁹² Thus, between the

290. *Id.* at 4112. When the matter returned to the House, the conference committee report recommended concurrence with the Senate's action. *Id.* at 5800, 5802 (statement accompanying conference committee report). Discussing the recommendation, Representative Budd stated his reason for the 1884 proposal: "I offered it because on the Pacific coast and in the Territories when an Indian commits a crime he is corralled on his reservation and the courts can not punish him. Recently Judge Wingard sent some of these Indians back to the tribes for punishment." *Id.* (remarks of Rep. Budd). The provision concerning federal officers' exercising authority to "shield" Indians from punishment may have been a response to Judge Wingard's action.

291. *Id.* at 5802-03 (remarks of Rep. Ellis).

292. *Id.* at 934 (remarks of Rep. Cutcheon). A portion of the Commissioner of Indian Affairs' report to the same effect (minor crimes handled by the Court of Indian Offenses) was read by Representative Cutcheon. *Id.* at 935. Apparently, Representative Cutcheon assumed that the Courts of Indian Offenses (CFR courts) enforced something other than "the law of the tribe."

1884 and 1885 sessions, legislators provided at least three reasons for the exclusion of misdemeanors from the Major Crimes Act: (1) the hardship that would be occasioned for petty offenses that were not thought of as offenses within Indian tribes; (2) the increased opportunity for fraud against the federal government; and (3) the Department of the Interior's Court of Indian Offenses handled "trivial violations." An Indian tribe's ability to punish anyone — member, nonmember, or non-Indian — was never given as a reason for not enacting more inclusive legislation. If any underlying assumption can be implied from the 1884-1885 record, it is that Indian tribes did not exercise jurisdiction over any criminal acts, regardless of the perpetrator's identity.

C. Executive Department Legal Opinions Relating to Indian Country Criminal Jurisdiction

Oliphant cited Opinions of the Attorney General to show that the executive branch shared the presumption that tribes did not have jurisdiction over non-Indians.²⁹³ The Opinions of the Attorney General and the Opinions of the Solicitor of the Department of the Interior should not be considered in isolation from other events. Legal opinions are, obviously, only a small portion of the available record concerning executive branch positions on Indian affairs. Reports to Congress and treaties negotiated by executive branch officials reflect more fully that branch's perceptions and politico-legal position concerning Indian tribes and their perceived attributes. Those items are discussed in the preceding section in connection with related legislative action. The legal opinions are discussed separately here only because the Court opinions present them separately.

Following *Oliphant's* lead, the *Duro* dissent cited an 1883 Opinion of the Solicitor of the Department of the Interior which had been adopted as the United States Attorney General's Opinion.²⁹⁴ The Opinion was in response to an inquiry from the Secretary of the Interior concerning the murder of an Arapaho Indian by a Creek Indian on the Potawatomie reservation.²⁹⁵ The Secretary's inquiry specifically alluded to the Dakota territorial court decision in the *Crow Dog* case,²⁹⁶

293. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978) (citing 7 Op. Att'y Gen. 174 (1855); 2 Op. Att'y Gen. 693 (1834)). Later, the Court also cited a 1970 Opinion of the Solicitor of the Department of the Interior that reached a similar conclusion and noted that the opinion had been withdrawn without explanation or replacement. *Id.* at 201 & n.11 (citing *Criminal Jurisdiction of Indian Tribes over Non-Indians*, 77 Interior Dec. 113 (1970)).

294. *Duro v. Reina*, 495 U.S. 676, 704 n.2 (1990) (Brennan, J., dissenting).

295. *Crimes Committed by Indians*, 17 Op. Att'y Gen. 566, 566 (1883). Tribal names are spelled differently in the opinion, consistent with the contemporary usage, i.e., "Arrapahoe" and "Pottawatomie."

296. *United States v. Crow Dog*, 14 N.W. 437 (Dakota 1882).

which was subsequently overruled by the Supreme Court.²⁹⁷ The Secretary had proposed that the treaty term "bad men" included an Indian perpetrator, despite the statutory Indian-against-Indian exemption, an argument apparently accepted by the territorial courts in *Crow Dog*.²⁹⁸ The Attorney General disagreed and opined that United States courts did not have jurisdiction over the alleged murderer, despite the "outrageous character of the homicide."²⁹⁹

Of particular note is that the Potawatomie Tribe, within whose district the crime was committed, *had no law that covered this crime*, which was committed by an Indian not a member of the reservation tribe against another Indian, also not a member of the reservation tribe.³⁰⁰ This was the same situation as in *Duro*. Contrary to the implication in the *Duro* dissent, the Attorney General was not acting under the presumption that any tribe would or could govern intertribal crimes.³⁰¹ In the end, the Attorney General hinted rather broadly that, regardless of law to the contrary, the Secretary might undertake prosecution based upon the Dakota court's decision in *Crow Dog*, to mollify the community because of "the great outrage committed by

297. *Ex parte Crow Dog*, 109 U.S. 556 (1883). The Supreme Court's decision was issued six months after the Attorney General's Opinion and reached the same conclusion on much the same grounds.

298. See *United States v. Crow Dog*, 3 Dakota 106, 112 (1882) (published in abridged form at 14 N.W. 437). The Dakota court held that the Sioux treaties were specific and, therefore, controlled over the more general Indian-against-Indian exception to federal criminal jurisdiction. *Id.* Those treaties, the court held, obligated the United States to protect the signatory tribes against all "bad men" regardless of race. *Id.* at 113. Kan-Gi-Shun-Ga ("Crow Dog" in English) was a murderer and, therefore, a "bad man." The fact that the victim, Spotted Tail, was an important Sioux chief and had signed the relevant treaties was mentioned but not expressly given significance.

299. *Crimes Committed by Indians*, 17 Op. Att'y Gen. at 566.

300. *Id.* at 570; see also 1883 REPORT, *supra* note 286, at 9. The Commissioner's report also notes that neither the Cheyennes and Arapahos nor the Shawnees and "Pottawatomies" were members of the "compact" entered into among other tribes in Indian Territory in 1870.

301. Even the portion of the Attorney General's Opinion quoted in the dissent's footnote is not as positive as is implied. The attorney general was merely concluding that since the Potawatomie could not prosecute, the alleged murderer would have to be released unless one of the other tribes (Creek or Arapaho) could prove that he had violated one of their laws and that the tribe "having jurisdiction . . . according to general principles, and by forms substantially conformable to natural justice." *Crimes Committed by Indians*, 17 Op. Att'y Gen. at 570. Information which was no doubt available to the Solicitor of the Department of the Interior indicated that the Creek Nation *did not*, under its laws, have jurisdiction to prosecute because the crime was not committed within tribal territory. See 1883 REPORT, *supra* note 286, at 8-10. Additional information likely available to the Solicitor indicated that the Arapahos' attempt to take the perpetrator by force had been opposed by federal officials. If the Arapaho exercised recognized jurisdiction over intertribal crime, federal opposition to Arapaho efforts to capture the criminal and mete out justice would have been illegal.

the prisoner; one so well calculated to rouse and to render discontented the communities concerned therein."³⁰² The Attorney General was apparently certain that the perpetrator would go free (or be summarily executed by the Arapaho) if the federal government did not prosecute.

A second interesting factor is that the 1883 Attorney General's Opinion is directly contrary to an opinion apparently issued just two years earlier in the *Crow Dog* matter. In his argument before the Dakota territorial court, the United States Attorney relied, in part, on a letter of August 22, 1881, from the Secretary of the Interior advising him that the "bad men" clause of the Sioux treaties established federal jurisdiction over the murderer of Spotted Tail.³⁰³ According to the United States Attorney, the Secretary's opinion was supported by the United States Attorney General in a letter dated August 24, 1881.³⁰⁴ The 1883 Attorney General's Opinion does not mention the 1881 opinion, and the change in position is unexplained. One change that may have had some influence on the decision was that in 1882, the Department of the Interior had begun establishing Courts of Indian Offenses,³⁰⁵ but there is no particular reason to conclude that the Solicitor General had that in mind in 1883.

The *Duro* dissent mentioned the 1883 Attorney General's Opinion in a footnote concerning congressional intent: "Given the proximity of this incident to the *Crow Dog* incident, it is implausible to conclude that Congress did not consider the situation of intertribal crimes when passing the Major Crimes Act."³⁰⁶ Congress' attention was called to the situation discussed in the Attorney General's Opinion perhaps more frequently than was the *Crow Dog* opinion. The 1883 and 1884 reports of the Commissioner of Indian Affairs describe the incident in detail, including the Attorney General's Opinion and the situation's ultimate outcome.³⁰⁷ The dissent's assertion may be true, even though the House

302. Crimes Committed by Indians, 17 Op. Att'y Gen. at 570.

303. *United States v. Crow Dog*, 3 Dakota 106, 109 (1882) (editor's summary of argument for the United States).

304. *Id.*

305. See 1883 REPORT, *supra* note 286, at 10-11. Courts had been established, at least, at the Devils Lake Agency (now in North Dakota) and the Standing Rock Agency (now South Dakota) in 1882-83. See 1884 REPORT, *supra* note 286, at 7.

306. *Duro v. Reina*, 495 U.S. 676, 704 n.2 (1990) (Brennan, J., dissenting).

307. 1883 REPORT, *supra* note 286, at 8-10. Johnson Foster, a Creek Indian, shot and killed Robert Poisal, an Arapaho of the Cheyenne and Arapaho Reservation, within the Potawatomie Reservation. The areas reserved to those tribes were all in the Indian Territory (now Oklahoma), but not adjacent to each other. See FRANCIS P. PRUCHA, ATLAS OF AMERICAN INDIAN AFFAIRS map 60 (1990). Foster was caught by the Seminole Light Horse, taken to the Cheyenne and Arapaho Agency, and then turned over to military authorities at Fort Reno to protect him from threatened Arapaho "summary vengeance." As detailed by the Commissioner:

[T]he courts of the Creek Nation, to which nation the prisoner belonged,

discussion only mentions the *Crow Dog* matter.³⁰⁸ However, the statement is essentially a non sequitur because the Major Crimes Act imposed federal jurisdiction without regard to the perpetrator's or victim's tribal affiliation.

As detailed in the preceding section, eighteenth- and nineteenth-century federal officials most frequently characterized intertribal relations as war or bloody interpersonal revenge. It is possible to conclude that Indian tribes used that means to exercise jurisdiction over intertribal crimes. It is, however, doubtful that contemporary federal officials so viewed it, and there is nothing to the contrary in the 1883 Attorney General's Opinion. While in the Commissioner's 1884 report there is a hint of satisfaction with the result of intertribal revenge, federal officials took a great deal of effort and risk to prevent that type of action. None of that, including the death of a United States marshal, would have been necessary, or even appropriate, if the tribe's exercise of intertribal authority were acceptable to federal officials.

Duro takes the position that the executive branch's legal opinion on intertribal jurisdiction record is clearer for the period after the establishment of tribal courts under the IRA.³⁰⁹ That record, according to the majority, is somewhat ambiguous but tends to support the conclusion that the executive branch operated on the presumption that tribal courts had jurisdiction over only tribal members.³¹⁰ In a broader

were without jurisdiction, the murder having been committed outside the limits of their country; that the Absentee Shawnees and Pottawatomies, within whose boundaries the crime was committed, had no laws applicable to the case and that neither the Cheyennes and Arrapahoes nor the Absentee Shawnees and Pottawatomies were parties to the reciprocity compact

1883 REPORT, *supra* note 286, at 9. The department accepted the offer in the 1883 Attorney General's Opinion and requested that Foster be indicted for murder. In the meantime, Foster was removed from Fort Reno and taken to Fort Smith for trial on other federal charges. The U.S. Marshal was accompanied by a "strong force" of troops, who were required to fend off a group of Arapaho who tried to take Foster. Before the group reached Fort Smith, Foster "brutally murder[ed]" a deputy marshal (a white man) and escaped. At the time of the 1883 report, Foster was still at large, and the problem of federal jurisdiction had been removed by the second murder.

The final detail was added in the 1884 report: "[T]he Indians saved the Government all further trouble in the [Foster] matter by finally shooting the murderer down like a wild beast" 1884 REPORT, *supra* note 286, at 11.

308. See 16 CONG. REC. 934-36 (1885). After a conference committee on the Appropriations Act, to which the Major Crimes Act had been attached, the Senate approved the result, including the Major Crimes Act portion, without addressing that portion. The only discussion concerned the most appropriate way of handling the opening of Indian Territory to non-Indian homesteaders. 16 CONG. REC. 2466-68 (1885).

309. *Duro v. Reina*, 495 U.S. 676, 690-91 (1990).

310. *Id.*

context, the administrative record is less ambiguous than the *Duro* majority indicates.

In the late 1870s, the Department of the Interior began appointing "Indian police" at various reservations.³¹¹ Individuals were selected from the tribe to serve under the agent, not under tribal officials. The Indian police apprehended alleged transgressors and took them to the Indian agent for judgment. This method of law enforcement was tacitly approved by Congress' salary appropriations for these Indian police.³¹² In 1882, the department, by regulation, created the Courts of Indian Offenses, which, after appropriations were finally made to pay judges, were established on most reservations. Congress was aware of, and did not object to, the preparation and dissemination of the regulation.³¹³

In his 1885 report, the Commissioner of Indian Affairs sought appropriations to pay \$20 per month to judges so that they would not have to also work as Indian policemen (who were being paid) and to induce "the best and most intelligent of the Indians to serve."³¹⁴ The Commissioner was direct in his assessment of the purpose of and need for the Courts of Indian Offenses:

The policy of the Government for many years past has been to destroy the tribal relations as fast as possible, and to use every endeavor to bring the Indians under the influence of law. To do this the agents have been accustomed to punish for minor offenses, by imprisonment in the guard-house and by withholding rations; but by the present system [Court of Indian Offenses] the Indians themselves, through their judges, decide who are guilty of offenses under the rules, and pass judgment in accordance with the provisions thereof. Neither the section in the last Indian appropriations bill above quoted [the Major Crimes Act] nor any other enactment of Congress reaches any of the crimes or offenses provided for in the Department rules, and without such a

311. See generally WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES* (1966); cf. Law and Order — Dual Sovereignty — Powers of Indian Tribes and U.S., OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 891 (opinion dated Apr. 27, 1939).

312. See, e.g., Appropriation Act of May 27, 1878, ch. 142, 20 Stat. 63, 86.

313. See 1883 REPORT, *supra* note 286, at 10-11. The report states "[o]n the 10th of April last you gave your official approval to certain rules governing the 'court of Indian offenses,' prepared in this office in accordance with instructions contained in your letter of December 2 last." *Id.* Even though the "you" mentioned in the letter was apparently the Secretary of the Interior, the information was available to Congress and no objection was made.

314. 1885 REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 1, 49th Cong., 1st Sess. 23 (1885) (U.S. Ser. Set vol. 2379).

court many Indian reservations would be without law and order, and the laws of civilized life would be utterly disregarded.³¹⁵

The precise legal basis for the Courts of Indian Offenses has never been clearly established. In the 1888 case *United States v. Clapox*,³¹⁶ the United States District Court for Oregon stated:

These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the conditions of these dependent tribes to whom it sustains the relation of guardian.³¹⁷

Even though the initial regulations did not expressly limit jurisdiction to members of the local tribe,³¹⁸ federal administrative opinion (at least in the 1930s) was that jurisdiction was limited to members.³¹⁹

A 1939 Solicitor's Opinion³²⁰ (quoted essentially verbatim in the original *Cohen's Handbook of Federal Indian Law*³²¹ but not mentioned in either *Duro* opinion) emphasizes the essentially personal nature, as opposed to territorial nature, of Indian tribal authority. That opinion repeatedly characterizes tribal authority as a matter between a tribe and its members. A 1935 Solicitor's Opinion made a similar statement:

Courts of Indian Offenses are manifestations of the inherent power of the tribes *to govern their own members*. It has been the persistent program of Congress to leave crimes

315. *Id.* at 21.

316. 35 F. 575 (D. Or. 1888).

317. *Id.* at 577. The district court went on to state that "the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man." *Id.*

318. The 1904 regulations limited jurisdiction to Indians "belonging to the reservation." U.S. OFFICE OF INDIAN AFFAIRS, REGULATIONS OF THE INDIAN OFFICE §§ 584-591 (1904 ed.), quoted in OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 893 (opinion dated Apr. 27, 1939). Similar regulations were apparently adopted in 1884 and 1894. See Secretary's Power to Regulate Conduct of Indians, OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 531, 533 (opinion dated Feb. 28, 1935). Generally, there were no tribal membership rolls prior to the allotment acts (late 1890s through 1920s). Further research may show that "belonging to the reservation" had essentially the same meaning in 1884-1904 as "member of the reservation tribe" has presently.

319. See Solicitor's Opinions cited *infra* notes 320-25.

320. Law and Order — Dual Sovereignty — Powers of Indian Tribes and U.S., OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 891 (opinion dated Apr. 27, 1939).

321. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 359-62 (1941 ed.).

involving only Indians within the control of the tribes . . . and the authority of tribes to arrest, try and punish *their own members* has been beyond cavil.³²²

The same conclusion was reached in "Powers of Indian Tribes,"³²³ the Department of the Interior Opinion that laid the foundation for much of the Department's Indian program during the Reorganization Era and has been influential in the development of Indian law since its issuance. The *Duro* majority characterizes that opinion as "equivocal."³²⁴ Perhaps the textual discussion seems equivocal but the specific, repeated, express conclusions are not:

Under section 16 of the Wheeler-Howard Act (48 Stat. 984, 987) the "powers vested in any Indian tribe or tribal council by existing law" are those powers of local self-government which have never been terminated by law or waived by treaty. Among these powers are the following:

. . . .
8. To administer justice with respect to all disputes and offenses *of or among the members of the tribe*, other than the ten major crimes reserved to the Federal courts.³²⁵

These opinions, made at a crucial point in the development of modern Indian law, are essentially unequivocal. Perhaps the "equivocation" noted in the *Duro* decision is merely imprecise or indiscriminate word usage by different members of the executive branch.³²⁶

D. *The Problem of Tribal Civil Jurisdiction Over Nonmembers*

Duro states, as a basic rule, that an Indian tribe has authority only over its members. That is a practical, workable means of ascertaining whom a tribe can govern. However, that rule is not consistent with several prior decisions. If applied across the board, the membership-

322. Secretary's Power to Regulate Conduct of Indians, OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 531, 536 (opinion dated Feb. 28, 1935) (emphasis added) (citations omitted); see also Rosebud Sioux Tax Ordinance, OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 873, 875 (opinion dated Feb. 17, 1939) ("A practical means of enforcement [of the tribal tax ordinance] is particularly necessary since *nonmembers are not subject as involuntary defendants to the jurisdiction of the tribal court.*" (emphasis added)).

323. 55 Interior Dec. 14 (1934), *reprinted in* OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 445 (opinion dated Oct. 25, 1934).

324. *Duro v. Reina*, 851 F.2d 1136, 1140-41 (9th Cir. 1988), *cited in Duro v. Reina*, 495 U.S. 676, 682 (1990).

325. 55 Interior Dec. at 16-17, 65-66, *reprinted in* OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 446 (emphasis added).

326. The unequivocal Solicitor's Opinions were rendered by Solicitor Margold. The possibly ambiguous Solicitor's Opinions were rendered by Acting Solicitor Kirgis. Solicitor Margold was and is more well known for having expertise in federal Indian law.

only test effectively eliminates territory as a component of tribal authority. Prior cases acknowledge tribal civil jurisdiction over nonmembers. That presents a problem. If dealing with nonmembers is extrajurisdictional, how is civil jurisdiction over nonmembers possible? *Duro* attaches the members-only theory to consent, albeit consent implied from tribal membership. If tribal authority is established by consent, then persons other than members can give the requisite consent. The possibility of nonmember consent to tribal jurisdiction raises a question concerning the type and nature of the consent necessary.

One possibility, requiring express consent, would be inconsistent with implied consent through membership. Another possibility, consent implied from mere presence within a reservation has been rejected.³²⁷ From *Duro* and other decisions it can be inferred that a nonmember's voluntary contact with the tribe or tribal members is sufficient to establish tribal jurisdiction to some degree, i.e., gives some measure of implied consent.

The consent theory breaks down entirely if there is no consensual relationship of any sort. The Supreme Court has approved tribal civil jurisdiction in some situations that provide no basis for implied consent. Citing *Brendale*, *Duro* notes that tribes have nonconsensual civil authority when it is "vital to the maintenance of tribal integrity and self-determination."³²⁸ The "vital tribal interest" jurisdiction is presented as inherent in tribal sovereignty, not a power delegated by Congress.

Tribal authority, therefore, goes beyond consent in some instances. If the basic test is "vital tribal interests," precluding jurisdiction over nonmember criminals would seem to be an imposed restriction on tribal authority — one imposed by constitutional limitations on the federal government rather than by the inherent nature of tribal sovereignty. A basic test of "voluntary consent" more rationally explains *Duro's* limitation in criminal matters, but then "vital tribal interests" is an addition, and, in effect, a federal delegation, because it extends jurisdiction beyond the consent limitation. *Duro* provides little guidance in choosing which test is to be applied or has priority.

1. *The Foundations of the Tribal Civil Jurisdiction Corridor*

To reconcile the apparent conflict with civil-jurisdiction decisions, *Duro* gathers the decisions acknowledging tribal "external" civil jurisdiction into three categories:

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

328. *Duro v. Reina*, 495 U.S. 676, 688 (1990) (citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Reservation*, 492 U.S. 408 (1989)).

(1) judicial resolution of disputes involving nonmembers;³²⁹

(2) "areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination";³³⁰ and

(3) "situations arising from property ownership within the reservation or 'consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'"³³¹

The first category implies no limitation on tribal court jurisdiction over disputes involving nonmembers. However, the authorities cited merely recognize that the tribal court has the power to issue judgments even though non-Indians are parties. In practice, that category is a particular application of the consent theory. In *Williams v. Lee*,³³² the relevant tribal court (under the Navajo Tribal Code of the time) had authority over non-Indians only when they consented to that jurisdiction.³³³ Department of the Interior rules for CFR courts, the Department's Model Tribal Code, and many tribal statutes have similar limitations.³³⁴

329. *Id.* at 687 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978); *Williams v. Lee*, 358 U.S. 217, 223 (1959); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 253 (Rennard Strickland et al. eds., 1982)).

330. *Id.* at 688 (citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989)).

331. *Id.* (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

332. 358 U.S. 217 (1959).

333. In January, 1959, a few months before the *Williams v. Lee* decision, the Navajo Tribal Council adopted Resolution CJA-1-59, which adopted, as tribal law, the Department of the Interior regulations for CFR courts, 25 C.F.R. pt. 11, including § 11.22, which provided in part: "The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties." 25 C.F.R. § 22, quoted in *NAVAJO TRIB. CODE* tit. 7, § 253 note (1977). As of 1978, title 7, § 253(3) of the Navajo Tribal Code provided for tribal court jurisdiction over "[a]ll civil actions in which the defendant is an Indian and is found within its territorial jurisdiction." *NAVAJO TRIB. CODE* tit. 7, § 253(3) (1978). The Tribal Code was subsequently amended to provide civil jurisdiction over "[a]ll civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." *NAVAJO TRIB. CODE* tit. 7, § 253(2) (Supp. 1987). The tribe has had limited success in enforcing the final clause of § 253. See *UNC Resources v. Benally*, 514 F. Supp. 358 (D.N.M. 1981) (concerning one off-reservation radioactive accident with on-reservation consequences found too remote to support tribal court jurisdiction); *UNC Resources v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981) (same); see also *Swift Transp. Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982) (holding that U.S. Highway 89 right-of-way is not within tribal court jurisdiction despite assertion of jurisdiction in *NAVAJO TRIB. CODE* tit. 7, § 254 (1978 & Supp. 1987)), vacated as moot, 574 F. Supp. 710 (D. Ariz. 1983).

334. See 25 C.F.R. § 11.1 (1990) (originally adopted in 1935); *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986) (the Three Tribes' tribal code was amended after that litigation began to eliminate the non-Indian consent requirement). Nonconsensual

The third *Duro* category has two distinguishable subparts: consensual relationships and property ownership. The consensual subpart is consistent with a relatively long line of civil cases, primarily tax cases.³³⁵ The property ownership subpart, however, is accurate (and distinguishable from the zoning category) with respect to property on Indian land within the reservation. On non-Indian land within a reservation, tribal regulatory jurisdiction is governed by the "vital interests" language of the second category.³³⁶

The second category, "vital tribal interests," covers many situations that also involve tribal law enforcement interests. It is potentially of the greatest interest, particularly to tribal governments wishing to regulate all activities within the reservation. Civil regulation is a potential alternative to criminal regulation. The decisions supporting tribal jurisdiction over "vital tribal interests" are also the most difficult to reconcile with *Duro's* limitation in tribal criminal jurisdiction.

The seminal decision for nonconsensual civil regulation is *Montana v. United States*,³³⁷ which held that the Crow Tribe could not regulate

civil jurisdiction over nonmembers may not provide a meaningful remedy because of the difficulty in obtaining state court enforcement of a tribal court judgment. See generally *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986); *William V. Vetter, Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987).

335. *Merrion* upheld the tribe's power to tax natural resource extraction activities on leased tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). In *Colville*, the tribes' power to impose taxes on cigarette sales was essentially unquestioned and the sales involved transactions with the tribe or a tribal member. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 144-45 (1980). *Colville* stated that nonmembers and non-Indians held essentially identical relationships to the tribe for tax purposes. In each situation, the nonmember had voluntarily taken some action that placed her or him within the scope of tribal authority. *Id.* at 152-53.

336. See, e.g., *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981). If nothing else, the tribe can assert the rights of a landowner on tribal land. *Merrion*, 455 U.S. at 146 n.12.

Real property ownership within reservation boundaries is divided into two broad categories: (1) "fee" or "nontrust" land that has passed into non-Indian ownership as a result of the allotment acts or other legislation aimed at terminating Indian tribes as entities; and (2) "trust" or "Indian" lands owned by Indians, the tribe, or the United States in trust for Indian individuals or tribes. Regulation of activities on Indian lands is within tribal jurisdiction. Ownership or use of trust lands also generally entails some type of consensual relationship with Indian owners, a separate basis for jurisdiction. Use of nontrust lands, however, is subject to the "vital tribal interests" test. Therefore, the "ownership of property" part of the third category should be limited to Indian lands. The Court's recent decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683 (1992), may indicate a categorization for state tax property purposes based upon allotment and issuance of a fee patent, regardless of current ownership.

337. 450 U.S. 544 (1981).

hunting and fishing on nontrust land merely because the land is within reservation boundaries.³³⁸

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee [usually non-Indian] lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.³³⁹

Since *Montana*, there have been a number of decisions that considered the scope of tribal civil regulatory jurisdiction. The most recent Supreme Court decision involving that issue is *Brendale* which was cited by the *Duro* majority as authority for the second factor — “vital to the maintenance of tribal integrity and self-determination.”³⁴⁰ *Brendale* is not comfortable authority for any proposition.³⁴¹ That case engendered three opinions, none with a majority, disagreeing on the test for determining the extent of tribal zoning authority over nontrust land.³⁴² The *Brendale* language cited in *Duro* is from Justice White’s

338. *Id.* at 566.

339. *Id.* (citing *Fisher v. District Court*, 424 U.S. 382, 386 (1976)) (dealing with state infringement on tribal self-government when all parties to litigation are tribal members); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (holding state trial court jurisdiction over action against tribal member for debt incurred on reservation would interfere with tribal self-government); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-29 (1905) (holding indirect effect of state tax on non-Indian property does not interfere with vital tribal interests even though it has the effect of lessening funds potentially available for charitable assistance to tribe); *Thomas v. Gay*, 169 U.S. 264, 273 (1897) (holding indirect effect of state tax on lessee’s property does not interfere with vital tribal interest even though it may lessen amount tribe might receive from leasehold).

340. *Duro v. Reina*, 495 U.S. 676, 688 (1990) (citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Reservation*, 492 U.S. 408 (1989)).

341. *Brendale* involved a conflict between county and tribal zoning on two distinct parcels of fee land within the Yakima Reservation. One tract (*Brendale*’s) was within the “closed” area of the reservation, an area used almost exclusively for natural resource utilization, with a very small portion of nontrust land. The other tract (*Whiteside*’s) was near the edge of the reservation in an area with few resources (it overlooked the county airport) and a much lower portion of trust land. The tribe was found to have jurisdiction as to *Brendale*’s parcel but not as to *Whiteside*’s. That result was reached on the *Brendale* parcel by combining the opinion written by Justice White (joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) with the opinion written by Justice Stevens (joined by Justice O’Connor). The result on the *Whiteside* parcel was reached by combining the Stevens/O’Connor opinion with the one written by Justice Blackmun (joined by Justices Brennan and Marshall), a 4-2-3 split.

342. Justice Blackmun’s three-justice opinion is that the tribe has inherent authority to zone all land within its reservation, including non-Indian fee lands; only where the tribe has not exercised that power does the county have jurisdiction to zone and even that power does not reach lands held by or for Indians. *Brendale*, 492 U.S. at 448-68

four-justice opinion, which expressed tribal zoning jurisdiction most narrowly: A tribe has authority to preclude a particular use on non-Indian fee land only if that use adversely affected protected tribal interests.³⁴³ In addition, “[t]hat impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe.”³⁴⁴

While the *Brendale* split may inhibit reliance, previous decisions have enforced nonconsensual tribal civil regulation of nonmembers on fee lands. In *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen*,³⁴⁵ the tribe successfully defended its regulation of riparian rights appurtenant to non-fee lands abutting Flathead Lake, within the reservation. The Ninth Circuit found that the tribe’s lake-bed ownership generated considerable tribal funds; improper riparian development could adversely impact the lake and harm tribal economic and self-determination interests.³⁴⁶ In *Cardin v. De La Cruz*,³⁴⁷ the Quinault tribe successfully enforced its building, safety, and health regulations against a non-Indian grocery store owner even though the store was on nontrust land. In addition to the existence of a consensual relationship, the Ninth Circuit found that the alleged violations threatened the health and safety of tribal members.³⁴⁸

(Blackmun, J., dissenting). The White opinion and the Stevens opinion agree that a tribe’s power to zone non-Indian fee lands is limited but disagree on how that limitation should be phrased and its effect on the *Brendale* parcels. The Stevens two-justice opinion draws a line using a corollary to the tribe’s power to exclude: to the extent the tribe has managed to retain the “essential Indian character” of an area, zoning power is retained even though non-Indian fee lands may be included. *Id.* at 433-38. The “essential Indian character” of tribal lands is, apparently, measured by the extent to which the tribe’s power to exclude has not been taken away by federal statute or “surrendered” by the tribe. Just how the line is to be drawn remains quite unclear. White’s four-justice opinion is perhaps even less quantifiable than in the Stevens opinion and would have remanded the case for specific findings of fact concerning the precise impact of proposed development. *Id.* at 432-33.

343. *Id.* at 430-31.

344. *Id.* at 431.

345. 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982). The area in which the Namen’s property was located was primarily non-fee land. Namen’s was developed as a marina to take advantage of the large lake’s recreational values. Without the lake’s impact, *Namen* would probably not qualify for tribal regulation under two of the three *Brendale* opinions.

346. *Id.* at 964. But compare *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1905), and *Thomas v. Gay*, 169 U.S. 264 (1897), both cited in *Montana*, for the scope of direct impacts on tribal interests. Both held that state taxation of non-Indian, on-reservation activities only indirectly impacted the tribe, despite contentions that the taxation would lower the funds available for tribal purposes. See also *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980).

347. 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982).

348. *Id.* at 366.

*Babbitt Ford, Inc. v. Navajo Tribe*³⁴⁹ is closely related to tribal law enforcement. There, the Ninth Circuit sustained the tribe's enactment and enforcement of a civil ordinance controlling self-help repossessions on the reservation.³⁵⁰ The ordinance prohibited repossessions without permission of the debtor or the tribal court. Nonmember persons violating the ordinance were subject to exclusion from the reservation and liable for damages.³⁵¹ The Ninth Circuit found that the ordinance related to safety and peace on the reservation and was therefore enforceable against nonmembers, particularly because of the possibility of violence arising from a nonconsensual repossession.³⁵² While the decision does not indicate a need for a prior consensual relation before the regulation is enforceable, the Navajo statute was limited to repossession of a Navajo's property on land within the tribe's jurisdiction.³⁵³

In contrast, in *Swift Transportation v. John*³⁵⁴ the United States District Court for Arizona enjoined tribal members and officials from continuing a tort case in Navajo Tribal Court. A Swift employee was driving on United States Highway 89 within the boundaries of the Navajo Reservation when an accident occurred. The injured parties (John and others), members of the Navajo Tribe, brought suit for damages in Navajo Tribal Court. The district court held that tribal court jurisdiction could not be sustained under the "vital tribal interest" theory.³⁵⁵ The only interests served in this particular litigation

349. 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

350. *Id.* at 593-94.

351. If the reposessor were a Navajo, violation of the ordinance was a misdemeanor. The ordinance was apparently drafted with *Oliphant* in mind.

352. *Babbitt*, 710 F.2d at 593. *But see* UNC Resources v. Benally, 514 F. Supp. 358 (D.N.M. 1981) (holding invalid a Navajo ordinance granting tribal court jurisdiction over nonresidents whose action causes damage on the reservation); UNC Resources v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981) (same). In those cases, the damaging event (a radioactive "spill") occurred outside the reservation but caused damage to land and livestock within the reservation. The courts held that there was an insufficient connection between the reservation and the causative event to allow tribal jurisdiction.

353. *Babbitt*, 710 F.2d at 590 n.1 (quoting NAVAJO TRIB. CODE tit. 7, § 607 (1977)). The power to exclude was a secondary reason for the ordinance's validity.

354. 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (D. Ariz. 1983). The district court decision was appealed to the Ninth Circuit which, after determining the appeal was moot, remanded it to the district court which, in turn, vacated the injunction previously granted. Apparently, the parties settled while the appeal was pending. There is no indication in the reports that the district court's decision was found wanting in any particular.

355. *Id.* at 1193. The district court found that there was no consensual relationship between Swift and the tribe or tribal members. The court also found that the right-of-way for U.S. 89 was no longer part of the Navajo Reservation, as a result of the manner in which that right-of-way was acquired. On the consent issue, the district court found that merely driving within the reservation was insufficient, even though that

were those of the injured tribal members which, according to the district court, do not satisfy the *Montana* tribal-interests requirement.³⁵⁶

These pre-*Duro* cases show that tribes have *some* type of nonconsensual jurisdiction under *some* circumstances. It may, however, be limited, a la *Brendale*, to specific events or conditions that impose a high degree of risk to the tribe or its membership (as opposed to its individual members), and may also require a very cumbersome and

would be sufficient for a state's exercise of long-arm jurisdiction.

More in the way of minimum contacts is required for a tribal court to assert personal jurisdiction over non-Indians than is required for a state court to exercise long-arm jurisdiction over a non-resident. In addition, the ability of a state to require non-resident motorists to appear in state court is grounded primarily upon its power to exclude such motorists from highways within the state. As a result of the establishment of the right-of-way, there is no corresponding power in the Navajo Tribe to exclude non-members from U.S. Highway 89. Furthermore, if the Court were to accept defendants' contention that mere presence within reservation boundaries is enough to allow tribal court jurisdiction, there would be no need to consider *Montana's* threshold distinction between those reservation lands owned by Indians and those owned by non-Indians.

Id. (citations omitted). *But see* Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990) (holding highway right-of-way not withdrawn from reservation)

356. *Id.* The district court stated:

The Court of course understands that an automobile accident can have a "direct effect . . . on the economic security, or the health or welfare" of the individuals involved. Under this second portion of the [*Montana*] test, however, the focus is on the interests of the tribe rather than the interests of the individual members of the tribe. This distinction is reflected in the cases cited in *Montana*, as well as subsequent cases applying this aspect of the test. Limiting tribal court jurisdiction over non-Indians to cases involving a direct effect on the tribe itself is also consistent with *Montana's* "general proposition" that tribal powers do not extend to nonmembers.

Id. (citations omitted). The *Swift Transportation* decision concerning jurisdiction over non-Indian defendants is questionable. A number of tribes have enacted legislation that grants tribal courts nonconsensual jurisdiction over nonresidents. In *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986), the Supreme Court noted that the tribal code had been amended to grant that type of jurisdiction but made no comment on the propriety of its exercise. Providing a convenient judicial forum for its constituents would seem no less a fundamental power of government than the right to tax approved in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, there were also other factors, such as consensual relations with the tribe and utilization of tribal resources, that satisfy the *Montana* requirements.

It could also be argued that the *Swift Transportation* decision would allow the exercise of tribal jurisdiction if the tort occurred on tribal land, a geographic factor. Even if that argument were successful, the personal nature of tribal jurisdiction expressed in *Duro* may nullify any ground gained. There is nothing in *Duro* to indicate that a nonmember's status changes when she or he goes onto tribal or trust property. The nonmember's activity in *Swift Transportation* (driving through the reservation) is qualitatively and quantitatively different from the hunting and fishing discussed in *Montana*. If tribal ownership of the highway right-of-way supported tribal jurisdiction, the implied-consent-by-presence theory would be revitalized.

uncertain case-by-case analysis. It is not yet possible to say that if the "vital interests" test is an exception to a jurisdiction-by-consent rule, or vice versa. In a 1992 decision involving the same tribe as in *Brendale*,³⁵⁷ the Court characterized *Brendale* as involving a "proposed extension of a tribe's inherent powers," suggesting that the vital interests test is an exception to a consent rule.³⁵⁸

2. The "Political" Nature of Indian Tribes

Neither *Duro* opinion directly addresses the juridical nature or composition of Indian tribes.³⁵⁹ While both opinions discuss, at length, the "inherent sovereignty" aspects of *Oliphant* and *Wheeler*, the political-entity theory supporting decisions such as *Morton v. Mancari*,³⁶⁰ *United States v. Antelope*,³⁶¹ and *Moe v. Confederated Salish & Kootenai Tribes*³⁶² (not discussed in either opinion) is germane.

As stated in *United States v. Mazurie*,³⁶³ Indian tribes are "unique aggregations possessing attributes of sovereignty both over their members and their territory . . . [They] are a good deal more than 'private, voluntary organizations.'"³⁶⁴ To avoid equal protection problems, federal enactments deal with members of political entities rather than with members of a racial group.³⁶⁵ Federal criminal statutes relating specifically to Indians apply not because of the defendant's racial identity but because of his or her membership in a federally recognized Indian tribe.³⁶⁶ As noted in these decisions, "Indian" must be considered a

357. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683 (1992).

358. *Id.* at 692.

359. The majority opinion is necessarily based on tribes' political nature. The dissent's discussion treats "Indians" as a unitary group, which could be either political or racial.

360. 417 U.S. 535 (1974).

361. 430 U.S. 641 (1977).

362. 425 U.S. 463 (1976).

363. 419 U.S. 544 (1975).

364. *Id.* at 557, quoted with approval in *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

365. See, e.g., *United States v. Antelope*, 430 U.S. 641 (1977); *Fisher v. District Court*, 424 U.S. 382, 390 (1976); *Morton v. Mancari*, 417 U.S. 535, 552-54 (1974).

366. *Antelope*, 430 U.S. at 646. If a tribe is officially "terminated," its prior members are no longer subject to federal jurisdiction under the Major Crimes Act. *Id.* at 646-47 & n.7 (citing *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974)). However, in *Antelope*, the Court noted that two circuit courts have held that persons of Indian ancestry who lived on a reservation and maintained a tribal relation with the reservation's Indians were subject to the Major Crimes Act, even though they were not members of any tribe. *Id.* (citing *Ex parte Pero*, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939); *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) (dicta), vacated on other grounds, 421 U.S. 944 (1975)). In *Antelope*, the Court expressly declined any opinion on that issue since the defendants were enrolled members of a recognized tribe.

political classification to avoid wholesale invalidation of federal statutes that treat "Indians" differently from all others.³⁶⁷

The historic actions of Congress and the executive branch in dealing with Indians send mixed messages. A great mass of legislation is directed toward specific tribes as entities, e.g., appropriations and allotment acts. However, other legislation treats all Indians as a class, without regard to tribal affiliation. The statutes concerning criminal jurisdiction most often belong to this latter group. The Trade and Intercourse Acts and amendments, from 1790 forward, and other acts specifically addressing federal criminal jurisdiction (such as the Major Crimes Act) refer to "Indian" and "Indian country," not to "tribal members." When establishing the statutory basis of the federal-Indian relationship (as opposed to treaty-related matters), it does not appear that the responsible persons questioned whether "Indian" was a political or a racial category. The verbal records identify Indians as a racial group, an identification that appears to have needed no explanation.³⁶⁸

An 1843 Attorney General Opinion may point toward a political identification of "Indian." The Secretary of War had inquired concerning federal court jurisdiction over Mr. Lovely Rogers,³⁶⁹ who had allegedly participated in the murder of the Cherokee Nation Treasurer, David Vance.³⁷⁰ Rogers reportedly had "Cherokee blood in his veins" but was a citizen of Georgia, under Georgia law. Rogers resided in the Cherokee Nation as a trader. The Attorney General first referred to the Indian-against-Indian exception in section 25 of the 1834 Trade and Intercourse Act and stated that the section "would have furnished

367. *See Morton*, 417 U.S. at 552:

Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

See also Moe, 425 U.S. at 480 (quoting the above passage with approval).

368. *See, e.g., United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) (cited by both *Duro* opinions, 495 U.S. at 694 (majority), and 495 U.S. at 703, 706 (dissent)); *United States v. Kagama*, 118 U.S. 375 (1886) (cited by the *Duro* dissent, 495 U.S. at 703). *See supra* part III.A. At the same time, it must be remembered that the equal protection clause did not appear in the Constitution until the end of the Civil War, long after the basic statutes had been enacted.

369. Rogers was apparently a popular surname in the Indian Territory during the 1840s. Lovely Rogers was the accused murderer in the Attorney General's Opinion, J.K. Rogers was the accuser in the same opinion, and William S. Rogers was the accused murderer in *United States v. Rogers*, 45 U.S. (4 How.) 200 (1845).

370. Jurisdiction of United States Courts over the Case of Rogers, 4 Op. Att'y Gen. 258 (Oct. 9, 1843).

the rule applicable to Mr. Rogers.”³⁷¹ He then stated that the Treaty of New Echota “essentially changed this rule.”³⁷² Article 5 of the treaty provided that Cherokee Nation laws could not apply to United States citizens residing in the Nation with tribal permission. The Attorney General concluded:

It is very clear, under this treaty, that citizens of the United States residing in Indian country by permission, cannot be made subject to the laws enacted by the Cherokee councils — the jurisdiction over them [United States citizens] belonging to the courts of the United States, under the act of 1834.³⁷³

At least the Attorney General was of the opinion that “citizen” and “Indian” were mutually exclusive political categories; a Georgia citizen could not be treated as an Indian, regardless of his Indian blood.

If “Indian” is a political classification, the next problem is identifying the political group.³⁷⁴ In the earlier treaties, the United States dealt with various self-identified Indian groups as separate political entities. In some later treaties, such as the Stevens treaties of the 1850s, smaller groups, perhaps ethnologically and socially related, were combined to effectively create a “tribe” that did not previously exist.³⁷⁵ The IRA also could have the effect of combining tribal groups into a single political entity.³⁷⁶ Similarly, a single ethnological group has been

371. *Id.* at 259.

372. *Id.*

373. *Id.*

374. *See, e.g.*, *United States v. Rickart*, 188 U.S. 432 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866). *But cf.* *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). The Court has engaged in defining “Indian” on occasion and has used less than commendable logic. *See United States v. Joseph*, 94 U.S. 614 (1877), *rev’d by United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Sandoval*, 231 U.S. 28 (1913). These later opinions considered if Pueblo members were “Indians” and based their conclusions on very derogatory, ethnocentric descriptions of what constituted “Indianness.”

375. *See Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 664 n.5 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 192 (1978); *United States v. Washington*, 520 F.2d 676, 682 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (determining if the different Indian groups were Indian tribes for treaty fishing rights purposes). These combinations were probably more for administrative convenience than any other reason.

376. Where two or more tribes are assigned to a single reservation, the IRA allowed both consolidated organization as a single “tribe” and organization as separate, ethnic tribes. Indian Reorganization Act of 1934, ch. 576, § 19, 48 Stat. 984, 988 (codified at 25 U.S.C. § 479 (1988)) (“any Indian tribe, organized band, pueblo, or the Indians residing on one reservation”); *see also* Wheeler-Howard Act — Interpretation, OP.

divided into two or more "tribes" through congressional action or treaty.³⁷⁷ Several tribes became divided into smaller "tribes" when some members remained behind as when the majority was removed westward.³⁷⁸ However, for political existence, it is not absolutely necessary that a group receive formal federal recognition so long as there is an identifiable group with the racial and social characteristics generally attributed to an Indian tribe.³⁷⁹ The only unifying characteristic of these variously created groups is their recognition, by federal officials, as a distinct group.

*United States v. Kagama*³⁸⁰ is the significant statement of the legal status of Indians in the late nineteenth century. In *Kagama*, the Court considered the 1885 Major Crimes Act in the context of a crime committed by an Indian against another Indian of the same tribe on their tribe's reservation. Defining the United States-Indian relationship, the Court said:

They [Indian tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations³⁸¹

Notably, *Kagama* speaks of "a separate people" (a political term), not a "race."

If "Indian" is a political classification and the basic political unit is the "tribe," the earliest federal Indian law decisions require the conclusion reached in *Duro*. A person has the legal-political status of "Indian" only in relation to a particular tribe. Therefore, insofar as any tribe is concerned, the world is divided into two political, juridical groups: members and nonmembers.

SOLIC. DEP'T INTERIOR, *supra* note 140, at 484, 489 (opinion dated Dec. 13, 1934):

The right to organize is not restricted to the collective group of tribes, where more than one tribe is located on a reservation. Thus, any one of several such tribes or bands . . . may organize under section 16 [25 U.S.C. § 476], on its own behalf, without securing the consent of other Indians residing on the same reservation.

377. See Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 (dividing the Great Sioux Reservation into seven separate reservations).

378. See *United States v. John*, 437 U.S. 634 (1978) (Choctaws); *United States v. Boyd*, 83 F. 547 (4th Cir. 1897) (Cherokee).

379. See *Montoya v. United States*, 180 U.S. 261 (1901); *Mashapee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

380. 118 U.S. 375 (1886).

381. *Id.* at 381-82.

3. *Personal Nature of Tribal Jurisdiction*

Duro fixes an *in personam*-type boundary for tribal criminal jurisdiction. While such a boundary may be somewhat inconsistent with modern advocacy, it is consistent with precedent and the political nature of tribes. In the Supreme Court's first Indian law case, *Fletcher v. Peck*,³⁸² Justice Johnson, concurring, stated: "All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."³⁸³ While the language is somewhat awkward or archaic, its meaning is clear. The European powers prevented Indian nations from imposing their authority on anyone but their own people.³⁸⁴ Considering tribal authority as personal is also consistent with modern criminal and civil cases, although those cases do not use those specific terms. In *Antelope*, the defendants' *personal* affiliation with the reservation tribe was pivotal.³⁸⁵

In *Cherokee Nation v. Georgia*,³⁸⁶ Justice Johnson, again concurring, stated:

[The Cherokee Tribe's] condition is something like that of the Israelites when inhabiting the deserts. Though without land that they can call theirs in the sense of property, *their right of personal self-government* has never been taken from them; and such a form of government may exist, though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. And such they certainly do possess; it has

382. 10 U.S. (6 Cranch) 87 (1810).

383. *Id.* at 147 (Johnson, J., concurring). The statement was quoted in part and used as authority in *Montana v. United States*, 450 U.S. 544, 565 (1981), the current primary referent for determining tribal civil jurisdiction over nonmembers, and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), the current primary referent denying tribal criminal jurisdiction over non-Indians.

384. The quoted language itself may not make it clear that Justice Johnson was speaking to tribal units; his preceding discussion does. Justice Johnson expressly distinguished between different tribal groups, contrasting those that have "totally extinguished their national fire" and those, such as the tribes "to the west of Georgia," that "retain a limited sovereignty, and the absolute proprietorship of their soil." *Fletcher*, 10 U.S. (6 Cranch) at 146. It would be a very strained construction to argue that Justice Johnson was speaking of an Indian tribe's authority to govern all Indians, regardless of tribal membership.

385. *United States v. Antelope*, 430 U.S. 641, 646 & n.7 (1977).

386. 30 U.S. (5 Pet.) 1 (1831).

never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty, except as to their land and trade.³⁸⁷

Justice Johnson's concurring statements are not inconsistent with the other Justices' statements concerning the nature of tribal sovereignty. *Oliphant* quotes Justice Johnson's concurrence in *Fletcher* as a basis for the lack of tribal jurisdiction over non-Indian persons;³⁸⁸ *Wheeler* cites the same source as authority for the proposition that Indian tribes' jurisdiction is limited,³⁸⁹ the inference being that jurisdiction is limited to particular persons.

In 1845, Chief Justice Taney, speaking for a unanimous Court in *United States v. Rogers*,³⁹⁰ distinguished between "Indian" as a racial group and a person's membership in a particular tribe. Rogers, a white man, was charged with murdering another white man within Cherokee Nation territory. Rogers contended that because both he and his alleged victim were adopted members of the Cherokee Nation, he was exempt from federal prosecution under the Indian-against-Indian exception in the 1834 Trade and Intercourse Act. Ruling against that contention, the Court stated that the 1834 Act's exemption "does not speak of members of a tribe, but of the race generally — of the family of Indians. . . ."³⁹¹ Rogers did not, the Court held, become an Indian by

387. *Id.* at 27 (Johnson, J., concurring) (emphasis added). Justice Johnson's assertions concerning the remaining power of Indian tribes, such as the power to depart and retain their governments, seems somewhat divorced from contemporary reality. The underlying cause of the case before the Court was Georgia's (and the federal administration's) clear, express desire to force the Cherokee and other tribes to leave their homeland to occupy land west of the Mississippi River, where they would be obligated to remain. Perhaps Justice Johnson equated the Cherokees' moving west of the Mississippi with "departing." Even though the United States claimed sovereignty to the new area, the removal treaties generally "guaranteed" that those areas would never be made part of a state, contrary to the situation at their eastern locations. Departing to any other location would have required displacement of other indigenous peoples, as well as the Spanish or British who there claimed sovereignty. Justice Johnson may have overlooked the practical consequences of a decision to move. The Israelites, with whom Justice Johnson compared Indians, reputedly experienced considerable difficulty when they arrived at their chosen location. The Israelites established their new homes, again reputedly, only with significant outside help.

388. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (quoting *Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring)).

389. *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (citing *Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring)).

390. 45 U.S. (4 How.) 567 (1845).

391. *Id.* at 572. The result in *Rogers*, specifically on this issue was later changed by a treaty between the Cherokee Nation and the United States. See Treaty with the Cherokee Nation, July 19, 1866, 14 Stat. 799. Article 13 of that treaty allocated to tribal courts exclusive jurisdiction over civil and criminal cases in which *only tribal members, including adopted members*, were parties. *Id.* § 13, 14 Stat. at 803. That

being adopted into the tribe.³⁹² However, the Court also made it clear that Rogers' consent to adoption into the tribe made him amenable to tribal law and possibly entitled to tribal privileges.³⁹³ Therefore, even when "Indian" was treated as a racial classification for federal jurisdiction, tribal authority applied to tribal members, without regard to race.³⁹⁴

The personal nature of tribal jurisdiction has, at times, been recognized with respect to tribal criminal jurisdiction. Congress has consistently held tribes responsible for members' extraterritorial acts. If an Indian committed a crime subject to federal jurisdiction under the Trade and Intercourse Acts, tribes were required to deliver the perpetrator to federal officials or have the victim's losses deducted from the tribe's treaty payments.³⁹⁵ Congress may have merely intended to employ tribal social pressure to discourage raiding, but it is more probable that Congress acted on the presumption that the tribes could take official action against members who committed crimes outside the tribe's territorial jurisdiction.

provision was quite likely the result of the treaty requirement that the Indians' slaves be freed and given tribal membership, rather than any desire that the tribe have jurisdiction over white men. (Another possibly significant factor was the belief that a large portion of the white residents of tribal lands were Southern sympathizers.) Similar provision was made in the Act establishing a temporary government for the Territory of Oklahoma. Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94. Had Rogers committed his murder a few years later, he may have been subject to tribal, not federal, jurisdiction. See *Nofire v. United States*, 164 U.S. 657 (1897); *Alberty v. United States*, 162 U.S. 499 (1896).

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

393. *Id.* at 573.

394. *But see supra* notes 370-73. The 1990-91 congressional advocacy conveniently overlooks this rather obvious distinction in *Rogers*. See *infra* part IV.

395. Such a provision, derived from the 1834 Act, is part of today's code, 25 U.S.C. § 229 (1988). The provision states:

If any Indian, belonging to any tribe in amity with the United States . . . shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy . . . property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant . . . may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall . . . make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper . . . to obtain satisfaction for the injury.

Id. The current explanatory notes to section 229 indicate that this section is based on section 17 of the 1834 Trade and Intercourse Act (Act of June 30, 1834, ch. 161, § 17, 4 Stat. 731).

A 1939 memorandum by the Solicitor of the Department of the Interior details the basis of tribal court jurisdiction.³⁹⁶ The memorandum addressed various questions concerning the power of tribal courts and police to enforce tribal law if the crime or the perpetrator were not on restricted land within reservation boundaries. The Solicitor emphasized repeatedly the *personal* nature of tribal government:

If, on the other hand, the Indian courts [i.e., CFR courts] are viewed as tribal courts, deriving their power from the unextinguished fragments of tribal sovereignty, it must be recognized that *this sovereignty is primarily a personal rather than a territorial sovereignty*. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons.³⁹⁷

And:

That the original sovereignty of an Indian tribe extended to the punishment of a member by the proper tribal officers for depredations or other forms of misconduct committed outside the territory of the tribe cannot be challenged. Certainly *we cannot read into the laws and customs of the Indian tribes a principle of territoriality of jurisdiction with which they are totally unfamiliar*, and which no country has adopted as an absolute rule. That Indian tribes friendly to the United States acted to punish their members for depredations committed against whites outside of the Indian country is a matter of historical record.³⁹⁸

Current Department of the Interior regulations, in a limited situation, authorize tribal prosecution of members' off-reservation crimes. The Court of Indian Offenses of the Hopi Reservation is authorized to hear cases involving members who violate Hopi laws which expressly apply to off-reservation activities.³⁹⁹

396. Law and Order — Dual Sovereignty — Powers of Indian Tribes and U.S., Op. SOLIC. DEP'T INTERIOR, *supra* note 140, at 891 (opinion dated Apr. 27, 1939). The discussion dealt with jurisdiction of both tribal courts and CFR courts but took the position that there was no significant difference between those courts' jurisdiction, particularly where the Court of Indian Offenses was understood as exercising the criminal jurisdiction of the tribe. For some reason, this analysis is not among those mentioned in *Duro*.

397. *Id.* at 894 (emphasis added).

398. *Id.* at 896 (emphasis added).

399. 25 C.F.R. § 11.2(a) (1990). The regulation states:

A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38 through 11.87H, when committed by any Indian, within the reservation or reservations for which the court is established,

In *Settler v. Lameer*,⁴⁰⁰ two members of the Yakima Indian Nation challenged the tribe's authority to prosecute them for off-reservation fishing violations. The Ninth Circuit held that there was nothing in the relevant treaty that surrendered the tribe's right to regulate members' fishing activities, even if those activities took place off the reservation.⁴⁰¹ The Ninth Circuit made a similar ruling in the civil context. *Littell v. Nakai*⁴⁰² involved a dispute between two Navajo officials. The court held that the dispute was within the exclusive jurisdiction of tribal court, even though some of the alleged activities took place outside the reservation.⁴⁰³

In the civil jurisdiction context, *Montana v. United States*,⁴⁰⁴ citing *Wheeler* (a criminal context), held that tribal self-government powers involve only relations among the individual members of the tribe.⁴⁰⁵ *Washington v. Confederated Tribes of Colville Indian Reservation*⁴⁰⁶ held that for state taxation purposes, nonmember Indians have the same status as non-Indians.⁴⁰⁷ Justice Rehnquist's separate opinion in *Colville*, concurring with the majority's conclusions concerning non-member Indians, stated:

[T]he doctrine of sovereign immunity traditionally recognized by this Court derived from the sovereign relationship

provided that such court on the Hopi Reservation shall also have jurisdiction to enforce against members of the tribe within the Hopi Reservation the ordinances passed by the Hopi tribal council which prohibit offenses against the peace and welfare of the tribe committed by such members off the reservation.

Id. (emphasis added) In contrast to *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), this regulation appears to limit enforcement authority (arrest) to the geographic boundaries of the reservation.

400. 507 F.2d 231 (9th Cir. 1974).

401. *Id.* at 237. The Ninth Circuit held, however, that the tribe's authority to physically arrest a violator was limited to the "usual and accustomed" fishing places. *Id.* at 238-39. The Ninth Circuit noted that modern conditions required the power of off-reservation arrest. If arrest powers were limited to the reservation, member-violators could avoid the tribe's regulatory power by merely staying off the reservation; the defendants in *Settler* were not reservation residents. *Cf.* *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded on other grounds* 623 F.2d 448 (6th Cir. 1980); Note, *Indian Law — Tribal Off-Reservation Jurisdiction*, 1975 WIS. L. REV. 1221.

402. 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).

403. *Id.* at 490. The Ninth Circuit stated: "We do not read *Williams* [v. Lee, 358 U.S. 217 (1959)] as holding the locus of some particular act as conclusive." *Id.* at 490.

404. 450 U.S. 544 (1981).

405. *Id.* at 564-66 (citing *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978)).

406. 447 U.S. 134 (1980).

407. *Id.* at 158.

between a tribe and its members . . . Immunities [from state jurisdiction] which have formed the backdrop for this Court's pre-emption analysis have been those derived from these precepts. This form of immunity, and the principles which underlie it, are simply inapplicable to the recognition of a tax immunity for an individual who resides on a reservation, but is not a member of the tribe . . . *The fact that a nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share.*⁴⁰⁸

Decisions that affirm tribal civil authority over nonmembers are not inconsistent with this personal nature of tribal authority. The *Montana* decision recognizes tribal jurisdiction beyond tribal membership but limits that jurisdiction to persons having a consensual relationship with the tribe or whose personal acts have or threatened a direct effect on tribal interests.⁴⁰⁹ In *Merrion v. Jicarilla Apache Tribe*,⁴¹⁰ the Court held that a tribe's power to tax nonmembers comes into being only when the nonmember engages in on-reservation trade or other activity to which the tribe can attach a tax.⁴¹¹ Justice Stevens' dissent in *Merrion* emphasized the limitations on tribal authority over nonmembers, citing particularly the portions of *Oliphant* and *Montana* noted above.⁴¹² Presaging a major component in the *Duro* decision, Justice Stevens stated: "The tribe's authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that '[i]n this Nation each sovereign governs only with the consent of the governed.'" ⁴¹³

The personal nature of tribal authority also has an impact on federal delegation of jurisdiction to states. In *United States v. Burland*,⁴¹⁴ the Ninth Circuit addressed the contention that Montana obtained jurisdiction over all individual members of the Confederated Salish and Kootenai tribes when Montana assumed Public Law 280 jurisdiction

408. *Id.* at 186-87 (Rehnquist, J., concurring in part, dissenting in part) (citations omitted) (emphasis added).

409. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

410. 455 U.S. 130 (1981).

411. *Id.* at 140.

412. *Id.* at 171-73 (Stevens, J., dissenting). Chief Justice Burger and Justice Rehnquist joined in Justice Stevens' dissent.

413. *Id.* at 172-73 (Stevens, J., dissenting) (quoting *Nevada v. Hall*, 440 U.S. 410, 426 (1978)).

414. 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971).

over the Flathead Reservation.⁴¹⁵ The Ninth Circuit concluded: "Congress was aware of the difference between ceding jurisdiction to the states in terms of subject matter and territory and ceding such jurisdiction in terms of persons. When Congress provided for the latter it did so subject to a variety of specific conditions not present in Public Law 280."⁴¹⁶ The Ninth Circuit's conclusions are consistent with the primarily territorial nature of federal and state jurisdiction and the contrasting, primarily personal, nature of tribal jurisdiction.

The personal nature of tribal authority is a conceptual problem for persons trained or raised in the common law. The European concepts of state political jurisdiction that were being developed before and during the conquest of the Americas were inextricably tied to concepts based upon or derived from the legal protection of land ownership, i.e., territory. Native Americans did not, as a rule, have similar concepts of land ownership. That was one of the primary reasons Europeans considered Native Americans uncivilized and living in a state of nature. Indian tribes apparently did consider specific areas as tribal domain and conducted wars to prevent other tribes' incursions or to conquer other tribes' domain. However, the European consensus was that tribal interest in territory was not European-type ownership, but control of resource utilization.⁴¹⁷ Attributing European nation-state concepts of territorial jurisdiction to pre-Columbian Indian tribes (and many other indigenous people) was inappropriate because individual ownership of land or its resources was incompatible with most tribal philosophies and most pre-Columbian social patterns. However, only a territorial concept of sovereignty/jurisdiction can support a government's general jurisdiction over persons not consensually associated with that nation. In this respect, the *Duro* decision may conform more to historic theory than to contemporary reality.⁴¹⁸

4. *Drawing the Line Between Civil and Criminal Jurisdiction*

Duro makes the distinction between "civil" and "criminal" very significant for tribal jurisdiction purposes. In most situations not

415. State jurisdiction over the Flathead Reservation was obtained under Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Pub. L. No. 83-280), when Montana, by statute, obligated itself to assume federal jurisdiction over that reservation.

416. *Burland*, 441 F.2d at 1203.

417. A recognition of European-type land ownership by natives might have created a roadblock for Europeans desiring sovereign "rights" in the Americas. The European ideological connection between land title and the power to govern precluded recognition of Indian fee title and contemporaneous claims of European sovereignty. By categorizing Indian real property interests as temporary uses, European sovereignty without actual possession was ideologically acceptable, just as the medieval duke retained authority despite his serfs' temporary possession.

418. If tribal governments were limited to their pre-Columbian sphere, there would be no tribal courts, no jails, no criminal statutes to be enforced. Modern tribal governments would not, *per se*, exist.

related to Indians, it is not necessary to determine if a regulation is "civil" or "criminal." Many regulatory laws include penalties of various types. For instance, a zoning code may allow an agency to issue administrative orders or a court to assess civil monetary penalties and, ultimately, criminal sanctions. There is no need to characterize all or part of the zoning code as civil or criminal if the enacting jurisdiction has the power to impose both types of penalty. When a question does arise, usually the fundamental problem is procedural, i.e., whether criminal law procedures have to be followed before imposing a particular penalty. In contrast, after *Duro*, determining whether a particular tribal ordinance is civil or criminal is a jurisdictional issue. If criminal, the ordinance is not enforceable against nonmembers; if civil, the ordinance might be enforceable against nonmembers.

Because of the uniqueness of the question, there is not a great number of relevant cases. However, in federal Indian law, there is a line of potentially analogous cases — those dealing with a state's jurisdiction under Public Law 280.⁴¹⁹ Public Law 280 was enacted in 1953 as part of a congressional program to terminate the federal-Indian relationship (which included the legal "termination" of some tribes). Public Law 280 delegated federal criminal and civil jurisdiction with respect to Indians to specified states and authorized all other states to assume the same jurisdiction.⁴²⁰ In *Bryan v. Itasca County*,⁴²¹ the Supreme Court held that while Public Law 280 delegated broad criminal jurisdiction over reservation Indians, it did not delegate the same degree of civil jurisdiction.⁴²² The civil delegation, the Court held, did not include general civil regulatory or taxing authority.⁴²³ As a result, when a state attempts to exercise authority within a reservation under the aegis of Public Law 280, the first question is whether the state law to be applied is criminal or civil.

The decisions dealing with that issue frequently involve a state's attempt to impose its gambling laws on reservation-based Indian gambling operations (frequently bingo). Based upon the civil-criminal dichotomy in *Bryan*, the cases distinguish between "criminal/prohibitory" laws and "civil/regulatory" laws.⁴²⁴ If the state's intent is to prohibit

419. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Pub. L. No. 83-280) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)).

420. *Id.*

421. 426 U.S. 373 (1976). In *Bryan*, a Minnesota county levied its personal property taxes on a mobil home owned and occupied by a reservation Indian. The Court held the tax impermissible, despite the fact that Minnesota was one of the mandatory Public Law 280 states. *Id.* at 390.

422. *Id.* at 390.

423. *Id.*

424. See, e.g., *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); see also *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

a category of conduct entirely (e.g., murder), the statute is "criminal/prohibitory" and is enforceable on reservations. If the law permits an activity, subject to regulation (e.g., operating mobile home parks), then it is "civil/regulatory" and not enforceable on reservations.⁴²⁵ The civil/regulatory, criminal/prohibitory dichotomy was approved, with minor qualification, by the Supreme Court in *California v. Cabazon Band of Mission Indians*.⁴²⁶ The Court specifically said that the prohibitory/regulatory distinction is consistent with *Bryan's* construction of Public Law 280, but that it is not a "bright line" rule.⁴²⁷ The Court also stated: "But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280."⁴²⁸ To determine if the law is "civil" or "criminal" requires an examination of more than the particular statutory section involved. The section's place in related state law and the general intent of that broader law is important. In *Cabazon*, the Court noted a broad spectrum of California law concerning gambling, including the state lottery, parimutuel horse-race betting, card rooms, and bingo. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."⁴²⁹

The civil-criminal dichotomy has also been applied in the Federal Assimilative Crimes Act⁴³⁰ setting. In *Pueblo of Santa Anna v. Hodel*,⁴³¹ the District Court for the District of Columbia considered the application of New Mexico anti-gambling laws to a proposed racetrack within the Pueblo. The court found that New Mexico statutes evidenced a strong state policy against gambling, but there

425. *Id.*; see also *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

426. 480 U.S. 202 (1987).

427. *Id.* at 210.

428. *Id.* The Court went on to discuss whether California could impose its gambling laws on reservation Indians under the normal, non-Public Law 280 preemption rules. *Id.* The Court held that California's bingo laws were preempted because of the significant tribal and federal interests in tribal self-sufficiency and the minimal state interest in preventing infiltration of organized crime (of which there was no real evidence). *Id.* at 221-22. To the same effect, see *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding that both state gambling regulations and state sales taxes were an impermissible imposition on tribal autonomy).

429. *Cabazon*, 480 U.S. at 211.

430. 18 U.S.C. § 13 (1988). The Act applies to federal enclaves and Indian reservations and incorporates local state criminal law to fill any gaps in federal criminal law.

431. 663 F. Supp. 1300 (D.D.C. 1987).

was a detailed exception for parimutuel gambling on horse races.⁴³² Because of that exception, the court found that the New Mexico horse racing statutes were civil/regulatory, and therefore not a state "criminal" law for Assimilative Crimes Act purposes.⁴³³ However, the court also found that the general anti-gambling laws were criminal/prohibitory for all other types of gambling.⁴³⁴ Therefore, the prohibition of dog racing was a crime for Assimilative Crimes Act purposes.⁴³⁵

These cases do not directly consider the line between permissible tribal civil regulation of nonmembers and impermissible application of tribal criminal laws to nonmembers. However, there is no particular reason why the same considerations should not apply, and any ambiguity resolved in favor of tribal authority.⁴³⁶ A tribe may not be able to impose criminal sanctions on nonmembers, but that should not prevent the tribe from the imposing of civil sanctions so long as a sufficient tribal interest is identified and the statutory scheme is regulatory, not prohibitory.

IV. The Congress's New Corridor

Duro spurred activity in Congress, and legislation was enacted purporting to nullify the decision. The original 1990 enactment emulated a venerable tradition, i.e., burying significant Indian-related enactments in apparently irrelevant legislation. In fact, the 1990 legislation improved on prior levels of burial.⁴³⁷ Ascribing any leg-

432. *Id.* at 1313.

433. *Id.*

434. *Id.* at 1314.

435. *Id.*; see also *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977) (holding that Washington State fireworks laws were criminal/prohibitory for Assimilative Crimes Act purposes, even though limited fireworks sales were permitted).

436. In *Pueblo of Santa Anna v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987), the court noted that the civil-criminal dichotomy was applied to protect tribal autonomy from undue state interference. In the Public Law 280 or Assimilative Crimes Act setting, that purpose would counsel in favor of finding a state statute civil and, therefore, not applicable to reservation matters. In the tribal jurisdiction setting, that purpose would counsel finding the tribal regulation civil and, therefore, applicable to nonmembers.

437. The 1990 legislation was initially presented as subsections added to a minor section of the massive (over \$290 million) FY 1991 Defense Department Appropriations Bill (S. 3189, 101st Cong., 2d Sess. § 8070(b), (c) (1990)), severely stretching any relevance requirement. The Senate measure was an amendment, by way of substitution, to the original House bill (H.R. 5803, 101st Cong., 2d Sess. (1990)). Sen. Daniel Inouye (D-Haw.) later indicated that he personally added the amendment to the appropriations bill because of the urgency of the matter and the approaching end of the session. See 137 CONG. REC. S5223 (daily ed. Apr. 25, 1991). It apparently took five months for the matter to become urgent. Senator Inouye was the Chairman of the Select Committee on Indian Affairs and of the Defense Department Appropriations Subcommittee. Sub-

islative intent to the enactment would require elevating form over substance to a level where objective reality is ignored. Because of the legislation to which the amendment was attached, the press to rush that bill through Congress, and the fact that the tribal jurisdiction amendment was only mentioned in a massive conference report (filed essentially contemporaneously with passage), it is unlikely that more than a handful of members were aware of the amendment's existence. It is even more unlikely that anyone, in the face of the Gulf War crisis and the desire to end the congressional session, would have prevented the passage of Defense Department appropriations just to consider or prevent inclusion of the amendment.⁴³⁸

The only mention made of the Indian jurisdiction amendments was in the conference report. The report alleged that the Supreme Court had "reversed" 200 years of tribal misdemeanor jurisdiction over nonmembers, creating a "jurisdictional void"; that Congress had never denied the power of tribes to prosecute nonmember Indians; and that the measure was presented strictly as a stopgap until "Congress is able to enact comprehensive legislation addressing the con-

section 8070(a), the provision to which the amendment was attached, did have something to do with the Defense Department; it reserved \$8 million for programs under section 504 of the Indian Financing Act of 1974, 25 U.S.C. § 1544 (1988). Not only did the appropriations bill have normally controversial items, such as money for the B-2 bomber, the Seawolf submarine, and the "advanced tactical fighter" development program, it also dealt with national and international aspects of the Gulf War.

If that did not present sufficient obscurity, the measure was presented on an expedited basis and legislators urged not to present amendments. See H.R. Res. 529, 101st Cong., 2d Sess. (1990), 136 CONG. REC. H11,733 (daily ed. Oct. 25, 1990); 136 CONG. REC. S16,735 (daily ed. Oct. 26, 1990) (remarks of Sen. Stevens). The Senate Appropriations Subcommittee report introducing the bill did not address the *Duro* addition (§ 8070), nor did anyone participating in the floor debate. The Senate bill was passed as a substitute for the House version, and the matter was referred to a conference committee. The conference committee report (H.R. REP. No. 938, 101st Cong., 1st Sess. (1990)) was filed in the House near midnight on Wednesday, October 24 (136 CONG. REC. H13,556 (daily ed. Oct. 24, 1990)), and symbolically in the Senate on Friday, October 26, (136 CONG. REC. S17,034 (daily ed. Oct. 25, 1990)). There was a substantial reaction in the House, primarily because the ultimate committee meeting included only three people, was late at night at an obscure location, and the ranking minority House member was not invited. See 136 CONG. REC. H13,406 (daily ed. Oct. 24, 1990) (remarks of Rep. Dickinson). The conference report was over 1700 pages long and weighed 14.5 pounds. See 136 CONG. REC. H13,505 (Oct. 24, 1990) (remarks of Rep. Solomon). Nevertheless, the House approved the conference report on Thursday afternoon (136 CONG. REC. H11,736 (daily ed. Oct. 25, 1990)), and the Senate approved it late Friday (136 CONG. REC. D1425, S16,768-69, S17,005-35 (daily ed. Oct. 26, 1990)).

438. Sen. Patrick Leahy (D-Vt.), who expressed serious reservations about items such as the increase in authority to mobilize reserves and the \$200 million for full-scale development of the Advanced Tactical Fighter, nevertheless stated: "On balance this bill has so many important items that we need[] at this time that I will vote 'yes' despite these reservations." 136 CONG. REC. S16,766 (daily ed. Oct. 26, 1990).

ditions.”⁴³⁹ No citations were given to support the assertions concerning the alleged congressional recognition of tribal authority. A number of other assertions of “fact” in the report were, at best, glib advocacy.

The 1990 legislation amended a portion of the ICRA to read as follows (the added language is in italics):

Section 1301. Definitions

For purposes of this subchapter [25 U.S.C. §§ 1301-03], the term-

(1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and *means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;*

(3) “Indian court” means any Indian tribal court or court of Indian offense; and

(4) “Indian” *means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.*⁴⁴⁰

The conference committee added a provision for automatic expiration, on September 30, 1991,⁴⁴¹ “based upon” the intent of the relevant congressional committees to “develop more comprehensive legislation within the coming year to clarify the intent of the Congress on the issue of tribal power to exercise criminal misdemeanor jurisdiction over Indians.”⁴⁴²

On February 19, 1991, Rep. Bill Richardson (D.-N.M.) introduced a bill that merely deleted the sunset provision, i.e., made the 1990 amendments permanent.⁴⁴³ The text of the bill stated its purpose as “[t]o make permanent the legislative reinstatement, following the decision of Duro against Reina (58 U.S.L.W., May 29, 1990), of the power of Indian tribes to exercise criminal jurisdiction over Indi-

439. CONFERENCE REPORT ON H.R. 5803, H.R. REP. NO. 938, 101st Cong., 1st Sess., 136 CONG. REC. H13,556, H13,596 (daily ed. Oct. 24, 1990).

440. 25 U.S.C. § 1301 (1988 & Supp. II 1990) (as amended by Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990)).

441. Pub. L. No. 101-511, § 8077(d), 104 Stat. 1856, 1892-93 (1990).

442. H.R. REP. NO. 938, *supra* note 439.

443. H.R. 972, 101st Cong., 2d Sess., 137 CONG. REC. H1849 (daily ed. Feb. 19, 1991).

ans.”⁴⁴⁴ Representative Richardson’s reasons for introducing the bill, presented in writing solely for the record, echo the conference report’s reasons for the 1990 amendments, albeit more advocatorily — and also without citation to any authority.⁴⁴⁵

Following a committee hearing,⁴⁴⁶ the measure passed the House on an expedited basis.⁴⁴⁷ The measure’s language, the on-floor advocacy, and the report reveal that the 1990 comprehensive study commitment was avoided.⁴⁴⁸ The bill’s only action was to repeal the sunset provision. Just as in 1990, to obtain passage, promoters of the bill promised that concerns raised at the hearing (e.g., inadequacy of tribal courts, lack of meaningful remedy for ICRA violations) would be addressed in subsequent proceedings.

Both 1991 House Report 61 and the bill’s advocates make some valid policy arguments.⁴⁴⁹ However, the “historical precedents” and

444. *Id.*

445. See 137 CONG. REC. E511 (daily ed. Feb. 19, 1991) (extended remarks of Rep. Richardson).

446. *Hearing [Apr. 11, 1991] on H.R. 972 Before Subcomm. on Indian Affairs of House Comm. on Interior & Insular Affairs*, 102d Cong., 1st Sess. (1991).

447. See 137 CONG. REC. H2988 (daily ed. May 14, 1991). A brief report was submitted as part of the expedited consideration. H.R. REP. NO. 61, 102d Cong., 2d Sess., 137 CONG. REC. H2990-92 (daily ed. May 14, 1991). Reports requested from the Department of the Interior and the Department of Justice were not available at the time the measure was presented for expedited House consideration. *Id.* at H2992.

448. In an argument designed to trigger a primal reaction in congresspersons, advocates repeatedly said the proposal would save the federal government \$10 million. See, e.g., 137 CONG. REC. H2988 (daily ed. May 14, 1991) (remarks of Rep. Miller); *id.* (remarks of Rep. Rhodes); *id.* at H2990 (remarks of Rep. Richardson); H.R. REP. NO. 61, 101st Cong., 2d Sess., 137 CONG. REC. H2992 (daily ed. May 14, 1991) (cost and budget compliance statement). The allegedly supporting document filed at the time of the House discussion was a letter from the Congressional Budget Office (CBO) that indicated that if the federal government had to establish part-time CFR courts at all reservations, it would cost “about \$10 million” annually. Letter from Robert D. Reischauer, Director, Congressional Budget Office, to Hon. George Miller, House Comm. on Interior & Insular Affairs (May 1, 1991), in 136 CONG. REC. H2990 (daily ed. May 14, 1991). The letter also said that such a comprehensive effort was unlikely and that more likely actions (such as joint tribal judge-CFR judge appointments, tribal-federal contracts, or establishment of fewer CFR courts) would be less costly. While the letter said the proposed enactment might preclude the need for additional appropriations, the advocates implied that current appropriations would be reduced by the enactment. Causing a decrease and not requiring an increase are significantly different actions. The proponents’ financial argument is rather ironic in light of those same persons’ advocacy of tribal court enhancement bills that call for appropriations of over \$50 million annually. See *infra* note 459.

449. However, even some of the policy arguments are questionable. In his advocacy, Representative Richardson stated: “The Third District of New Mexico [Representative Richardson’s district] alone there are Navajo, Apache, Ute, and Hopi Indians, as well as 19 different Indian pueblos, *all culturally* and geographically *very close to one another*.” 137 CONG. REC. H2889 (daily ed. May 14, 1991). The long-standing tensions between the Navajo and Hopi tribes has been before Congress frequently.

the assertions of prior congressional recognition and approval are pure advocacy, inconsistent with the historic record.⁴⁵⁰ The only recognition of the Supreme Court's rationale in *Duro* is the proponent's repeated assertions that the 1991 enactments do not create tribal jurisdiction but merely "clarify" and/or "confirm" an inherent tribal power to punish nonmember Indian misdemeanants. For example, the 1990 Conference Report, reproduced in the 1991 House Report, stated: "Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member [sic] Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members."⁴⁵¹ Even if one grants accuracy to that dubious characterization of congressional history, the statement is misleading; it is equally true that Congress has never questioned the jurisdiction of the United States Marines over Antarctic penguins. Proving that a question was never asked does not prove a particular answer to that question; lack of denial does not prove affirmation.

On April 25, 1991, Senator Inouye introduced two bills relating to *Duro*. The first, Senate Bill 962, was the same as House Bill 972, but more terse. The second, Senate Bill 963, ignored the 1990 amendment but contained essentially identical language, without the sunset provision.⁴⁵² Senate Bill 963 also contained "findings" and "policy" statements similar to the earlier advocacy statements and expressing a congressional policy to provide funding for tribal courts equivalent to comparable state courts and to extend full faith and credit for tribal court judgments.⁴⁵³ Senator Inouye's "extended remarks" introducing the bills were essentially the same as those made in the House and Senate on previous occasions.⁴⁵⁴ "Oversight" hearings

450. See *supra* parts III.B, III.C.

451. HOUSE SUBCOMM. ON INDIAN AFFAIRS, COMM. ON INTERIOR & INSULAR AFFAIRS, REPORT ON H.R. 972, H.R. REP. 61, 102d Cong., 1st Sess. 5 (1991), 137 CONG. REC. H2990-91 (daily ed. May 14, 1991) (quoting DEFENSE APPROPRIATIONS CONF. COMM. H.R. REP. 938, 101st Cong., 2d Sess. 133 (1990)).

452. 137 CONG. REC. S5136 (daily ed. Apr. 25, 1991).

453. *Id.* The effect of these policy statements, if any, is questionable. If no funds were directly appropriated, the measure had a better chance of passage, but it could have been contested because it establishes a federal "policy" that would logically require later appropriations. On the full faith and credit issue, the language proposed may be rather toothless. It does not amend the current full faith and credit implementing statute (28 U.S.C. § 1738 (1988)) and, therefore, does not require states to honor the "policy." That provision is also inherently biased because even if implemented, it would not require tribal courts to grant the same status to state decisions. See generally William V. Vetter, *Of Tribal Courts and "Territories" - Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987).

454. 137 CONG. REC. S5223 (daily ed. Apr. 25, 1991) (extended remarks of Sen. Inouye).

were held by the Senate committee on May 9, 1991,⁴⁵⁵ and June 6, 1991.⁴⁵⁶

On-the-record action did not resume until near the September 30th deadline. Apparently accompanied by much behind-the-scene negotiations, the deadline was extended for eighteen days⁴⁵⁷ and then eliminated.⁴⁵⁸ The language adopted in the FY 1991 Defense Department Appropriation Bill became permanent. Again, passage was gained through commitments to study and address civil rights concerns, apparently including the perceived unfairness of an Indian not being able to appeal from tribal court decisions.⁴⁵⁹

455. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing on S. 962, S. 963 Before the Senate Select Comm. on Indian Affairs*, Senate Hearing 158, pt. 1, 102d Cong., 1st Sess. (1991).

456. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing on S. 962, S. 963 Before the Senate Select Comm. on Indian Affairs*, Senate Hearing 158, pt. 2, 102d Cong., 1st Sess. (1991).

457. Pub. L. No. 102-124, 105 Stat. 616 (1991). A 31-day extension was introduced in and passed by the Senate (S. 1773), but the period was reduced to 18 days by the House, to which the Senate acceded. The Senate had previously proposed a two-year extension. See SENATE SELECT COMM. ON INDIAN AFFAIRS, CONFERENCE REPORT TO ACCOMPANY H.R. 972, S. REP. NO. 153, 102d Cong., 1st Sess., 136 CONG. REC. S13,327 (daily ed. Sept. 19, 1991). This was apparently a compromise with committee members who wanted to tie "resolution" of the perceived *Duro* problem with perceived problems affecting individual rights in tribal courts, including federal review in civil cases. *Id.* The House refused to agree to that limitation.

458. Pub. L. No. 102-137, 105 Stat. 646 (1991).

459. As expressed by Sen. Slade Gorton (R.-Wash.): "[W]e have an agreement to fully examine the issue of tribal sovereignty, tribal courts, and Federal review of Indian civil rights claims from the chairman of the select committee, Senator Inouye." 137 CONG. REC. S14,930-31 (daily ed. Oct. 17, 1991); see also CONFERENCE REPORT ON H.R. 972, POWER OF INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER INDIANS, H.R. REP. NO. 261, 102d Cong., 1st Sess. (1991), 137 CONG. REC. H8131 (daily ed. Oct. 22, 1991). Earlier, Senator Gorton had linked permanent extension to a resolution of civil rights concerns. See 137 CONG. REC. S13,470 (daily ed. Sept. 23, 1991). Apparently, an additional concern was the definition of "Indians" over whom the tribes were being allowed to "continue" exercising jurisdiction. See S. REP. NO. 153, 102d Cong., 1st Sess. (1991).

Senator Inouye stated that his proposals would not grant tribal courts jurisdiction over persons who are racially Indian but are not considered, or who do not consider themselves, Indian (137 CONG. REC. S5224 (daily ed. Apr. 25, 1991)). The enactment limits tribal jurisdiction to persons who are "Indian" for federal jurisdictional purposes. There is no express requirement that the defendant "Indian" have any tribal connection whatever. However, Senate Report 153 indicates that as a matter of practice, tribal membership is the touchstone for federal prosecutions and a non-enrolled person contending he or she is an Indian would have the burden of proof.

In a process that overlapped debate on the anti-*Duro* legislation, a number of hearings have been held on various proposals aimed at improving tribal courts. In part, the proposals have taken the position that adequately funded tribal courts are the answer to all problems concerning civil rights violations. Toward that end, appropriations exceeding \$50 million have been proposed. See S. 1752, 102d Cong., 2d Sess. (1992),

The anti-*Duro* legislation has at least two significant, interrelated problems. The most fundamental is the misinterpretation of *Duro*. Comments supporting the 1990 conference committee report and the 1991 bills assume the theory underlying *Duro* is that Indian tribes have plenary sovereign power except where expressly and specifically denied by Congress.⁴⁶⁰ That is not *Duro's*, or *Oliphant's*, premise. The 1990-91 legislation is based upon a theory of inherent tribal sovereignty that was rejected in *Duro*. Indirectly, that is tacitly acknowledged by Senator Inouye's remarks introducing his 1991 bills, where he included a lengthy quotation from the *Duro* dissent's opinion.⁴⁶¹

The Court's actual basis in *Duro* is that the tribes' "inherent," "dependent" sovereignty, without more, precludes exercising independent "external relations," *without express delegation from Congress*.⁴⁶² That Congress may not have "denied" tribal jurisdiction over nonmembers is a non sequitur. *Duro* is founded on the fundamental nature of Indian sovereignty, as refined during the sixteenth through eighteenth centuries. Chief Justice John Marshall's seminal opinions (and the other Justices' opinions in the early cases) are not based upon specific congressional action or inaction. Neither is *Duro*. Congressional advocates assume that federal law equated tribal authority with European-state sovereignty of the 1700s. Those assertions are not consistent with beliefs actually expressed in historic Congresses. The Court has consistently held that inherent tribal authority is something different, with particular emphasis on external relations.

Duro and other cases divide potential tribal authority into "internal" and "external" categories. Congressional silence has opposite results in those categories. On "internal" matters, congressional silence means the tribe has retained powers. On "external" matters, congressional silence means the tribe has received no delegated authority.

reprinted in SENATE SELECT COMM. ON INDIAN AFFAIRS, PROVIDING FOR THE DEVELOPMENT, ENHANCEMENT, AND RECOGNITION OF INDIAN TRIBAL COURTS, S. REP. 314, 102d Cong., 2d Sess. (1992).

460. See 137 CONG. REC. S5223 (daily ed. Apr. 25, 1991) (remarks of Sen. Inouye) ("Tribal Governments retain all powers of self-government except those which have been explicitly divested by Congress. Congress has never acted to divest tribal government of this authority."). Senator Inouye's words represented a major argument of the respondents and all amici (including the United States) in *Duro*. The Court's decision rejects that argument. See also *House Subcomm. on Indian Affairs, Comm. on Interior & Insular Affairs*, H.R. REP. NO. 61, 102d Cong., 1st Sess., 137 CONG. REC. H2990, H2991 (daily ed. May 14, 1991).

461. See 137 CONG. REC. S5224 (daily ed. Apr. 25, 1991). Senator Inouye quotes the dissent's history discussion, which is not an adequate survey of congressional activities, as demonstrated in *supra* part III.

462. A cogent argument can be made that *Oliphant* has a similar basis. See *supra* part III.A.

Despite its fragile underpinnings, the 1990-91 legislation had to be based upon some theory of inherent tribal authority. That need relates to the Court's *Reid v. Covert*⁴⁶³ discussion. If Congress delegates federal prosecutorial power, full constitutional protections must accompany the delegation,⁴⁶⁴ thus the advocates' emphasis on the no-explicit-withdrawal theory. After *Duro* and the 1990-91 legislation, the question is whether Congress, as a matter of law, delegated nonmember jurisdiction, which could be done.⁴⁶⁵ In court, the legislation will present a rather uncomfortable choice. The Court will have to conclude that *Duro* incorrectly interpreted the law (the Court's function, not Congress'), or that *Reid* does not preclude unrestricted delegations to tribal courts, or that the legislation is unconstitutional.

V. *Avoiding the New Corridor*

Maintaining day-to-day peace and tranquility is a basic necessity. Traditional and informal controls can serve the need, particularly when a group is stable and homogenous and remaining part of the group is necessary or highly desired. Before European incursions, Native American groups had adequate internal controls. Only a few of the hundreds of groups had to use highly coercive methods like those needed by their contemporary Europeans. The advent of Europeans significantly increased cultural diversity. That, together with the non-natives' desire to "civilize" indigenous peoples by dismantling tribal authority, substantially reduced the efficacy of traditional group controls. If the traditional Indian tribe had been able to maintain homogeneity, traditional social controls may have remained adequate. However, federal policy prevented that, both directly through allotment and termination policies and indirectly through policies aimed at strengthening tribal resources.⁴⁶⁶

463. 354 U.S. 1 (1957).

464. There is the possibility that the Court would find the ICRA provides adequate protection to overcome the *Reid v. Covert* problem. In *Reid*, the Court was addressing the propriety of subjecting civilian dependents to the military justice system. That system provides few of the procedural or substantive constitutional safeguards. In contrast, the ICRA provides nearly all of the same constitutional protections provided in equivalent state courts, with perhaps the single significant absence being the right to appointed counsel.

465. See *United States v. Mazurie*, 419 U.S. 544 (1975) (approving delegation of authority to adopt liquor regulations that include criminal penalties).

466. The allotment and termination legislation resulted in non-Indians having the legal right to own property and reside inside reservation boundaries. A *Duro* amicus brief argued that federal employment preferences, not limited to the local tribe's members, have resulted in many Indians being employed on reservations other than their own. See Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the Rosebud Sioux Tribe et al., in Support of Respondents, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546) [hereinafter Motion & Brief, *Duro*].

Reservations, like all other areas in the United States, need some means of controlling unruly persons. Partly through necessity, Native American societies have adopted or adapted European-style coercive social controls, i.e., criminal law and its punishments. At least in theory, the most serious on-reservation crimes are subject to federal sanction, enforced by federal officials. However, crimes involving only non-Indians are subject to state authority. While violent crime clearly affects quality of life, "minor" misdemeanors and antisocial activities may have a more pervasive impact. Tribal authority is probably most necessary in "routine" matters (e.g., disturbing the peace, traffic control, littering) which individually are not very significant but can become severe problems if there is no effective, prompt local police authority. This is particularly true when persons from outside the community are present in significant numbers, such as during festivals or powwows or (as with the Pima-Maricopa Indian Community) popular recreation. This type of control has been hampered by *Oliphant* and *Duro*. In many ways, this is a practical problem that is not well served by legal theorizing.⁴⁶⁷

Together, *Duro* and *Oliphant* preclude Indian tribes from fully exercising local law enforcement authority against anyone other than tribal members. Some reservations have predominantly non-Indian residents; some have a significant number of nonmember Indian residents. In any situation, tribal police acting solely under tribal law are confronted with uncertainty about whom they can control. Apparently there is no present legal impediment to tribal police's stopping, with reasonable cause, any person violating tribal laws. *Duro* implicitly approved tribal control through "arresting" violators and turning them over to other authorities or excluding them from the reservation.⁴⁶⁸ That power is, however, useless if the perpetrator is a reservation resident.

Duro definitely exacerbated problems for tribal governments. However, the decision also hints at potential solutions. The majority opinion expressly states that the basis for the *Duro* conclusion is the same as that for *Oliphant*. Therefore, means for establishing criminal jurisdiction over nonmembers may also work for non-Indians.⁴⁶⁹ Means limited

467. By the same token, there are undoubtedly many situations that are solved in a practical manner and never appear on any court's docket, despite inconsistency between the solution and legal theory.

468. *Duro*, 495 U.S. at 697.

469. That benefit could produce unfavorable results. If the tribal solution affects only Indians, non-Indians may not be particularly concerned about the solution's technical niceties. However, if non-Indians are also affected, their concern would obviously be greater. See, e.g., 137 CONG. REC. H2988 (daily ed. May 14, 1991) (comments of Rep. Kyl during the 1991 House discussion of House Report 972, indicating his support for the measure only after obtaining on-record assurance that it did not

to Indians do not solve the entire problem but could be beneficial on reservations without a significant non-Indian presence.

A. Intertribal "Treaties"

Duro mentions the possibility of "neighboring" tribal governments entering into reciprocal agreements granting criminal jurisdiction over the members of participating tribes but expressly declines rendering any opinion on that possibility.⁴⁷⁰ Reciprocal agreements might work on some reservations, such as the Sioux reservations in the Dakotas. There are also some where reciprocal agreements are highly unlikely, such as the intertwined Hopi and Navajo reservations. Despite the Court's aside, intertribal agreements raise substantial questions.

From the beginning of its Indian jurisprudence through *Duro*, the Supreme Court has held that Indian tribes do not retain the power to control external relations.⁴⁷¹ In *Cherokee Nation v. Georgia*,⁴⁷² which enunciated that rule, it is relatively apparent that the "external relations" reference was to interaction with governments foreign to the United States, such as Great Britain, France, and Spain.⁴⁷³ If not before, in *Oliphant* the Supreme Court included relationships between tribes and nontribal individuals in the "external relations" category. *Duro* held that dealings with nonmember Indians were also in that category; nonmembers are "external" to Indian tribes even if they are not external to the United States.⁴⁷⁴ If dealings between a tribal government and a nonmember individual involve external relations, it is very difficult to understand how dealings between politically separate

affect non-Indians and was not a bellwether for legislation to reverse the *Oliphant* decision). Since non-Indians are the political majority, that type of reaction could increase political restrictions on tribal governments. This statement assumes a degree of interpolity antagonism that does not necessarily exist in all situations, and should exist in none. Unfortunately, one of the most notable features of Indian and non-Indian relations since 1492 has been the significant discrepancy between political and philosophical statements from a distance and actual events in the neighborhood.

470. *Duro*, 495 U.S. at 697.

471. The fact that this lack of authority resulted from an understanding between European powers made without consultation with the Indians did not, at least then, seem of particular consequence to the non-Indians involved. See *Johnson v. M'Intosh*, 22 U.S. (9 Wheat.) 503 (1823).

472. 30 U.S. (5 Pet.) 1 (1831).

473. British-Indian relationships were a major factor in the War of 1812, within the adult lifetime of the Justices on the Bench in 1831. In the initial negotiations for a treaty ending the War of 1812, the British demanded that the Indian tribes be included in the treaty provisions and that a permanent reservation be established in the Old Northwest as a barrier between the British and the United States. After the U.S. negotiators rejected that, the British essentially abandoned the Indian cause. See DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 289-96 (1989). When *Cherokee Nation* was decided, federal officials were still concerned about British influence on tribes in the Upper Missouri, Upper Mississippi, and Oregon regions.

474. *Duro*, 495 U.S. at 686.

tribal governments would not. If anything, intertribal relations are more like the international relations precluded by European fiat.⁴⁷⁵ Any different conclusion would be inconsistent with the "political" nature of Indian tribes. Thus, despite *Duro*'s tantalizing hint, the very basis of that decision seems to preclude the hinted action.

If external relations are involved, the intertribal-treaty solution would require federal approval, either on an individual-agreement basis or through general enabling legislation. There, however, other significant problems exist. If the approval were administrative, i.e., by the Department of the Interior without express congressional delegation, there may be a question concerning the department's authority.⁴⁷⁶ If congressional approval, direct or indirect, is necessary, *Duro* (perhaps in dicta) raises a significant constitutional question. Based on *Reid*, *Duro* questions Congress' ability to subject United States citizens to tribunals that do not provide full constitutional guarantees and at least implies that tribal courts are not now required to meet those standards.⁴⁷⁷ To avoid the *Reid* problem, Congress would have to provide full constitutional protection for nonmembers.⁴⁷⁸ That would require two sets of tribal criminal procedures, an awkward arrangement at best, and arguably a violation of the IRA's equal protection requirement. To avoid resulting problems, Congress would probably adopt a blanket requirement that tribes provide full constitutional protections in all prosecutions — a further intrusion on tribal internal autonomy.

Another problem with the intertribal agreement notion relates to the nature of a member's "consent" to tribal jurisdiction. *Duro* rejects the idea that an Indian's "consent" to membership in one tribe is

475. The various tribes might organize into a single "federal" polity, making them not "foreign" to each other. That would probably require enabling federal legislation. In some instances, perhaps, all that might be needed is a clarification of which "tribes" are external to which others. For example, the federal government has dealt with various parts of the Sioux Nation both as groups and individually. Similarly, the various member-tribes of the Iroquois Nation are recognized as having had a political relationship that antedates the United States. In each instance, there is a credible argument that the included tribes are not "external" to each other.

476. If the department's general supervisory power (25 U.S.C. § 2) is adequate to support the creation of CFR courts, which it has been held to be, perhaps that power could be further stretched to include authorization of government-to-government relations among the tribes.

477. *Duro*, 495 U.S. at 693 (citing *Reid v. Covert*, 354 U.S. 1 (1957)). There is concern in Congress about the status of individual rights on reservations. See *supra* note 457.

478. In *Reid*, the Court affirmed Congress's power to approve less protective procedures for military personnel. That power is based upon the military's special character and needs (not found in Indian affairs) and the express constitutional power to provide for the nation's defense. *Reid v. Covert*, 354 U.S. 1, 19-40 (1957).

sufficient to subject her or him to the jurisdiction of any other tribe.⁴⁷⁹ Differing tribal customs, traditions, and social relations, combined with the nature of a tribal member's personal consent, present a conceptual problem. The individual's consent, assuming it is a knowing, voluntary act, is to the authority *as established by her or his tribe's customs, traditions, and social relations*. An intertribal agreement, if valid, would subject each member to a significantly different set of traditions. The only way to be free of those undesired obligations would be to retire from one's own tribe, a rather drastic step. In a way, the suggestion of intertribal agreements assumes a high degree of cultural homogeneity, contrary to the Court's express declaration.⁴⁸⁰

Even if the legal obstacles might be overcome, practical obstacles remain. Intertribal agreements would be effective only as to members of consenting tribes. While there may be more resident nonmember Indians who are members of nearby tribes than of more distant tribes, not all nonmember Indians would be covered by local area agreements — Albert Duro's problem with the Pima-Maricopa Community probably would not have been covered by such an agreement. The result would be similar to the Ninth Circuit's derided "contacts" test, partially effective but not a solution.

B. Courts of Indian Offenses (CFR Courts)

Duro notes the respondents' contention that CFR courts, which continue to operate on some reservations, possess jurisdiction over all

479. *Duro*, 495 U.S. at 695. The Court stated:

[T]he tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities. *Petitioner's [Duro's] general status as an Indian says little about his consent to the exercise of authority over him by a particular tribe.*

Id. (citations omitted) (emphasis added).

480. Perhaps the suggestion was made having in mind international treaties that consent to foreign jurisdiction over the contracting parties' nationals, not an unusual occurrence in the modern world. That practice is, however, diametrically opposed to the practice that engendered separate Indian and European legal systems in the Americas. As discussed at length in *In re Ross*, 140 U.S. 453 (1891), extensively quoted in Justice Frankfurter's concurrence in *Reid*, the practice of European countries, beginning long before the "discovery" of the New World, was to negotiate agreements with non-Christian countries that guaranteed European nationals would not be subject to non-Christian laws. See *Reid*, 345 U.S. at 54-64 (Frankfurter, J., concurring). There is no question that Europeans, starting with Spain, considered Native American societies to be non-Christian, barbarous, and uncivilized. Because of their military and technological superiority, the Europeans felt little need for negotiating exemption from local law. European ideology and military power did not allow European nationals to be subject to the laws of even the most advanced Indian polities.

Indians.⁴⁸¹ *Duro* effectively characterizes the CFR courts as a federal program, exercising *federal* powers.⁴⁸² Based upon the *Duro* rationale, it is necessary for those courts to exercise federal powers; otherwise, CFR courts would be limited to jurisdiction over members of the local tribe(s), the department's regulations to the contrary notwithstanding. In addition to the anomalous nature of the courts' creation, the question of which government's power these courts exercise has not been conclusively determined. At least the Solicitor of the Department of the Interior has taken the position that CFR courts exercise federal administrative authority.⁴⁸³ Initially, CFR courts assumed duties that had been performed by federal officials, i.e., the local agent.⁴⁸⁴ Whether

481. *Duro*, 495 U.S. at 690 (citing 25 C.F.R. § 11.2(a) (1989)). Section 11.2(a) provides that "[a] Court of Indian Offenses shall have jurisdiction over all offenses enumerated . . . when committed by any Indian, within the reservation or reservations for which the court is established . . ." 25 C.F.R. § 11.2(a) (1989). By way of definition, section 11.2(c) provides:

[A]n Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction and a "reservation" shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

Id. § 11.2(c). This definition is more limited than the one in the 1990-91 legislation.

482. There is considerable difficulty with conceiving of the jurisdiction actually exercised by CFR courts as federal. The crimes over which those courts exercise jurisdiction are the very crimes that are not covered by the Major Crimes Act (18 U.S.C. § 1153 (1988)), e.g., carrying concealed weapons, abduction, embezzlement, forgery, receiving stolen property, disorderly conduct, malicious mischief, cruelty to animals, illicit cohabitation, failure to send children to school (25 C.F.R. §§ 11.38-73 (1990)), and expressly includes "violation of an approved tribal ordinance" (25 C.F.R. § 11.74 (1990)). A number of these regulatory "crimes" are specifically adopted for only one tribe. *See, e.g.*, 25 C.F.R. §§ 11.76H-87H (1990) (applicable only to Hopi Indians).

483. Secretary's Power to Regulate Conduct of Indians, OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 531 (opinion dated Feb. 28, 1935). Similarly, the jurisdiction of tribal courts and CFR courts over tribal members has been characterized as commensurate. *See Law and Order - Dual Sovereignty - Powers of Indian Tribes and U.S.*, OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 891 (opinion dated Apr. 27, 1939); *see also Powers of Indian Tribes*, 15 Interior Dec. 14, 64 (1934), *reprinted in* OP. SOLIC. DEP'T INTERIOR, *supra* note 140, at 445 (opinion dated Oct. 25 1934) (this seminal declaration of inherent tribal authority is somewhat equivocal on the source of CFR courts' powers).

484. *See* 1884 REPORT, *supra* note 286, at 6-8. The Commissioner's report included communications from agents at reservations where CFR courts had been established. The agent at the Standing Rock Agency (Dakota) reported that the court "aid[s] me materially in administering the affairs of the agency." *Id.* at 7. The agent at the Devils Lake Agency (Dakota) reported:

The court of Indian Affairs is of great assistance to the agent in keeping the Indians under proper restraint and enforcing the laws published by the Department. The system also relieves the agent of much disagreeable work and odium in connection with the duty of imposing fines or imprisonment

the agent's actions were a usurpation of tribal authority or a filling of a void left by the decline of tribal authority is primarily a matter of opinion. The only court decisions that directly address the character of CFR courts have held that the decisions are federal administrative tools;⁴⁸⁵ or that the CFR courts are exercising sufficient federal authority to be considered an arm of the federal government.⁴⁸⁶ Congressional administrative officials appear to be of the opinion that any extension of today's CFR courts would be a federal project.⁴⁸⁷

If CFR courts can effectively enforce tribal ordinances against all Indians regardless of tribal membership, their establishment on all reservations might solve the nonmember Indian problem. It is, however, highly unlikely that such a solution would be acceptable. CFR courts are created by, and subject to, Department of the Interior regulations.⁴⁸⁸ The presence of a CFR court, even as an adjunct to tribal court, would increase departmental presence, which is contrary to the thrust of current federal policy and may not be desired by tribal governments or individual Indians.

upon offenders.

Id. The Commissioner, to support his request that the judges be paid, argued that "[t]he agents would be relieved of a large amount of unnecessary labor and annoyance, and it would be a matter of economy to the Government in saving the expense heretofore incurred of suppressing crimes which are now included in the jurisdiction of the court of Indian offenses." *Id.* at 8.

The implication that these courts were exercising federal authority is also supported by the "crimes" initially within their jurisdiction. As indicated by the Commissioner, "this court has been instrumental in abolishing many of the most barbarous and pernicious customs that have existed among the Indians from time immemorial . . ." *Id.* at 6. The Commissioner goes on to state that "I believe that in a few years polygamy and the heathenish customs of the sun dance, scalp dance, and war dance will be entirely abolished," implying that the courts will be instrumental in that result. *Id.* At least some of the "crimes" being punished in these courts were integral parts of traditional Indian culture, not transgressions previously proscribed by tribal custom. To the same effect, see 1883 REPORT, *supra* note 286, at 10-11, which states:

There is no good reason why an Indian should be permitted to indulge in practices which are alike repugnant to common decency and morality; and the preservation of good order on the reservations demand that some active measures be should be taken to discourage and, if possible, put a stop to the demoralizing influence of heathenish rites.

485. *United States v. Clapox*, 35 F. 575 (D. Or. 1888). The proximity of *Clapox* to the court's initiation indicates that the deciding court was very much "in touch with" the court's purpose and function.

486. *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

487. See Letter from Robert D. Reischauer to Hon. George Miller, *supra* note 448.

488. As federal courts, it can be inferred from *Duro* that CFR court procedures must conform to the federal constitution. If not, those courts would be in the rather unusual position of exercising federal authority but not subject to constitutional restraints. Again, the Court's reference to *Reid* implies that this situation would not be acceptable.

C. Individual Consent

The key factor in tribal authority over members, under *Duro*, is consent. Because consent confers jurisdiction over members, it is logical to conclude that consent could confer jurisdiction over nonmembers. While the Court has rejected implied consent based upon signs posted at reservation boundaries,⁴⁸⁹ there appears little reason why voluntary and informed consent should not be effective. The problem, of course, is obtaining the consent; most people will not simply appear at tribal headquarters to sign a consent form. However, with respect to a significant number of nonmembers, tribes have effective means of requiring consent.

The *Duro* majority stated that tribal enforcement officers have the power to restrain and eject persons who disturb public order on the reservation, apparently even if the tribe has no criminal or civil jurisdiction over the offender,⁴⁹⁰ and: "We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe's agreement not to exercise its power to exclude an offender from tribal lands"⁴⁹¹ The essentially unsolicited nature of the Court's comment implies that some type of actual consent by nonmembers would be sufficient.⁴⁹²

In the situation mentioned by the Court (regarding an apprehended offender), the necessary consent would probably be similar to that required for a waiver of rights in a criminal setting, perhaps similar to the federal rules for accepting guilty pleas. The accused would probably also have to be at least generally informed of the available alternatives, such as state or tribal prosecution, exclusion, or permission to remain, and so on. Once a person has been apprehended and faces potential criminal penalties, the burden on tribal enforcement officers would probably be relatively high, but could be satisfied using standardized forms and procedures.

There appears to be no logical reason why obtaining consent need be delayed until an offense has been committed. Most Indian treaties allow tribal authorities to exclude or expel undesired persons from the reservation.⁴⁹³ As a result of federal legislation such as the Allotment

489. See *Duro*, 495 U.S. at 695; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

490. *Duro*, 495 U.S. at 697.

491. *Id.* at 689.

492. The Court's implication also appears to support an argument that a person's acquiescence to tribal court criminal jurisdiction, such as by entering a guilty plea, is sufficient to support jurisdiction. That would prevent convicted persons from later challenging the tribal court's jurisdiction by way of habeas corpus. That argument is, however, vulnerable to the *Duro* dissent's comment concerning the general legal requirements for an effective waiver. See *id.* at 708 n.4.

493. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

Acts, that tribal power does not extend to all nonmembers who may come onto the reservation.⁴⁹⁴ The power does extend, however, to any person on individual Indian or tribal lands, even if the person has some contractual right to be there.⁴⁹⁵ In *Merrion v. Jicarilla Apache Tribe*,⁴⁹⁶ the Court stated:

Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation.⁴⁹⁷

While most of the statement is in terms of "non-Indian," the first sentence indicates that what is said applies to all nonmembers.

When combined, *Merrion* and *Duro* establish the tribes' ability to condition both initial entry into, and continued presence on, the reservation. Those conditions could include express consent to tribal criminal jurisdiction. If formal consent to jurisdiction in exchange for not exercising the right to evict is sufficient, a similar consent in exchange for not exercising the right to exclude should also be sufficient. The only difference is that the former would be obtained after a tribal offense has been committed, rather than before, as with the latter. On reservations with a high proportion of non-Indian-owned land, that mechanism may not be very practical. However, on relatively isolated reservations with few non-Indian landowners, the administrative costs and problems may well be justified by increased tribal authority.

If pre-admission consent is adequate, a tribal administrative mechanism could be established to obtain that consent.⁴⁹⁸ The mechanism

494. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981).

495. See *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) (10-year reservation resident non-Indian who lived on tribal land leased by his parents held excludable).

496. 455 U.S. 130 (1982).

497. *Id.* at 144-45 (citing *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958)).

498. The most inclusive method would be to require all nonmembers entering the reservation to execute a written consent. The nonmember would probably have to be given at least a summary of tribal laws and court rules, which the consent would

for obtaining consent would obviously vary with the degree of coverage. The greater the period and degree of contact, the more likely consent would be regarded as sufficient. But it would still be necessary to document express consent to tribal jurisdiction.

With respect to semi-transient persons, the law enforcement benefits may extend well beyond the mere fact of jurisdiction. The documentary requirement would publicize the fact that tribal authorities intend to enforce tribal law. In addition, it is more likely that consent will be obtained if requested before a crime is committed. A person asked to consent to jurisdiction after committing a crime may see refusal as a means of escaping punishment, especially if that person's reservation connections are not particularly significant. In contrast, before a crime has been committed only persons intent on committing a crime would be reluctant to consent.

The most significant problems with a nonmember consent system are highly transient persons who have no desire to stay on the reservation, and persons with a legal right to come within the reservation without the tribe's consent.

With respect to highly transient persons, such as tourists driving through on major highways, the potential benefits may not justify the cost of establishing and administering an adequate consent system.⁴⁹⁹ In potentially more egregious situations, such as powwows or other popular attractions, an adequate consent system might be feasible if combined with such things as event admissions or motel and campground registrations. Another potential means for obtaining transients' consent would be to adopt some type of penalty for members (and consenting nonmembers) who have nonmember guests or tenants for more than a specified period, unless the guests or tenants have consented to tribal jurisdiction. A more coercive measure might penalize the member for any damages or losses caused by nonconsenting guests or tenants.

Obtaining pre-crime consent from persons with a right to enter without tribal consent is a more difficult problem. As indicated in *Montana*, while on nontrust land, those persons are beyond day-to-day tribal regulation. For those persons, the only means of obtaining

acknowledge. A less pervasive system, aimed at nonmember residents (excepting non-Indian landowners) could be established by requiring all affected persons to execute a consent/registration if they stay on the reservation for more than a specified number of days, either consecutively or annually. That type of system could also be enforced by civil or criminal sanctions against tribal members who sheltered nonregistered persons.

499. Enforcing consent in that setting, even if possible, would probably create public relations and political problems that might far outweigh any benefits.

pre-crime consent would be when they somehow came within one of the *Montana* exceptions, i.e., commercial dealings or some threat to tribal interests. Decisions such as *Brendale*, *Cardin*, and *Namen*, however, may provide some leverage. If zoning, health, or other tribal interests can be sufficiently articulated to require tribal permission for some activity those persons wish to undertake on nontrust lands (e.g., a zoning variance), a strong argument could be made for the power to condition tribal permission on the applicant's consent to tribal jurisdiction.⁵⁰⁰

D. Civil Regulations

Another potential means for establishing tribal control lies in civil law. The *Duro* result is largely predicated on the criminal law's significant intrusion on personal liberty. It is established that a tribe has civil jurisdiction over nonmembers who enter into consensual relationships with the tribe or who engage in activities that may have a negative impact on tribal social or economic interests.⁵⁰¹ There is also an established, relatively artificial, distinction between civil-regulatory laws and criminal-punitive laws. It would, perhaps, not be judicious to adopt tribal regulations that merely labelled as "civil penalties" the sanctions for otherwise criminal transgressions.⁵⁰² However, it should not be difficult to impose civil monetary penalties for violations of civil regulations.⁵⁰³ Since most misdemeanors are penalized by fine, eliminating possible incarceration should not significantly handicap enforcement. Perhaps the tribal zoning code could declare that any injury to property or persons is a nonconforming use and impose a civil penalty on persons who engage in or permit nonconforming uses. The amount of the penalty could, of course, be tailored to the degree of nonconformity, i.e., the amount of damage occasioned. As civil penalties, these exactions would not be subject to the \$5000 limitation for criminal fines.⁵⁰⁴

500. In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), the non-Indian was excluded because of his federal conviction for theft of federal property from a federal installation within the reservation, something entirely unconnected with his reservation residence. The Ninth Circuit held that Hardin's exclusion was an appropriate exercise of the tribe's power to persons who threaten the health or welfare of the tribe. *Id.* at 479; cf. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

501. See discussion *supra* part III.D.

502. Similarly none of the proscribed acts should be called "crimes," "misdemeanors," or "infractions." All of the terms regularly associated with criminal law should be avoided.

503. Cf. *FMC v. Shoshone-Bannock Tribe*, 905 F.2d 1311 (9th Cir. 1990) (tribal court imposed an annual civil fee of \$100,000 in connection with the tribal hiring preference law).

504. 25 U.S.C. § 1302(7) (1988).

While *Brendale* may place some limit on “civil” regulation, decisions such as *Cardin* and *Namen* indicate that the “tribal interest” language of *Montana* can be liberally construed when an identifiable, concrete tribal interest is affected.⁵⁰⁵ Criminal laws, by definition, protect against activities that are considered harmful to society; subjecting the identical activities to civil penalties does not make them less harmful. A *Cabazon*-type distinction between civil and criminal laws would, however, require care in drafting civil regulations relating to traditionally criminalized activities.⁵⁰⁶ Perhaps to support an argument that these are, indeed, civil regulations, existing tribal criminal codes could be retained. It would probably also be appropriate to have civil regulations enforced by some tribal officer other than the criminal prosecutor. One example of legislation essentially employing this theory was addressed in *Babbitt Ford, Inc. v. Navajo Indian Tribe*.⁵⁰⁷ The tribal ordinance regulated self-help repossessions. Tribal members who transgressed were subject to misdemeanor charges. Nonmember transgressors were subject to exclusion and civil damages judgments. The Ninth Circuit held that ordinance enforceable in tribal court against nonresident members.⁵⁰⁸

E. Extraterritorial Jurisdiction

Another potential solution to the *Duro* problem is the exercise of extraterritorial jurisdiction. That would not solve the problem of non-Indian offenders and would be effective only to the extent tribal governments are willing to participate. It should not, however, require federal participation, as the intertribal-treaty approach does.

The personal nature of tribal jurisdiction appears to allow the imposition of tribal sanctions upon members even though the triggering events occur outside the reservation.⁵⁰⁹ Member’s crimes on other reservations affect law and order on that other reservation, hence the need for intertribal cooperation. If the tribal police can detain alleged perpetrators, as *Duro* expressly approved, and turn them over to officials with jurisdiction, there appears to be no particularly strong

505. See discussion *supra* notes 345-56.

506. A major factor in the distinction is whether the law absolutely prohibits a particular activity or merely regulates it. If the object is to control the use of weapons, a permit system could be established and the zoning code amended to allow the use of weapons only in areas zoned for hunting or recreational shooting. Similarly, physical fighting could be proscribed except in recreation centers. If fighting is defined to include any action traditionally included in a criminal battery, child or spouse abuse would violate the zoning code. Repeated violations could probably be subject to incarceration for contempt of court, assuming the first violation resulted in a court order prohibiting further violations.

507. 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

508. *Id.* at 600.

509. See *supra* part III.D.3.

argument against turning the perpetrator over to his or her own tribe, rather than state or federal officials.

The effectiveness of this solution is, at best, partial. It would not enable reservation officials to directly exercise local control; it would depend upon an essentially pan-Indian exercise of extraterritorial jurisdiction and a high degree of intertribal cooperation. The local tribal government would, in effect, be depending on the membership tribe (often far distant, geographically, and in other ways) to enforce local law and order — not a very desirable state of affairs. That solution also does not address the *Oliphant* problem; non-Indians would remain beyond tribal control.

F. Limited Tribal Membership

Duro, at least twice, mentioned the fact that nonmembers and non-Indians are unable to participate in tribal government. Although the relationship is not clearly drawn, the ability to participate in a tribe's government appears equated with consent to that government's authority. The opinion did not fully detail what is meant by "participation in tribal government," but three factors are mentioned: right to vote, right to hold office, right to serve on juries.⁵¹⁰

The degree to which a tribe would have to allow nonmember participation to avoid the *Duro* result is uncertain. Allowing nonmembers to serve on juries appears important, but the *Duro* majority did not mention the fact that some tribes do allow nonmember jurors. That fact was made known to the Court in amicus briefs presented in *Duro*.⁵¹¹ If opening jury panels to nonmembers were, of itself, sufficient to overcome the "lack of participation" factor, it is logical to assume that *Duro* would have made some mention of that. Since there is no mention, a greater degree of participation must be necessary.

Two other factors were mentioned by the *Duro* majority, the alleged subservience of tribal courts to tribal politics and tribal court application of tribal tradition and custom. Eliminating the influence of tribal tradition, to the extent it exists, may not be desirable, at least

510. *Duro*, 495 U.S. at 688. The portion of *Oliphant* cited in support of that proposition mentions only the right to sit on tribal court juries and the fact that tribes are not precluded from allowing nonmembers to sit on juries. *Id.* (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 & n.4 (1978)).

511. The amicus brief states that the following persons may sit on juries in the indicated tribe's court: (a) Colville — all adult residents; (b) Lummi — all registered state voters; (c) Upper Skagit — "not limited to enrolled members"; (d) Winnebago — any Indian. Motion and Brief, *Duro*, *supra* note 466, at 28 n.10 (No. 88-6546). The Navajo Tribal Code has been amended to allow all reservation residents, not just Navajos, to sit on juries. See NAVAJO TRIB. CODE tit. 7, § 654 (Supp. 1987). The 1985 amendment that substituted "Any person" for "Any Navajo Indian" also reduced the minimum age from 21 to 18. *Id.* § 654 note.

on the civil side. There is nothing in the *Duro* briefs that indicates the degree of influence of tribal tradition in the criminal process.⁵¹² Given the requirements of the ICRA, it is unlikely that the influence is overwhelming. The political control issue probably goes to the heart of the majority's concern.

The separation of the judicial and political branches is a fundamental feature of legal ideology in the United States. Obviously, some degree of political influence on the Judicial branch does exist in the federal and state governments. The appointment of federal judges is a political process (as amply demonstrated by recent Supreme Court Justice appointment debates), but after appointment those judges are effectively free from political control. Similarly, state judges are usually elected, also a political process, but the other branches of state government normally become involved only when a vacancy exists and they cannot, for political reasons, remove a judge. Despite actual independence of tribal judges and regardless of actual noninterference by other tribal-government branches, so long as the potential for political manipulation exists, tribal courts will be perceived as subservient and, therefore, inadequate to protect individual rights. It takes only a few bad examples⁵¹³ to establish a perception of general inadequacy.

The perceived inadequacy of tribal courts⁵¹⁴ to protect nonmembers, reflected in the *Duro* decision, can be eliminated at least partially in two ways, legally establishing the independence of tribal judges and providing for nonmember participation in tribal government. Establishing judicial independence would do much for the non-Indian perception of tribal justice.

Opening tribal government appears to be more likely to obviate the *Duro* objection to jurisdiction over nonmembers. The theory apparently is that if tribal courts are subject to political influence, persons who have the right to participate in the political process should not be able to object to that process's result. Therefore, if the scope of participation is broadened, the scope of tribal court jurisdiction might broaden commensurately. It is not that a different category of persons will be subject to tribal court jurisdiction, but that a broader group

512. It is unlikely that any degree of education would convince non-Indians, including non-Indian jurists, that traditional Indian punitive measures should be enforced on nonmembers.

513. See *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982); *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (D. Mont. 1988), *vacated on stipulation*, 704 F. Supp. 1561 (D. Mont. 1989).

514. This "inadequacy" is undoubtedly a continuation of the ethnocentric viewpoint of non-Indians. In traditional societies, the persons who enforce group norms are not generally isolated (or insulated) from the community, but are fully involved. In that sense, segregation of the law enforcers is an alien concept.

of persons will be included in the subject categories. Naturally, there is an objection to extending tribal membership to additional persons. Insofar as federal benefits are concerned, it is not desirable to increase the number of beneficiaries, particularly to persons who do not share in the Indian heritage. Also, tribal rules cannot amend federal rules concerning participation in federal programs designed to benefit Indians. There may, however, be some method of allowing nonmembers the degree of participation necessary to overcome the *Duro* objections without running afoul of federal benefit programs.

Even though it might be inferred from the *Duro* opinion that some limited tribal membership would allow tribal courts to exercise jurisdiction over persons who are now nonmembers, the difficulties attending that solution are likely greater than the benefits. It appears fairly obvious that merely allowing nonmembers to sit on juries will not be enough.

Summation

The *Duro* decision undoubtedly represents a challenge to tribal officials — and a threat to law and order on the reservation. It also could be a catalyst for a significant increase in tribal control over reservation activities.

Duro expressly equated nonmember Indians and non-Indians, at least for tribal jurisdiction purposes. Tribal solutions that provide jurisdiction over nonmember Indians may allow the same control over non-Indians. Federal legislation will not provide tribal control over non-Indians. Even if Congress's plenary control over Indian affairs is sufficient to avoid the *Reid* problem, it is unlikely that power would be construed to avoid *Reid* for non-Indians (assuming that a measure granting tribal authority over non-Indians could pass, which is unlikely). Tribal measures that satisfy the *Duro* and *Montana* limitations are not subject to that handicap. Satisfying those limitations will, no doubt, require a degree of ingenuity and innovation by tribal authorities. That effort would be substantially rewarded — no longer would tribal officers be required to travel the sinuous, shifting maze.