REAFFIRMING INDIAN TRIBAL COURT CRIMINAL JURISDICTION OVER NON-INDIANS: AN ARGUMENT FOR A STATUTORY ABROGATION OF *OLIPHANT*

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This Comment challenges Oliphant v. Suquamish Indian Tribe, *which precludes Indian tribal courts from criminally prosecuting non-Indians. Given that non-Indians often comprise the majority of reservation populations, and that the current upswing in tribal gambling enterprises brings scores of non-Indians onto reservations, it is no longer feasible for the federal or state governments to maintain the predominant criminal jurisdictional authority over Indian country. Non-Indian authorities are often situated far from reservations and do not have the manpower to thoroughly investigate and prosecute the high number of reservation crimes that fall under their jurisdiction post-*Oliphant. *In response, this Comment proposes a politically and constitutionally acceptable statute that would abrogate* Oliphant *and return criminal jurisdiction to the tribes.*

In addition, this Comment analyzes a topic that has not yet been addressed by courts or scholarship: whether reaffirming Indian tribal court jurisdiction over non-Indians would recognize inherent tribal authority, rather than delegate federal prosecutorial power. A delegation of federal prosecutorial power would force tribal courts to adopt all of the procedural and doctrinal rules of federal courts. Although the Supreme Court has written that statutorily overruling Oliphant *would be considered a federal delegation of authority, this Comment argues that the Supreme Court has incorrectly assessed the nature of tribal sovereignty. Instead, it suggests that Indian tribal court jurisdiction over non-Indians has been a dormant tribal power ever since the tribes were incorporated into the United States, and that this power is merely held in trust by the federal government until such time as tribes are able to assume such jurisdictional responsibility. Therefore, Congress may relax its control over the tribes without delegating federal power. A congressional reaffirmation of tribal court jurisdiction, under inherent tribal sovereignty, would allow tribal courts to maintain their culturally sensitive procedures while ensuring justice on reservations.*

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"The judicial pursuit of principles in Indian law has been a little like Lewis Carroll's hunting of the snark: an aimless voyage towards an unknown objective."[1]

INTRODUCTION

In 1973, Mark Oliphant drunkenly assaulted a tribal police officer at a public festival on the Suquamish Indian[2] reservation.[3] He was held in a local

1. Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 609 (1979).

2. In this Comment, "Indian," "Native," and "Native American" will be used interchangeably. "Indian" is the preferred terminology in both court documents and legal scholarship, and is also the most common term used for self-identification among Native Americans.

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

jail for five days before being released on his own recognizance.[4] That same year, the Suquamish Tribe indicted Daniel Belgarde after he engaged law enforcement officers in a high speed chase across the reservation and crashed into a tribal police car.[5] To the surprise of tribal police, one of the passengers in Belgarde's car was none other than Mark Oliphant, who at the time was appealing to the Ninth Circuit the tribe's jurisdiction over his earlier arrest.[6]

Oliphant was released. Belgarde was jailed, but allowed to post bail that same day.[7] The Suquamish tribal court asserted criminal jurisdiction over the two men; after all, the United States Supreme Court had repeatedly voiced its approval of tribal judiciaries,[8] and both crimes were committed on tribal lands. But, after both men challenged the tribal court's jurisdiction, the Supreme Court reversed their convictions for a single reason: Oliphant and Belgarde were white.

In *Oliphant v. Suquamish Indian Tribe*,[9] the Supreme Court held that allowing tribal courts to exercise criminal jurisdiction over non-Indians was inconsistent with sovereign tribal authority.[10] Specifically, the Court was uncomfortable with subjecting non-Indians to the laws of tribal governments.[11] The Court was similarly concerned that because Indian tribes are considered to be semi-sovereign nations that are outside the scope of the Constitution absent an affirmative authority of Congress to the contrary, tribal judiciaries are not required to comply with several due process guarantees afforded to defendants in state and federal courts.[12]

Although the *Oliphant* Court recognized the serious consequences the ruling would have for reservation residents, Justice Rehnquist wrote that it was up to Congress to statutorily authorize tribes to prosecute non-Indians.[13] According to Rehnquist, however, such authorization would act as a congressional delegation of federal prosecutorial power under the dual sovereignty doctrine, binding tribal courts to the entirety of federal criminal law and procedure.[14] As a result, a statutory repeal of *Oliphant* would force tribes to

4. Brief for Petitioners at *14–15, *Oliphant*, 435 U.S. 191 (No. 76-5729), 1977 WL 204862.
5. *Oliphant*, 435 U.S. at 194.
6. *See* Brief for Petitioners, *supra* note 4, at *17.
7. *Id.*
8. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978) (Indian tribes "have [the] power to make their own substantive law in internal matters . . . and to enforce that law in their own forums.").
9. 435 U.S. 191.
10. *See id.* at 208–12.
11. *See id.* at 193–94.
12. *See id.*; *infra* Part III.B.
13. *See Oliphant*, 435 U.S. at 212.
14. *See id.* at 211–12; *accord* United States v. Enas, 255 F.3d 662, 667 (9th Cir. 2001) ("When a tribe exercises inherent power, it flexes its own sovereign muscle, and the dual sovereignty

choose between not having criminal jurisdiction over non-Indians at all, or transforming their tribal courts into reservation-based branches of the federal judiciary. This choice would deny tribal courts the ability to craft laws reflecting the unique culture and heritage of their tribes, as they were originally intended to do.[15]

In the years since *Oliphant*, the uncertainty surrounding prosecutorial authority has severely hampered efforts to maintain order on Indian reservations.[16] Criminal defendants in tribal courts almost invariably assert or deny their Indian status in order to challenge tribal jurisdiction under *Oliphant*, often leading to protracted litigation, clogged state and federal dockets, and a tremendous drain on federal, state, and tribal resources.[17]

In order to improve reservation safety and restore territorial sovereignty to Indian tribes, this Comment argues that it is necessary to legislatively abrogate the *Oliphant* decision. While several commentators have criticized *Oliphant*,[18] none have specifically considered whether a statutory expansion of tribal court criminal jurisdiction would be a reaffirmation of tribal sovereignty or a delegation of federal authority. This distinction is critical in determining how accurately tribal judiciaries will reflect tribal culture, customs, and tradition. This Comment contends that the *Oliphant* Court was incorrect when it held that such a statute would delegate federal power. Instead, Indian tribes have always had the inherent authority to try non-Indians in tribal courts[19] due to

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exception to double jeopardy permits federal and tribal prosecutions for the same crime. By contrast, when a tribe exercises power delegated to it by Congress, the Double Jeopardy Clause prohibits duplicative tribal and federal prosecutions.").

15. Tribal courts were originally established pursuant to the Indian Reorganization Act, which encouraged tribes to create culturally sensitive institutions. *See* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006); *see also* Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 998–99 (1991).

16. *See infra* Part I.

17. *See, e.g.*, *In re* Garvais, 402 F. Supp. 2d 1219 (E.D. Wash. 2004); State *ex rel.* Poll v. Mont. Ninth Judicial Dist., 851 P.2d 405 (Mont. 1993).

18. *See, e.g.*, Troy A. Eid, *Beyond* Oliphant*: Strengthening Criminal Justice in Indian Country*, 54-APR FED. LAW. 40 (2007); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* U.S. v. Lara*: Notes Towards a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651 (2009); Geoffrey C. Heisey, Note, Oliphant *and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051 (1998); R. Stephen McNeill, Note, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts Into the Federal Court System Without Compromising Their Unique Status as "Domestic Dependent Nations"*, 65 WASH. & LEE L. REV. 283 (2008); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant *Fix*, 93 MINN. L. REV. 1902 (2009).

19. Although this point as applied to nonmember Indians has been suggested in previous scholarship, it has not been explored in the context of expanding tribal court jurisdiction over non-Indians altogether. *See, e.g.*, Alex Tallchief Skibine, United States v. Lara, *Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47 (2004).

tribes' status as pre-Constitutional semi-sovereign nations.[20] Accordingly, a congressional abrogation of *Oliphant* would not constitute a delegation of federal authority, but rather a reauthorization of dormant tribal sovereignty to exercise such jurisdiction.

Part I of this Comment explores the tremendous damage *Oliphant* continues to inflict on reservation law-enforcement capabilities and general public safety. It explains how the present scheme makes it extremely difficult to determine whether tribal, state, or federal authorities have jurisdiction over a given offender for a given crime on a reservation. Part I then analyzes this confusion in light of reservation demographics and the hesitancy of non-Indian authorities to investigate and prosecute offenses arising in Indian territory.

Part II proposes guidelines for a restoration of tribal court criminal jurisdiction over crimes committed by non-Indians in Indian country. It addresses specific concerns, expressed both by Congress and the Supreme Court involving tribal court criminal jurisdiction, and proposes measures to alleviate these concerns including a requirement that the tribes provide counsel for indigent nonmembers (both Indian and non-Indian), as well as requiring that both Indian and non-Indian reservation residents be drawn into tribal juries. These suggestions are aimed at respecting tribal sovereignty while simultaneously ensuring that tribal courts do not unduly infringe upon the rights of non-Indians.

Part III addresses the argument that tribal courts should not have criminal jurisdiction over non tribal members in the first place. In response, this Comment analyzes empirical studies that indicate that the majority of concerns surrounding tribal courts lack merit.[21] Part III also argues that legitimate problems with tribal courts can be addressed through statutory safeguards. Particularly, the limited criminal punishments that tribal courts can administer[22] and the right of federal habeas review over any tribal court criminal judgment[23] would help address the problems that would arise from a Congressional reaffirmation of tribal criminal authority over non-Indians.

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20. *See* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880–81 (2d Cir. 1996) ("Because tribal powers of self-government are 'retained' and predate the federal Constitution, those constitutional limitations that are by their terms or by implication framed as limitations on *federal* and *state* authority do not apply to tribal institutions exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction.").

21. *See generally* Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

22. Indian tribal court criminal punishments are capped at one year in jail and $5,000 in fines. 25 U.S.C. § 1302(7) (2006).

23. *Id.* § 1303. For a discussion about the expansive scope of federal habeas review over tribal proceedings, *see infra* notes 207–216 and accompanying text.

Finally, Part IV argues that an abrogation of *Oliphant* should not be considered a federal delegation of authority to the tribes. Instead, it contends that such criminal jurisdiction is an inherent quality of tribal sovereignty, held in trust by the federal government until Congress determines that the tribes are ready for it. By classifying the proposed statute as a reaffirmation of inherent tribal sovereignty, Part IV argues that the statute would reassert tribes' dormant criminal jurisdiction over non-Indians, rather than merely extend federal authority.

I. "A JOURNEY THROUGH A JURISDICTIONAL MAZE"[24]: CRIMINAL JURISDICTION OVER INDIAN COUNTRY

A. Determining the Governing Authority: State, Federal, or Tribal?

Although some tribes had independently developed formal judiciaries as early as the 1820s,[25] throughout the nineteenth century most tribes maintained relatively informal mechanisms for resolving criminal matters arising on their reservations.[26] In 1883, the secretary of the interior attempted to streamline tribal judicial systems by creating Courts of Indian Offenses, federally run tribal forums designed to mirror federal courts.[27] Finally, in 1934, the Indian Reorganization Act authorized tribes to devise their own, independent constitutions and judiciaries, so long as the tribes received approval from the Secretary of the Interior.[28] While most tribes seized this opportunity to create culturally sensitive judicial forums, concerns about tribal courts' impartiality and fairness prompted Congress to pass the Indian Civil Rights Act (ICRA) in

24. For one of the most comprehensive articles on the pre-*Oliphant* criminal jurisdiction scheme in Indian country, see Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

25. *See* Peter Tasso, Greywater v. Joshua *and Tribal Jurisdiction Over Nonmember Indians*, 75 IOWA L. REV. 685, 695 (1990).

26. *See* Clinton, *supra* note 24, at 553.

27. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 107–09 (1966).

28. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at §§ 25 U.S.C. 461–479 (2006)). The specific code provision dealing with this authorization is 25 U.S.C. § 476. With the ability to create tribal laws came the ability to create tribal courts. *See* William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 75 N.D. L. REV. 551, 572–73 (2000). While there was originally a dispute about whether tribes had the sovereign authority to create their own courts free from federal control, such practice was upheld as an aspect of retained sovereign authority in *United States v. Wheeler*, 435 U.S. 313 (1978).

1968.[29] The ICRA pressed the majority of the Bill of Rights onto tribal governments and judiciaries, partially Americanizing them.

Despite the sophistication of many tribal judiciaries, and the ICRA's requirement that they adhere to most Bill of Rights provisions, jurisdiction over Indian country crimes is not vested solely with the tribe. Instead, the source of criminal authority changes if either the criminal offender or the victim is subjectively considered by the courts to be an Indian. What emerges then from these determinations is general jurisdictional confusion, which results in repeated litigation, unpunished crimes, and a culture of lawlessness on reservations.

The following table lays out the current jurisdictional scheme operating in Indian country, and illustrates the difficulty in making basic determinations about the governing authority in a given case arising on a reservation.

TABLE: CRIMINAL JURISDICTION IN INDIAN COUNTRY

29. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)). For a discussion about the importance of the Indian Civil Rights Act in the context of tribal court jurisdiction over non-Indians, *see* Parts III–IV, *infra*.

Perpetrator/Victim	***Jurisdiction***[30]	***Source of Authority***
Crimes by Indians Against Indians:		
Major Crimes	Federal or Tribal (concurrent)[31]	Indian Major Crimes Act, 18 U.S.C. § 1153 (2000)
Non-Major Crimes	Tribal (exclusive)	Inherent Sovereign Authority
Crimes by Indians Against non-Indians:		
Major Crimes	Federal or Tribal (concurrent)	Indian Major Crimes Act
Non-Major Crimes	Federal or Tribal (concurrent)	Indian General Crimes Act, 18 U.S.C. § 1152 (2000) (federal); Inherent Sovereign Authority (tribal)
Victimless Crimes by Indians	Federal or Tribal (federal authorities have jurisdiction over general federal crimes; tribal authorities have jurisdiction over non-federal victimless crimes, such as vandalism or public intoxication)	Inherent Sovereign Authority
Crimes by non-Indians Against Indians	Federal (exclusive)	Indian General Crimes Act (incorporates non-federal state offenses via the Assimilative Crimes Act, 18 U.S.C. § 13 (2000))
Crimes by non-Indians Against non-Indians	State (exclusive)	United States v. McBratney, 104 U.S. 621 (1882)
Victimless Crimes by non-Indians	State (exclusive)	Solem v. Bartlett, 465 U.S. 463 (1984)

1. Federal Criminal Jurisdiction in Indian Country

The threshold question in determining jurisdiction over a crime involving Indians is whether the offense was committed in areas collectively referred to as "Indian country." Indian country laws apply to all crimes arising within the limits of (a) any Indian reservation; (b) all dependent Indian communities within the borders of the United States;[32] and (c) all Indian allotments, to

30. This chart was inspired by WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 200 (5th ed. 2009). It is inapplicable to the six mandatory Public Law 280 states that have exclusive jurisdiction over all crimes committed in Indian country. *See infra* notes 46–54 and accompanying text.

31. Under the Major Crimes Act, federal authorities have exclusive jurisdiction over the enumerated major crimes. However, Indian tribes may still prosecute Indians for a lesser offense incidental to the major crime. As such, jurisdiction over enumerated major crimes involving both an Indian victim and offender is considered "concurrent" between federal and tribal authorities.

32. "Dependent Indian communities" generally refers to Native Villages in Alaska, which are not considered reservations (with the exception of the Metlakatla reservation). However, these Villages only constitute dependent Indian communities, and thus Indian Country, if they (a) are located on land set aside for the use of the tribe, and (b) the land, and not merely the tribe itself, is under the superintendence of the federal government. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 523–24, 530–31 (1998).

which the Indian title has not been extinguished (that is, Indian lands within reservations allotted to non-Indians by the federal government in the late 1800s, but kept in tribal trust status).[33]

If the crime took place in Indian country, federal jurisdiction is established by one of two statutes: the Indian General Crimes Act (GCA)[34] and the Indian Major Crimes Act (MCA).[35] The GCA reserves federal criminal jurisdiction over any area that is under exclusive federal control, including Indian country.[36] One of the federal laws incorporated in the GCA is the Assimilative Crimes Act;[37] when a crime is committed in a federal enclave for which there is no controlling federal law, the Assimilative Crimes Act gives federal authorities the ability to apply the laws and sentencing guidelines of the state in which the enclave is located.[38] This ensures that the federal government will maintain its jurisdiction over Indian country even absent a specific federal statute for a given offense.

Although the GCA grants the federal government expansive jurisdiction over reservation crimes, it carries two important limitations: First, federal law enforcement agents only have jurisdiction over a crime committed by a non-Indian if the victim is an Indian.[39] If a non-Indian commits a crime that is either victimless or involves another non-Indian, the crime is exclusively under state jurisdiction.[40] Second, the GCA explicitly reserves tribal court jurisdiction over non-major,[41] non-federal crimes committed in Indian country by one Indian against another.[42] This allows tribes to maintain authority

33. This scheme is defined in 18 U.S.C. § 1151 (2006). Discussion of the full history of Indian allotment is beyond the scope of this Comment. For a concise review of the allotment period and its aftermath see ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 30–36 (5th ed. 2007).

34. 18 U.S.C. § 1152 (2006).

35. *Id.* § 1153.

36. These areas, known as federal enclaves, consist of "[t]erritory or land that a state has ceded to the United States . . . [including] military bases, national parks, federally administered highways, and federal Indian reservations." BLACK'S LAW DICTIONARY 568 (8th ed. 2004).

37. 18 U.S.C. § 13 (2006).

38. *Id.*

39. *See* United States v. McBratney, 104 U.S. 621 (1881).

40. *Id.* at 621; *see also* Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984).

41. See *infra* notes 43–44 and accompanying text for a discussion of federal jurisdiction over Major crimes.

42. See 25 U.S.C. § 1301(2) (2006) ("'[P]owers 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."); 18 U.S.C. § 1152 (2006) (reserving tribal jurisdiction for crimes committed in Indian country "by one Indian against the person or property of another Indian").

over crimes committed entirely within their communities, reducing undue federal oversight over purely Indian country matters.

While the GCA primarily governs misdemeanor crimes, federal jurisdiction over felonies is governed by the MCA. The MCA grants federal jurisdiction over fourteen "major" crimes when committed by an Indian in Indian country, and ensures that underfunded tribal courts and jails are not forced to bear the expense of lengthy criminal trials and incarcerations.[43] Tribal prosecutions for major crimes are limited to misdemeanor charges for lesser included offenses, such as charging a murderer with the illegal discharge of a firearm.[44] Further, the Indian Civil Rights Act restricts tribal criminal sentences to one year in jail and a $5,000 fine.[45]

2. State Criminal Jurisdiction in Indian Country

State courts retain exclusive criminal jurisdiction over reservation crimes committed by non-Indians if the crimes are either (a) victimless or (b) involve only non-Indians.[46] To supplement this jurisdiction, in 1953, the federal government passed Public Law 280,[47] which relinquished all federal criminal jurisdiction over Indian country in those states enumerated in the statute.[48]

43. 18 U.S.C. § 1153(a) (2006). These fourteen crimes are murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (which generally covers crimes of sexual abuse), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under the age of sixteen, felony child abuse or neglect, arson, burglary, and robbery. *Id.* § 1153.

44. See, for example, *Duro v. Reina*, 495 U.S. 676, 681 (1990), in which the Salt River Pima-Maricopa Indian Community charged an Indian with illegally discharging a weapon, after he shot and killed a fourteen-year-old boy on their reservation.

45. 25 U.S.C. § 1302(7) (2006).

46. United States v. McBratney, 104 U.S. 621 (1881).

47. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588–60. The criminal provisions of PL 280 are codified at 18 U.S.C. § 1162 (2006) and 25 U.S.C. § 1321 (2006). For an examination of Public Law 280 and the effect it had on reservation safety, see generally Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

48. Public Law 280 states are split into mandatory and optional states. The mandatory states were required to accept Public Law (PL) 280 jurisdiction; the optional states voluntarily joined, but often only assumed jurisdiction over certain reservations. The mandatory states are Alaska (except the Annette Islands with regard to the Metlakatla Indians), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. 18 U.S.C. § 1162(a) (2006). The optional states are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *See* Carole Goldberg, *Questions and Answers About Public Law 280*, *in* CAROLE GOLDBERG, DUANE CHAMPAGNE & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 app. K, at 551 (2007), *available at* http://www.tribal-institute.org/download/pl280_study.pdf. Optional states have varying degrees of jurisdiction and may only assume such jurisdiction with the consent of the in-state tribes. For an overview of the scope, purpose, and shortcomings of Public Law 280 and an argument that its adoption ultimately hinders tribal sovereignty, see Ross Naughton,

These states are exclusively responsible for enforcing criminal law in Indian country, and assume all responsibilities that would otherwise be vested in the federal government.[49] Congress also provided a mechanism by which other states could join Public Law 280 jurisdiction so long as they received consent from in-state tribes.[50] States that do not opt into Public Law 280 are assumed to have rejected expanded jurisdiction over Indian country.[51]

Further complicating the situation, Public Law 280 affected the repeal of the MCA and the GCA in any state under its jurisdiction.[52] Remember that the GCA reserves tribal court jurisdiction over non-major reservation crimes involving only Indians.[53] Despite concerns that states would use Public Law 280 to usurp tribal court criminal jurisdiction, the Eighth Circuit and other courts have held that tribes retain the same criminal authority under Public Law 280 that they do under the federal statutory system.[54] Still, Public Law 280 further obfuscates an already confusing jurisdictional scheme and introduces yet another non-tribal sovereign authority into reservation affairs.

3. Tribal Court Criminal Jurisdiction in Indian Country

Until *Oliphant v. Suquamish Indian Tribe*,[55] it was settled doctrine that Indian tribes retained all sovereign powers not expressly abrogated by Congress,[56] including tribal court criminal jurisdiction over non-Indians. Yet the *Oliphant* Court rejected the decades of case law, and took upon itself the task of delineating tribal sovereignty by holding that tribal court criminal jurisdiction was limited to Indians. Following *Oliphant*'s lead, the Supreme Court further diminished tribal criminal jurisdiction in *Duro v. Reina*,[57] ruling that tribal

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Comment, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLA L. REV. 489 (2007).

49. These states are Alaska (except the Annette Islands with regard to the Metlakatla Indians), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. 18 U.S.C. § 1162.

50. 25 U.S.C. § 1321 (2006). Thus far, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington have opted into the statute. *See* Goldberg, *supra* note 48, at 551.

51. *See* Williams v. Lee, 358 U.S. 217, 220–21 (1959).

52. 18 U.S.C. § 1162(c).

53. *Id.* § 1152.

54. *See* Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990); *see also* Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 612 N.W.2d 709, 717 (Wis. 2000) ("Public Law 280 was not designed to deprive tribal courts of jurisdiction where they properly have it.").

55. 435 U.S. 191 (1978).

56. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139 (1982).

57. 495 U.S. 676 (1990), *superseded by statute*, Indian Civil Rights Act, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892, *as recognized in* United States v. Lara, 541 U.S. 193 (2004). Congress overruled *Duro* by passing legislation which amended the Indian Civil Rights Act. 25 U.S.C. § 1301

criminal authority is restricted to tribal members, rather than any Indian from any tribe (as was determined in *Oliphant*).

The *Duro* ruling created a jurisdictional void in which nonmember Indians who committed misdemeanor crimes against other Indians on reservations could not be prosecuted by anyone: non–Public Law 280 states had no criminal jurisdiction over Indians on reservations, the GCA precluded federal jurisdiction over non-major crimes committed by Indians on reservations, and *Duro* stripped tribes of their ability to try nonmember Indians. In response, Congress amended the Indian Civil Rights Act to reaffirm inherent tribal court criminal authority over all Indians, not just tribal members.[58] This amendment, known as the "*Duro* Fix," has since been upheld against constitutional challenges.[59]

So, under *Oliphant*, the *Duro* Fix, and the federal statutory scheme, tribal court criminal jurisdiction is restricted to misdemeanor crimes committed by Indians in Indian country. All tribal criminal laws are completely unenforceable against non-Indians. In light of reservation demographics and the law enforcement situation, this system arguably prevents tribes from maintaining public safety over their land.

B. Difficulties with Law Enforcement in Indian Country

1. Allotment, Blood Quantum, and Powwows: The Uncertainty of Reservation Demographics

In the late nineteenth century, Congress passed the Dawes Act, which opened many Indian reservations for non-Indian settlement in order to encourage tribes to adopt a Western system of private property.[60] Known as the allotment process, the federal government during this era allotted tribal members fee title to specific parcels of tribal land and sold any remaining territory to non-Indians.[61] At the time, many Indian tribes and Indian rights associations supported the allotment program. They assumed that giving the

(2006) (amended (section 2) to include "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;" and (section 3) substituted "offense; and" for "offense").

58. Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

59. These challenges have alleged that the *Duro* Fix violates double jeopardy, *see Lara*, 541 U.S. 193, as well as equal protection and due process, *see* Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005).

60. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (2006)).

61. Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV. 5, 6–7 (2002).

tribes legal title to their lands in the western sense would support and legitimize tribal claims to ancestral territories in the eyes of the government and non-Indians generally.[62] What resulted, however, was an unmitigated disaster: tribes permanently lost over 70 percent of their lands and reservations came to resemble a checkerboard of tribal land and non-Indian fee lands.[63]

Although Congress recognized its mistake and repealed the Dawes Act in 1934,[64] the repercussions of allotment are still felt today. One consequence is that the non-Indian population on some reservations is higher than that of enrolled tribal members.[65] For example, in one study, Indians comprised less than 20 percent of total reservation population in twelve of thirteen reservations surveyed with over 50,000 people living on them.[66] These significant non-Indian populations living in tribal territories pose severe difficulties for law enforcement on reservations, as demonstrated below.

Compounding the situation is uncertainty over who actually counts as an Indian for criminal jurisdictional purposes. The statutory definition of "Indian" in this context reads, "any person who would be subject to the jurisdiction of the United States as an Indian under [the Major Crimes Act] if that person were to commit an offense listed in that section in Indian country to which that section applies."[67] Unfortunately, the Major Crimes Act does not define "Indian" and provides no guidance for the judges who must make these jurisdictional determinations.[68] As a result, courts began to apply a series of ad hoc tests that essentially based Indianness on race.[69]

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62. CLINTON ET AL., *supra* note 33, at 33.

63. Frickey, *supra* note 61, at 7.

64. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006).

65. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 144 (1980) ("The Yakima tribe has more than 6,000 members, of whom about 5,000 live on the reservation. Enrolled members, however, constitute less than 1/5 of the reservation's population. The balance is made up of approximately 1,500 Indians who are not members of the tribes and more than 20,000 non-Indians.").

66. U.S. CENSUS BUREAU, AMERICAN INDIAN, ALASKA NATIVE TABLES FROM THE STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 38 tbl. 36 (2005), *available at* http://www.census.gov/statab/www/sa04aian.pdf [hereinafter STATISTICAL ABSTRACT]. On the reservations and trust lands of thirty-nine surveyed tribes, the combined population was 4,540,110, while the Indian population was 822,476, for a total of only 18 percent Indians. *Id.* Although the survey only involved thirty-nine out of 310 total Indian reservations, it included what are by far the three largest reservations in the United States (the Cherokee, Navajo, and Choctaw), and is generally indicative of a demographic problem posed by the current criminal jurisdictional situation in Indian country.

67. 25 U.S.C. § 1301(4) (2006).

68. This silence has led criminal defendants to unsuccessfully attack the MCA as being void for vagueness. *See, e.g.*, United States v. Nahwahquaw, No. 09-CR-0025, 2009 WL 1165395 (E.D. Wis. Apr. 28, 2009).

69. *See, e.g.*, Vialpando v. State, 640 P.2d 77, 81 (Wyo. 1982) ("Dennis Vialpando himself exhibits many of the distinct facial and racial characteristics of Indians and is fairly dark skinned.").

Seeking to clarify this approach, the United States District Court for the District of South Dakota created a four part "recognition" test that is now generally accepted and utilized by federal courts.[70] In addition to necessarily having "some" Indian blood, the four factors that prove recognition as an Indian are, in order of importance: (1) tribal enrollment, (2) government recognition through receipt of Indian assistance, (3) enjoyment of benefits of tribal affiliation, and (4) popular recognition as an Indian through residence on a reservation and participation in Indian social life.[71]

However, these factors are applied differently across jurisdictions,[72] and scholars have struggled to find any coherence in determining Indian status.[73] To begin, no court has ever definitively determined the required minimum amount of Indian blood to classify as an Indian. Some courts consider 1/8 Indian blood insufficient,[74] while others disagree.[75] Some find 15/64 Indian blood not to be enough,[76] but 15/32[77] or 1/4[78] to be sufficient. Even when a person cannot prove exactly what percentage Indian blood she has, sometimes courts accept a rough estimate.[79] With a system lacking specific blood quantum guidelines, prosecutors in Indian country are almost certain to face jurisdictional challenges with little guidance as to how a court will rule.

Even if a prosecutor can establish that a defendant has enough Indian blood to satisfy a particular jurisdiction's requirements, she will still be forced to prove the defendant's affiliation with a tribe in order to establish jurisdiction. Tribal enrollment and reception of tribal and federal Indian benefits are not particularly controversial given the relative ease with which they can

70. St. Cloud v. United States, 702 F. Supp. 1456, 1461–62 (D.S.D. 1988); *see also* United States v. Lawrence, 51 F.3d 150, 152–54 (8th Cir. 1995) (applying the *St. Cloud* factors to determine the defendant's Indian status). The U.S. Court of Appeals for the Ninth Circuit has formally adopted this as a full, four-factor test for determining Indian status. See United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009).

71. *St. Cloud*, 702 F. Supp. at 1461–62.

72. *See, e.g.*, *Cruz*, 554 F.3d at 853 (Kozinski, J., dissenting) (accusing the majority of "engag[ing] in vigorous verbal callisthenics to reach a wholly counter-intuitive—and wrong—result" in its application of the St. Cloud test); United States v. Bruce, 394 F.3d 1215, 1224–27 (9th Cir. 2005); *In re* Garvais, 402 F. Supp. 2d 1219 (E.D. Wash. 2004).

73. *See, e.g.*, Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177 (2006); Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275 (2001).

74. *Vialpando*, 640 P.2d at 80.

75. *See, e.g.*, *Bruce*, 394 F.3d at 1223; Sully v. United States, 195 F. 113 (8th Cir. 1912).

76. State v. Bonaparte, 759 P.2d 83, 85 (Idaho Ct. App. 1988).

77. St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988).

78. United States v. Dodge, 538 F.2d 770, 786–87 (8th Cir. 1976).

79. Vezina v. United States, 245 F. 411 (8th Cir. 1917) (holding that a woman with an estimated amount of 1/4 to 3/8 Chippewa blood was an Indian).

be proven. However, as with the blood quantum requirement, courts make subjective, case-by-case decisions as to whether evidence of participation in reservation and Indian culture is enough to qualify a person as an Indian.

For example, the Supreme Court of Wyoming found that a defendant was not an Indian even though he regularly attended powwows and tribal ceremonies, because these were recreational activities that did not amount to full participation in tribal life.[80] Similarly, the United States District Court for the Eastern District of Washington held that a defendant's use of a religious sweathouse, possession of a sacred Indian feather, and participation in tribal basketball games and powwows on the reservation where he lived were not sufficient for recognition as an Indian.[81] However, in *United States v. Bruce*,[82] the Ninth Circuit found the fact that a defendant lived on a reservation and participated in Indian religious ceremonies sufficient to reverse a district court holding that the defendant was not an Indian.[83]

These unpredictable judicial determinations of who counts as an Indian, either by blood or by action or some combination of the two, discourage prosecutions by providing grounds for a jurisdictional challenge to any tribal court's assertion of authority.[84]

2. Logistical and Cultural Barriers to Successfully Prosecuting Crime on Reservations

Even when state or federal agents do attempt to police Indian country, they are forced to confront difficulties beyond jurisdictional uncertainty. Non-tribal prosecutors are faced with two main problems in Indian country: the sheer number of crimes that fall under their jurisdiction in the post-*Oliphant* world and the extreme disincentives for a state or federal prosecutor to actually initiate charges against an Indian-country criminal perpetrator.

Although statistics involving crime on reservations are limited to reservation or crime-specific surveys, this data shows extreme problems with both violent and petty crimes. American Indians are almost twice as likely to be

80. Vialpando v. State, 640 P.2d 77 (Wyo. 1982).
81. *In re* Garvais, 402 F. Supp. 2d 1219, 1223 (E.D. Wash. 2004).
82. 394 F.3d 1215 (9th Cir. 2005).
83. *Id.* at 1224.
84. Tribal courts report an increase in jurisdictional challenges after years of court decisions, such as *Oliphant*, that question or limit their jurisdiction. *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1157 (2004). For an example of the extreme measures that prosecutors must undertake to prove Indian status, which is often the dispositive issue of their entire case, see Reply Brief of Defendant-Appellant at *1–4, *Bruce*, 394 F.3d 1215 (No. 03-30171). The extra steps necessary to establish federal jurisdiction make complicated prosecutions all the more difficult.

victims of violence as members any other ethnic group, with above-average rates of victimizations for rape, sexual assault, robbery, aggravated assault, and simple assault.[85]

Further straining non-tribal authorities is the high percentage of crimes by non-Indians against Indians. Sixty-six percent of all Indian victims of violent crime report that their attacker was non-Indian.[86] Specifically, Indians reported that the perpetrators in 86 percent of rape cases, 74 percent of robberies, and 66 percent of assaults were either Caucasian or African-American.[87] Because *Oliphant* precludes tribal courts from prosecuting non-Indian offenders, non-tribal authorities must alone bear the burden of investigating and prosecuting these attacks.

Incidents of petty crimes are similarly problematic. For example, in 2000, there were 142,931 reports of seven different petty crimes arising in Indian country alone.[88] While reliable data about who committed these crimes has not been collected, given the demographics in Indian country and the high percentage of alleged non-Indian perpetrators of violent crimes, it is reasonable to assume that a sizeable number involved non-Indians. Even more problematic for reservation residents, the federal government expressly acknowledges that it considers the majority of those crimes—particularly property offenses, crimes of violence, and public-order violations—to be low priority and likely declined for prosecution.[89]

In light of the high percentage of Indian country crimes that *Oliphant* places under exclusive federal jurisdiction, federal prosecutors (or state prosecutors in Public Law 280 states) face difficult odds in Indian country. There are several factors that further aggravate this problem and make it much less likely for prosecutors to fully investigate and ultimately prosecute Indian country crimes.

Because many Indian reservations are large, remote, and sparsely populated, it is difficult for state and federal authorities to maintain a permanent law enforcement presence in Indian country.[90] In 2004, for example, the FBI had

85. *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 5 (2004), *available at* http://www.usdoj.gov/otj/pdf/american_indians_and_crime.pdf.

86. *Id.* at 9.

87. *Id.*

88. These crimes were disorderly conduct, driving while intoxicated, drunkenness, liquor-law violations, simple assaults, vandalism, and other stolen-property violations. *See* U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2000, at 3 (2003), *available at* http://www.usdoj.gov/otj/pdf/tribal_law_enforcement.pdf.

89. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs04.pdf.

90. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, POLICING ON INDIAN RESERVATIONS vi (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/188095.pdf ("The typical [BIA

only one hundred agents charged with policing two hundred reservations and investigating 1,900 cases.[91] Indeed, in 2007, the director of the Bureau of Indian Affairs (BIA) testified before Congress that severe federal staff shortages result in ineffective law enforcement that often cannot run twenty-four hours a day.[92] Although Indian tribes may bolster reservation police by deputizing their own police forces in conjunction with the BIA or state authorities,[93] such officers may only make arrests and are unable to independently bring criminals to justice.

Such understaffed reservation law enforcement outfits cannot respond timely to crimes. In some cases, federal or state authorities take days to initiate an investigation.[94] While this problem can be somewhat alleviated by deputizing tribal police, these police forces are underfunded and undermanned.[95] The end result of the slow responses is that by the time authorities arrive, witnesses have vanished, crime scenes are contaminated, and the offenders have fled. So, prosecutors are left with insufficient evidence to bring charges, a particularly significant problem given that weak evidence is cited as the reason for over 20 percent of all federal prosecutorial declinations.[96]

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tribal police] department serves an area the size of Delaware, but with a population of only 10,000, that is patrolled by no more than three police officers and as few as one officer at any one time (a level of police coverage that is much lower than in other urban and rural areas of the country).").

91. Grant D. Ashley, Executive Assistant Dir., Fed. Bureau of Investigation, Remarks at the National Native American Law Enforcement Association's 12th Annual Training Conference (Oct. 28, 2004), *transcript available at* http://www.fbi.gov/pressrel/speeches/ashley102804.htm. This accounts for an FBI allotment of less than 1 percent in Indian country despite the fact that they often must serve as the sole investigator for Indian country crimes. Only 100 out of an approximate total of 12,515 FBI agents are assigned to Indian country. Federal Bureau of Investigation: By the Numbers, http://www.fbi.gov/page2/september06/numbers090606.htm (last visited Mar. 6, 2009).

92. *The Needs and Challenges of Tribal Law Enforcement on Indian Reservations: Oversight Field Hearing Before the H. Comm. on Natural Resources*, 110th Cong. 7 (2007) (statement of W. Patrick Ragsdale, Director, Bureau of Indian Affairs), *available at* http://indian.senate.gov/public/_files/Ragsdale051707.pdf.

93. For a list of these compacts between Indian tribes and non-Indian law enforcement authorities, see National Congress of American Indians: Law Enforcement Agreements, http://www.ncai.org/Law-Enforcement-Agreements.100.0.html (last visited Mar. 3, 2009).

94. Eid, *supra* note 18, at 41; *see also* U.S. COMM'N ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 150–51 (1981), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2f/d5/f4.pdf (noting that FBI response time to reservation crime is often over an hour due to remote locations and federal budget constraints). In Public Law 280 states, surveys indicate that the response time of state authorities to Indian reservation crimes is often even slower than that of the federal government. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1437–42 (1997).

95. Studies of policing in Indian country indicate that tribal police forces have approximately "between 55 and 80 percent of the resource base available to non-Indian communities." U.S. DEP'T OF JUSTICE, *supra* note 90, at 27.

96. U.S. DEP'T OF JUSTICE, *supra* note 89, at 34 tbl.2.4. For example, while overall federal declination rates within Indian country are not documented, in 2004, the BIA declined to investigate 48.9 percent of offenses under their jurisdiction arising in Indian country, compared with a national

U.S. attorneys who oversee reservation-based crimes must also consider the fact that the multitudes of petty crimes brought under federal jurisdiction by the GCA often take place far from the nearest federal courthouse.[97] This difficulty with distance also affects Indian witnesses. They are often unable to make it to the courthouse on time to testify, due to the cost of travel or weather problems that are magnified by the remoteness of many Indian reservations.[98]

Further, stemming from centuries of broken treaties, intrusive federal authority, and state attempts to usurp tribal sovereignty, many Indians mistrust state and federal agents, and are apathetic, reticent, or outright hostile towards investigators.[99] This aloofness can be exacerbated by non-Indian authorities' ignorance of reservation cultural norms. Federal and state agents are often unaware of the levels of respect in Indian culture needed to gain the cooperation necessary for effectively gathering evidence, marshalling witnesses, and prosecuting criminal offenders.[100] While mistrust between the police and the community is often prevalent outside of Indian country, it is especially noticeable when law enforcement officers and criminal prosecutors are neither culturally nor geographically connected to the tribes they are assigned to protect.

Authorities in Public Law 280 states fare no better than federal authorities in maintaining safety on Indian reservations.[101] Indeed, comprehensive

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federal prosecutorial declination average of 21.5 percent. The BIA did not provide explanations for their decision not to prosecute particular cases. *Id.* at 35 tbl.2.5.

97. *See, e.g.*, Eid, *supra* note 18, at 42 ("The nearest U.S. district judge serving the citizens of Towaoc is more than 400 miles away in Denver, an eight-hour drive—even in good weather."); Washburn, *supra* note 21, at 711 n.6 ("The distance from the Red Lake Reservation to Minneapolis is approximately 250 miles and might take nearly six hours even with good road conditions. Similarly, the Fort Peck Reservation is nearly 300 miles from the federal courts in either Great Falls or Billings, and both drives could easily take six hours in good weather."). Ben Casey, a tribal court administrator for the Pascua Yaqui Tribe in Arizona, reports that the detention facility closest to his reservation is nine hours away, in another state. Telephone Interview With Ben Casey, Tribal Court Administrator, Pascua Yaqui Indian Tribe (Oct. 12, 2008) (on file with author).

98. *See* Washburn, *supra* note 21, at 712 ("Consider also the unfortunate federal prosecutor or defense attorney: a harried trial attorney working hard to marshal the evidence in a criminal case while nervously looking out the window of the federal courthouse (at falling snow in Minneapolis in winter or the scorching desert terrain in Arizona in the summer time) and desperately hoping that her witnesses appear on time to testify.").

99. *Id.* at 735–40 (discussing the problems that federal prosecutors face when addressing the cultural barriers between Indian witnesses and non-Indian law enforcement officers).

100. *See* U.S. DEP'T OF JUSTICE, *supra* note 90, at ix; *see also* Washburn, *supra* note 21, at 732–33 ("One federal prosecutor has explained, for example, the Navajo cultural norm against looking a person in the eye, which can be considered 'offensive, an affront, even a challenge to the other person.'" (internal citations omitted)).

101. *See* Goldberg & Champagne, *supra* note 47, at 698 ("Themes evident in the statements of tribal officials include: infringement of tribal sovereignty; failure of state law enforcement to respond to Indian country crimes or to respond in a timely fashion; failure of federal officials to support con-

studies of criminal law enforcement in Public Law 280 states indicate that reservation crime rates are actually higher when the states assume primary jurisdiction.[102] Public Law 280 state reservation residents report that state police response times are inadequate[103] and that tribal police must shoulder an increased burden due to the state police's disinterest in reservation crimes.[104] Further, Public Law 280 state reservation residents report that, in particular, crimes associated with domestic abuse tend to go unpunished.[105] These crimes are exceptionally prevalent among Indians,[106] and are especially problematic to prosecute because of high rates of intermarriage between Indians and non-Indians;[107] situations in which a father, mother, and child could all conceivably fall under different jurisdictions based on blood quantum and tribal enrollment present a natural challenge in such cases.

An automatic response to the bleak picture of reservation law enforcement might be simply to hire more police and prosecutors. While an increased state and federal presence might reduce crime, this solution would flood reservations with unwelcome, alien police and would further enmesh non-Indian authorities with daily reservation life, frustrating tribal sovereignty and self-reliance.[108] Tribes would be forced to choose between their safety and their sovereignty, which should not be mutually exclusive.

Thus, *Oliphant*'s jurisdictional scheme for Indian country puts tribes, states, and the federal government in a difficult position. On one hand,

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current tribal law enforcement authority; a consequent absence of effective law enforcement altogether, leading to misbehavior and self help remedies that jeopardize public safety; discriminatory, harsh, and culturally insensitive treatment from state authorities when they do attend to Indian country crimes; confusion about which government is responsible and should be contacted when criminal activity has occurred or presents a threat.").

102. GOLDBERG & CHAMPAGNE, *supra* note 48, at 277–90.

103. Goldberg & Champagne, *supra* note 47, at 713.

104. *See id.* at 715–17.

105. GOLDBERG & CHAMPAGNE, *supra* note 48, at 288–89.

106. Indians are victims of domestic abuse at a rate between two and ten times higher than any other ethnicity. CALLIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENT VICTIMIZATION AND RACE, 1993–98, at 9 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf.

107. *See Federal Measures of Race and Ethnicity: Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 5 (1997) (statement of JoAnn K. Chase, Executive Director, National Congress of American Indians).

108. *See* Washburn, *supra* note 21, at 738 ("Like the cavalry, federal prosecutors and FBI agents swoop in occasionally to prosecute a perpetrator, but they do not maintain a constant presence and do not necessarily consider the broader impact of their work. They address only the serious offenses and they leave when each case is concluded. It is up to the tribal community to address other offenses and the aftermath of the felony and to attempt to restore the fabric of the community. Even assuming that the federal prosecutors who agree to handle such cases are generous, selfless, and committed to bettering the lives of the reservation community (as most of them no doubt are), even the best of intentions may not always be able to overcome the handicaps noted herein.").

tribes cannot adequately maintain sovereign authority over their territory in light of *Oliphant*'s jurisdictional preclusions. On the other, federal and state authorities are often unwilling or unable to adequately police Indian country, and are often met with cultural resistance from Indians when they do investigate.[109] Outsourcing criminal jurisdiction on Indian reservations to state and federal authorities strips tribal governments of their ability to serve their people and runs counter to Congress' stated goal of supporting tribal sovereignty.[110] When an unaccountable, often indifferent foreign sovereign places itself in charge of ensuring reservation safety, the authority of the tribal government—the body with the largest stake in protecting Indian tribes—is naturally diminished.

For these reasons, Congress should abrogate the *Oliphant* decision and reaffirm inherent tribal jurisdiction over reservation crimes. When tribes regain prosecutorial authority within their lands, they can finally prosecute petty crimes committed by non-Indians, such as vandalism, theft, simple assault, and disorderly conduct, violations that state and federal authorities simply do not have the manpower to adequately investigate and prosecute. This, in turn, would lessen the prosecutorial burden on state and federal authorities, who could then concentrate their limited resources on the major crimes that tribal infrastructure cannot handle. Part II of this Comment will explore what such a statutory abrogation might look like.

II. A STATUTORY ABROGATION OF *OLIPHANT*

Any statute restoring tribal criminal jurisdiction over non-Indians must achieve three main objectives: provide a reaffirmation of inherent tribal sovereignty; delineate the jurisdictional balance between tribal, state, and federal authorities; and protect the constitutional rights of criminal defendants in tribal courts (both Indian and non-Indian). There are many different ways that such a statute could be drafted. For the purposes of this Comment, the oft-mentioned "proposed statute" might follow the model cited below, though this is by no means the definitive version of what the statute should look like.[111]

109. *Id.* at 735–36 ("While federal prosecutors may be talented and committed public servants who are trying to 'do good' by helping to provide public safety or bringing justice to Indian country, each carries tremendous moral, emotional, and symbolic freight of which he may not even be aware.").

110. *See* 25 U.S.C. § 3601(2) (2006) (declaring that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government").

111. Below is a draft model code proposed by the author.

§ 1

A. Reaffirming Inherent Tribal Sovereignty

The most critical goal of the proposed statute is to express the congressional intent to reaffirm inherent tribal sovereignty, rather than delegate federal authority.[112] To do so, Congress must counter the Supreme Court's argument in *Oliphant v. Suquamish Indian Tribe*[113] that tribes were inexorably divested of their criminal jurisdiction over non-Indians by submitting to the sovereignty of the United States.[114]

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1) Congress hereby recognizes and reaffirms the inherent sovereign authority of federally recognized Indian tribes to assert criminal jurisdiction over all tribal members, nonmember Indians, and non-Indians for all offenses committed in Indian country in violation of tribal ordinances.
2) Each tribe shall have the power to render and enforce judgments, and to determine punishments, not to exceed $5,000, or one year imprisonment, or both.
3) In so reaffirming this inherent sovereign authority, Congress recognizes that tribal criminal jurisdiction over nonmember Indians and non-Indians is consistent with the overarching sovereignty of the United States.

§ 2

1) All tribal court criminal prosecutions shall be bound by the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (2006), except that § 1301(2) shall be amended to recognize the inherent authority of tribal courts to hear "all claims arising on the reservation."
2) Any nonmember criminal defendant prosecuted for a crime punishable by imprisonment shall be provided with counsel at the expense of the tribe.
3) All reservation residents, including non–tribal members, shall be eligible to be selected for tribal jury duty.

§ 3

1) This statute in no way repeals, abrogates, or supersedes any of the following statutes:
    a. The Indian General Crimes Act, 18 U.S.C. § 1152 (2006);
    b. The Indian Major Crimes Act, 18 U.S.C. § 1153 (2006);
    c. Public Law 280, 18 U.S.C. § 1162 (2006) and 25 U.S.C. § 1321 (2006); or
    d. Any other provision of federal law.
2) When, pursuant to their enumerated jurisdiction, a non-Indian government initiates criminal proceedings against a non-Indian for a crime committed in Indian country, and such prosecution is commenced prior to a concurrent tribal prosecution, all tribal court proceedings shall be stayed until the completion of the non-tribal prosecution.
3) This statute in no way delegates or otherwise authorizes tribal authority to prosecute violations of general federal law committed in Indian country.

112. Because Indian law decisions are a matter of federal common law, Congress has the power to rewrite the Court's historical narrative regarding the inherent jurisdictional limits of tribes. United States v. Enas, 255 F.3d 662, 673–75 (9th Cir. 2001). The importance of the distinction between inherent authority and delegated federal power is discussed in Part IV, *infra*.

113. 435 U.S. 191 (1978).

114. *See id.* at 209 ("Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.").

Congress can achieve this end rather easily. As it did with the *Duro* Fix,[115] Congress need only definitively state its desire to reaffirm the inherent tribal sovereign power of criminal jurisdiction over all crimes arising on the reservation, regardless of the perpetrator. By making clear that this reaffirmation of tribal authority is consistent with Congress' plenary power over Indian affairs,[116] the statute will reject *Oliphant*'s assumption that congressional silence about tribal court criminal jurisdiction indicates acquiescence towards the limitation of such authority.[117]

This proposed reaffirmation is akin to Congress' statutory reaffirmation of tribal court jurisdiction over nonmember Indians, which the Supreme Court found to be within Congress' authority.[118] Still, the question of whether the proposed statute exceeds Congress' powers would eventually have to be decided by the Supreme Court. Part IV of this Comment will discuss whether it is within Congress' authority to expand this reaffirmation to include non-Indians, ultimately concluding that it is.

B. Easing Tribes Into Expanded Jurisdiction

In abrogating *Oliphant*, Congress should maintain the Indian General Crimes Act (GCA),[119] the Indian Major Crimes Act (MCA),[120] and Public Law 280,[121] thus retaining federal jurisdiction over the enumerated Major Crimes, and Public Law 280 state authority over Indian reservations.[122]

115. The *Duro* Fix reaffirmed tribal jurisdiction over nonmember Indians by defining "powers of self-government" as "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." 25 U.S.C. § 1301(2) (2006).

116. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one . . . .").

117. *Oliphant*, 435 U.S. at 208.

118. United States v. Lara, 541 U.S. 193, 210 (2004). The Court ultimately concluded that Congress did in fact have such authority.

119. 18 U.S.C. § 1152 (2006) (giving federal law enforcement exclusive jurisdiction over misdemeanor crimes committed in Indian country by non-Indians against Indians, while retaining tribal court jurisdiction over non-major, non-federal crimes committed in Indian country by one Indian against another).

120. *Id.* § 1153 (establishing federal criminal jurisdiction over fourteen "major" crimes when committed by an Indian in Indian country).

121. *Id.* § 1162 (mandatory states); 25 U.S.C. § 1321 (2006) (optional states) (relinquishing federal control over Indian country crimes to certain enumerated states).

122. Because tribal court criminal jurisdiction in PL 280 states has been held to be the same as under federal law, *see supra* notes 53–54 and accompanying text, and the proposed statute would alter the parameters of such jurisdiction, the proposed statute should affect tribal court jurisdiction in PL 280 states as well.

Congress should also emphasize that federal and state jurisdiction, as statutorily and judicially defined, remain concurrent with tribal jurisdiction over nonmember, non-Major crimes.

Although these provisions may seem to run counter to the purposes of a statute aimed at restoring tribal sovereignty and jurisdiction, the political and financial infeasibility of immediately granting exclusive jurisdiction to tribes necessitates easing tribes into expanded jurisdiction. Indeed, a blanket abandonment of state and federal responsibility would be extremely problematic given most Indian tribes' financial difficulties.[123] If a tribe declines to prosecute a suspect for whatever reason, non-tribal authorities should have the power to initiate their own criminal proceedings. Maintaining the GCA, MCA, and Public Law 280 would also allow tribes unprepared for the responsibility of exclusive jurisdiction to continue to rely on state and federal authorities, until their own judiciaries are fully developed.[124] Allowing concurrent state and federal jurisdiction over nonmember, non-Major crimes will ultimately result in more prosecutions of Indian country criminals. If and when tribal finances are sufficient to fully support exclusive jurisdiction, Congress can revisit the situation as it sees fit.

The proposed statue should similarly require tribal courts to stay any concurrent prosecution when the state or federal government first initiates criminal proceedings against a non-Indian. By reserving first-in-time jurisdiction for state and federal prosecutors, the statute ensures that the better-funded, non-Indian authorities will have an opportunity to prosecute. This is necessary to prevent jurisdictional disputes between justice systems, which waste tribal, state, and federal resources and delay the prosecutions of reservation criminal offenders.[125]

Again, this seems to contradict the previous discussion of the inherent cultural difficulties faced by non-Indian authorities prosecuting reservation offenses, and to some extent it does. However, tribes retain concurrent jurisdiction and may still try non-Indian criminal offenders if they feel that the

123. *See* Goldberg & Champagne, *supra* note 47, at 724–25 (reporting that some tribes either lack the resources and facilities to expand their criminal prosecutions, or simply do not wish to shoulder such a burden).

124. *Id.* ("Not all of the tribal communities where we conducted interviews expressed an immediate interest in retrocession. Even where enthusiasm for the idea of retrocession was high, some communities thought they were not yet ready to mount their own police and criminal justice systems; still others were concerned that their small size or internal political conflicts made increased tribal jurisdiction infeasible.").

125. *See, e.g.*, Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 612 N.W.2d 709, 921–22 (Wis. 2003).

non-Indian authorities have done an inadequate job.[126] Further, these concessions may be a matter of practical, and even constitutional, necessity: the Supreme Court has indicated that diminishing state jurisdiction over nonfederal crimes involving solely non-Indians could unconstitutionally infringe upon state sovereign criminal authority.[127]

These jurisdictional compromises are designed to reduce crime rates on reservations, maximize tribal court jurisdiction, increase tribal sovereignty and self-government, protect reservation residents, and retain an acceptable level of non-Indian reservation presence. Also, allowing tribes to prosecute non-Indians will curtail resource-intensive jurisdictional challenges by defendants claiming they are not Indians, as opposed to the prevalence of such suits under the current statutory scheme. Affording tribal courts jurisdiction over non-Indians will place petty and domestic crimes (which make up the bulk of potential federal prosecutions, and provide the most problematic delineation between Indians and non-Indians) under concurrent tribal jurisdiction. Tribes can thus quickly adjudicate the petty offenses that the federal government is hesitant to take on, potentially reducing reservation crime rates.

C. Protecting the Rights of Criminal Defendants in Tribal Courts

Currently, tribal court proceedings must conform to the due process and equal protection clauses of the Indian Civil Rights Act.[128] These provisions

126. Concurrent tribal and state/federal prosecutions do not violate double jeopardy. *See* United States v. Wheeler, 435 U.S. 313, 329–30 (1978).

127. United States v. Lara, 541 U.S. 193, 205 (2004).

128. *See* 25 U.S.C. § 1301–1303 (2006). The ICRA applies the following provisions to tribal governments:

> No Indian tribe in exercising powers of self-government shall—
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject any person for the same offense to be twice put in jeopardy;
>
> (4) compel any person in any criminal case to be a witness against himself;
>
> (5) take any private property for a public use without just compensation;
>
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or

ensure that tribal criminal codes cannot violate basic constitutional precepts, and limit tribal court sentences to one year in jail and a $5,000 fine. Such compromises are necessary, in light of many tribes' inability to afford the high costs of incarcerating offenders.[129] As with the GCA and MCA, the ICRA would remain intact under the proposed statute to ensure that tribal court criminal proceedings comply with modern notions of constitutional rights.

In certain areas, though, the ICRA provides less protection to criminal defendants in tribal courts than that afforded to defendants in state or federal courts. For example, tribes are not required to provide indigent defendants with attorneys at the tribes' expense. Courts have long contended that such constitutional shortcomings are justified, because tribal members who enjoy the financial, cultural, and associational benefits of tribal affiliation relinquish their right to certain constitutional protections, such as a right to counsel.[130]

This justification does not apply to nonmembers, who cannot affiliate with a tribe and enjoy the privileges of tribal membership, and are often unfamiliar with tribal culture. They should not be forced to waive their rights merely upon entering Indian country. Accordingly, the proposed statute should preempt potential constitutional challenges by requiring tribes to provide free legal representation to nonmembers. This requirement will help quell the argument that tribal court jurisdiction over nonmembers would violate due process rights, a persistent concern of the Supreme Court and scholars.[131]

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punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Id. § 1302.

129. Tribal jails are often stretched thin in dealing with misdemeanor offenders, absent outside funding. *See generally* Eileen M. Luna-Firebaugh, *Incarcerating Ourselves: Tribal Jails and Corrections*, 83 PRISON J. 51 (2003), *available at* http://tpj.sagepub.com/cgi/reprint/83/1/51.pdf.

130. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). This distinction is premised on the fact that tribal affiliation is a political rather than racial categorization, has been upheld against equal protection challenges, and does not appear to be a serious point of contention in contemporary jurisprudence. *See* Morton v. Mancari, 417 U.S. 535, 553–55 (1974) (holding that Indian status is a political affiliation and not a racial classification, and accordingly that the standard of review for equal protection challenges attacking programs based on tribal status is rational basis rather than strict scrutiny).

131. *See, e.g.*, *Lara*, 541 U.S. at 213–14 (Kennedy, J., concurring) ("To demean the constitutional structure and the consent upon which it rests by implying they are wholly dependent for their vindication on the Due Process and Equal Protection Clauses is a further, unreasoned holding of serious import. The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights. The individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority

Due process concerns aside, some commentators have been hesitant to support such a costly requirement, arguing that it would tax impoverished tribal judiciaries beyond capacity.[132] But, given that federal courts would otherwise have had jurisdiction over the majority of these cases, the expense could be offset by diverting federal resources used on these prosecutions towards tribal public defender programs. So, provision of free legal representation to criminal defendants in tribal courts should not require funding greatly in excess of that already being spent on federal public defense.

This program would also strengthen tribal self-government and bolster Indian sovereignty by allowing tribes to train their own lawyers. Increasing tribal participation in the criminal process could also potentially alleviate problems of Indians refusing to cooperate with non-Indian authorities.[133]

Lastly, providing free representation to criminal defendants may reduce the number of habeas petitions arising from tribal courts. By avoiding these proceedings, a public defense program could help offset the cost of expanding tribal jurisdiction in the long run.[134] While tribes might ultimately expend some of their own resources on these programs, as one scholar has pointed out, "[t]ribes can likely afford . . . lawyers more than they can afford a fundamental loss of law enforcement jurisdiction over their populations."[135]

Another constitutional peculiarity of tribal criminal procedure is that tribal courts are not required to allow nonmember reservation residents to sit on juries, despite the fact that nonmember reservation populations are often larger than those of enrolled members.[136] In response, federal courts sometimes refuse to enforce civil judgments rendered by all-Indian tribal court

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ignores."); Matthew Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 634 (2008). Although tribal members waive the right to a court appointed attorney in tribal court, to date, a nonmember Indian has not challenged this aspect of the ICRA, and it is uncertain how such a challenge would be resolved.

132. *See, e.g.*, Goldberg & Champagne, *supra* note 47, at 724–25.

133. In one incident, a tribe set up a roadblock to prevent federal and state authorities from pursuing a suspect onto the reservation, to protest not having been consulted before the arrival of dozens of troops. *See* Goldberg-Ambrose, *supra* note 94, at 1430–31.

134. *See* McNeill, *supra* note 18, at 344–45.

135. Will Trachman, Comment, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CAL. L. REV. 847, 886 (2005).

136. *Compare* Navajo Nation v. MacDonald, 19 Indian L. Rep. 6053 (Navajo 1991) (upholding the Navajo jury selection process, which draws from all residents of counties within the Navajo reservation regardless of membership, as constitutional according to the Navajo tribal code), *with* Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988) ("[B]ecause the Petitioners, like the non-Indian residents of the Devils Lake Reservation, cannot vote in tribal elections, hold tribal office, sit on tribal juries, become members of the Devils Lake Sioux Tribe, nor significantly share in tribal disbursements the powers that may be exercised over them are appropriately limited." (citation omitted)).

juries against non-Indians.[137] This tension will only increase when criminal trials against non-Indians are added to the equation.

Because the Supreme Court requires jury pools to accurately represent the communities from which they are drawn,[138] the proposed statue should stipulate that nonmember reservation residents must be pooled for tribal juries. This will help legitimize tribal court proceedings in the eyes of non-Indians and reduce the potential for bias against non-Indians in tribal criminal proceedings.[139] While many Indian communities will inevitably produce all-Indian juries regardless of this requirement, this is no different from the challenges faced when pooling juries in any smaller, more homogenous American locality.[140]

III. JUDICIAL COMPETENCE AND FUNDAMENTAL FAIRNESS IN TRIBAL COURTS

Between the Indian Civil Rights Act's imposition of the majority of the Bill of Rights onto tribal court practice,[141] its guarantee of federal habeas review of tribal criminal sentences,[142] and the added safeguards of a right to counsel and nonmembers on tribal juries, the proposed statute must strike a balance between protecting nonmembers and respecting tribal customs. Despite these protections, critics will undoubtedly question the fairness of tribal court proceedings, especially once criminal prosecutions of non-Indians commence. For example, tribal courts are not bound by the entirety of the Bill of Rights, are free to interpret the due process and equal protection provisions of the ICRA in accordance with tribal custom,[143] and may preclude

137. *See, e.g.*, Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136 (9th Cir. 2001).

138. Taylor v. Louisiana, 419 U.S. 522 (1975).

139. Because the ICRA's equal protection clause applies to tribal court proceedings, lawyers would not be able to use peremptory challenges to discriminate based on race, similar to in state and federal courts. *See* Batson v. Kentucky, 476 U.S. 79 (1986). Similarly, striking jurors based on tribal membership (or the lack thereof) would clearly rob tribal juries of their representative nature by acting as a proxy for racial discrimination, and should not be allowed. *See Taylor*, 419 U.S. at 530 ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").

140. *See* Berger, *supra* note 21, at 1120 ("A potential criticism of tribal legal systems is that the small size of tribal communities and the importance of clan relationships among community members present an obstacle to objective resolution of legal disputes. This obstacle may not be significantly greater than it is in small towns, in which judges, lawyers, and parties typically know each other well.").

141. 25 U.S.C. § 1302 (2006).

142. *Id.* § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."). For a discussion of the importance of habeas review in legitimizing tribal court jurisdiction over nonmembers, see *infra* Part III.B.2.

143. *See* White Eagle v. One Feather, 478 F.2d 1311, 1312 (8th Cir. 1973) ("The question for our consideration is the scope and meaning of the Congressional use of well-known constitutional

non–tribal members from participating in tribal governments.[144] These concerns are all addressed below.

A. The Consent Theory

In *Duro v. Reina*,[145] the Supreme Court held that because nonmembers could not "consent" to tribal court jurisdiction through political membership in a tribe, placing nonmembers under the jurisdiction of tribal courts would be an intrusion into a U.S. citizen's "personal liberty."[146] As a result, *Duro* held that tribal courts should not have jurisdiction over any nonmember, Indian or otherwise.[147] Although the *Duro* Fix[148] repudiated the consent argument as applied to tribal criminal jurisdiction over nonmember Indians, it is still the governing theory in the case of non-Indians.[149]

However, the consent theory is inconsistent in several important ways, and should not preclude expanding tribal court criminal jurisdiction. Casual reservation visitors must realize that upon entering the territory of a sovereign authority, one is subject to its laws.[150] This realization is absolutely crucial for ensuring that non-Indians respect and obey tribal laws and ordinances. Much like one's choice to live in or visit a particular state, which attaches consent to be subject to its laws, the same consent exists by living on or visiting Indian res-

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terms, such as, here 'the equal protection of its laws,' within the setting of the culture and ethnical background of the Indian tribes.").

144. *See, e.g.*, CONSTITUTION OF THE STANDING ROCK SIOUX TRIBE art. V, § 1 ("Any enrolled member of the tribe at least eighteen (18) years of age and resident in the district in which he votes for at least thirty (30) days immediately prior to the date of the election shall be qualified to vote.").

145. 495 U.S. 676 (1990).

146. *Id.* at 693 ("Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority."). For an exploration of the "consent paradigm," see generally L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

147. *See* United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).

148. Pub. L. No. 101-511, § 8077(d), 104 Stat. 1856, 1893 (1990) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

149. The *Duro* Fix legislatively reaffirmed tribal court criminal jurisdiction over non-member Indians. *See supra* Part I.A.3.

150. "The commission of a crime on the reservation is all the 'consent' that is necessary to allow the tribe to exercise criminal jurisdiction . . . ." *Duro*, 495 U.S. at 707 (Brennan, J., dissenting); *see also* Heisey, *supra* note 18, at 1070 ("[T]here is no reason to believe that a non-Indian who leaves the confines of the state, enters Indian country, puts herself within the boundary of tribal authority, and commits a crime there should not be subject to the jurisdiction of the tribe. In fact, many non-Indians actually live in Indian country at the behest of Congress. In light of this fact, it is difficult to accept the *Oliphant* Court's argument that tribal culture is so alien to non-Indians that they must be shielded from tribal criminal jurisdiction.").

ervations.[151] Indeed, dissenting in *Duro*, Justice Brennan correctly noted that the Supreme Court has never held "that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign."[152] Non-Indians often live on reservations for their entire lives, serve on tribal juries, work in tribal businesses, marry tribal members, and practice tribal religions.[153] It is therefore difficult to justify the assumption that political participation is the sole factor that can create the cultural familiarity necessary for establishing consent towards tribal jurisdiction.[154]

By comparison, in *Montana v. United States*,[155] the Supreme Court created a method for determining tribal court civil jurisdiction over nonmembers. However, this test has little to do with political participation and undercuts much of the reasoning behind the consent argument. Known as the "*Montana* Exception," the rule states:

> [A] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee 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.[156]

This test gives tribes civil jurisdiction over non-Indians who could never consent to tribal court jurisdiction by joining the tribe. Its imprecise categories may instead be triggered by tenuous connections between non-Indians

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151. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (holding that city criminal jurisdiction over non-voting portions of surrounding areas did not violate the Constitution).

152. *Duro*, 495 U.S. at 707 (Brennan, J., dissenting).

153. *See* Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Court Jurisdiction Over Non-members Nearly Two Decades After* Duro v. Reina, 41 CONN. L. REV. 265, 292 (2008) ("Non-member Indians make up a significant portion of many reservations and are often integrated into the community through family and employment, making the Court's focus of 'consent' and voting rights appear misplaced.").

154. This issue is pertinent given the booming reservation casino industry, which attracts scores of non-Indians onto the reservations. The National Indian Gaming Association, charged with overseeing and regulating tribal gambling activities, estimates that 75 percent of the roughly 670,000 Indian casino jobs nationwide are held by non-Indians. National Indian Gaming Association, Indian Gaming Facts, http://www.indiangaming.org/library/indian-gaming-facts/index.shtml (last visited Mar. 8, 2009); *see also* Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 436 (2001). As tribal gaming expands, the already heavy non-Indian presence on reservations will increase, and it will be even more difficult for tribes to deal with the non-Indian reservation residents and employees who are immune from tribal criminal jurisdiction.

155. 450 U.S. 544 (1981).

156. *Id.* at 565–66 (citations omitted).

and the tribe, such as a car accident on a tribal road.[157] This dichotomy between civil and criminal jurisdiction is paradoxical: a Caucasian, lifelong reservation resident who marries into the tribe and works on the reservation cannot consent to tribal criminal jurisdiction,[158] but an insurer who signs a contract with an Indian business and whose agents have never set foot on the reservation has consented to civil jurisdiction.[159]

For example, say a tribe contracts with an oil company to drill on its reservation. The non-Indian foreman knowingly uses unsafe drilling techniques and the rig explodes, killing an Indian employee. The Supreme Court is comfortable with the tribe hearing a $10 million personal injury lawsuit that can only be appealed within the tribal legal system.[160] However, the Court will not allow the tribe to bring a misdemeanor charge of reckless endangerment against the foreman, because he is not an Indian. This is true despite the foreman's close ties to the reservation, the multiple avenues for challenging his detention,[161] and the likelihood that federal courts will decline to prosecute.[162] The Court's differing standards for civil and criminal jurisdiction seems to assume that tribal courts can be trusted with one but not the other, a theory that has repeatedly been discredited.[163]

In general, the consent theory protects non-Indians based on an unfounded assumption that tribal law and culture is too alien to fairly apply to any non-Indian.[164] Connecting tribal criminal jurisdiction over non-Indians to tribal governmental participation creates an artificially heightened standard for tribal criminal jurisdiction as compared to state or federal courts. It is also inherently contradictory when compared to tribal civil jurisdictional rules.

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157. *See, e.g.*, McDonald v. Means, 309 F.3d 530 (9th Cir. 2002).

158. State *ex rel.* Poll v. Mont. Ninth Judicial Dist., 851 P.2d 405 (Mont. 1993).

159. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

160. So long as an interaction between an Indian and a non-Indian on the reservation falls within one of the categories of the *Montana* Exception, the tribal court has exclusive civil jurisdiction. *Id.* at 18. It is true that federal diversity jurisdiction can exist when the matter in controversy exceeds $75,000. *See* CANBY, *supra* note 30, at 249–50. However, in such cases, the tribal court must be given the first opportunity to determine whether or not it has jurisdiction. If the tribal court hears the case, the losing party may not relitigate the matter in federal court, but can instead only challenge the tribal court's original jurisdiction. *LaPlante*, 480 U.S. at 19.

161. *See infra* Part III.B.2.

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

163. *See infra* Part III.B.1.

164. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-Members*, 109 YALE L.J. 1, 38–39 (1999) ("From the standpoint of fairness, subjecting a non-Indian with a retail store in Indian country to the exclusive jurisdiction of tribal court for collection actions may be at least as troubling as subjecting a non-Indian reservation resident to tribal jurisdiction over minor crimes, when the tribe may impose only modest sanctions, must follow most of the guarantees found in the Bill of Rights, and is subject to federal habeas corpus review." (emphasis omitted)).

B. Constitutional Concerns with Tribal Court Procedure

Although the Indian Civil Rights Act requires tribal courts to abide by the majority of the Bill of Rights' criminal provisions, there are a few notable exceptions. Specifically, tribes are allowed to have six rather than twelve-person juries, and are not required to convene grand juries for criminal indictments or to provide attorneys for indigent criminal defendants.[165]

However, these issues should not negate the legitimacy of tribal courts. All violations of tribal law are by definition misdemeanor offenses under the ICRA[166] (as well as under the proposed statute), negating the need to implement a grand jury requirement onto tribal courts. Also, juries of six rather than twelve people are constitutional in state courts.[167] Again, given that all tribal criminal prosecutions are necessarily misdemeanors, the six-person jury requirement should not be an issue when giving tribal courts jurisdiction over non-Indians.[168]

Further, existing safeguards found in the ICRA provide "a sufficient floor of rights that protects all [citizens] no matter in which tribal court they find themselves and provides a mechanism for federal review with complete constitutional protection,"[169] which would only be bolstered by the proposed statute. Indeed, under the Supreme Court's selective incorporation jurisprudence, several safeguards in federal criminal procedure are not required in state courts—and this is consistent with due process.[170]

This Comment argues below that the proposed statute and the ICRA, paired with the demonstrated reliability and impartiality of tribal courts, ensure adequate constitutional rights for any criminal defendant, Indian or otherwise. Further, as Mark Rosen notes, when tribal courts apply federal constitutional concepts, "[e]ven though the same outcome probably would have been obtained in a federal court utilizing ordinary federal doctrine, it is

165. *See* Morris v. Tanner, 288 F. Supp. 2d 1133, 1143 (D. Mont. 2003); Means v. Navajo Nation, 432 F.3d 924, 935 (9th Cir. 2005).

166. 25 U.S.C. § 1302(7) (2006).

167. Williams v. Florida, 399 U.S. 78 (1970).

168. For an examination of constitutional issues such as this in the context of tribal affairs, *see generally* James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51 (1998).

169. *Morris*, 288 F. Supp. 2d at 1144.

170. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545–51 (1971) (finding that there was no right to a jury trial in state court juvenile delinquent proceedings); Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the Fifth Amendment right to a grand jury indictment was not incorporated against the states by the due process clause of the Fourteenth Amendment); Walker v. Sauvinet, 92 U.S. 90, 92–93 (1875) (holding that the Seventh Amendment jury requirement for civil trials does not extend to state courts).

important *vis-a-vis* not only self-governance but also community-building that the tribal court had the opportunity to arrive at its legal conclusion by reference to its tribe's particular cultural values."[171]

1. Tribal Custom and Tribal Courts: Concerns with Judicial Impartiality

Tribal criminal codes and common law often draw heavily on tribal custom and tradition,[172] and tribes are not required to employ federal judicial interpretations of concepts such as due process and equal protection.[173] Accordingly, some fear that any non-Indian appearing in tribal court would face an inherent disadvantage due to her lack of familiarity with tribal norms.[174] Nonetheless, the absence of complete constitutional protections and the tribal reliance on custom[175] are not as problematic in practice as they might appear in theory. While documentation on how tribal courts have applied the Indian Civil Rights Act[176] is fairly limited, the handful of existing studies all conclude that tribal courts are generally as fair and impartial as their state and federal counterparts.

One such study, conducted by Bethany Berger, focused on the largest tribal judiciary in the United States, the Navajo Nation tribal court.[177] Though it is difficult to make generalizations about Indian tribal courts based solely on Navajo jurisprudence, the Navajo court is a particularly useful example because it is the largest and most developed tribal judiciary in the

171. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 515 (2000).

172. On the use of tribal custom in tribal courts, see generally Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

173. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.04[2], at 956 (Nell Jessup Newton et al. eds., LexisNexis Matthew Bender 2005 ed.) ("The interpretation and application of ICRA are largely matters for tribal institutions alone."). Federal courts are generally deferential towards tribal interpretations of such concepts. *See, e.g.*, Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) ("[C]ourts have been careful to construe the term[ ] 'due process' . . . with due regard for the historical, governmental and cultural values of an Indian tribe.").

174. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) ("Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.' The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out." (citations omitted)).

175. Indian tribal courts have developed extensive tribal common law based on their own traditions and tribal values. *See generally* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287 (1998).

176. 25 U.S.C. § 1302 (2006).

177. *See* Berger, *supra* note 21, at 1067–97.

country, and it embodies many of the qualities that make state and federal courts wary of tribal jurisdiction.[178]

Berger examined the win-loss records of non-Indians in Navajo civil trials, focusing on the types of cases that seemed prone to bias in a tribal court.[179] Her study showed that non-Indians won 47.4 percent of the ninety-five reported cases between 1969 and 2004 that involved Indians suing non-Navajos.[180] These included numerous non-Indian victories in provocative cases such as personal injury suits and allegations of predatory employment practices by non-Indian businesses on the reservation.[181] While non-Navajo appellants in the Navajo Supreme Court won only 26.5 percent of all cases,[182] this statistic is consistent with appellant success rates in non-tribal appeals courts as well.[183]

Non-Indians also won four out of seven cases that were decided according to the traditional Navajo concept of "nalyeeh," or restitution.[184] Given that federal courts often disapprove of the use of tribal custom in tribal courts,[185] this sample shows that the introduction of tribal tradition into jurisprudence is not an impassible hurdle for a non-Indian defendant. Although bare win/loss records are not entirely representative of tribal court fairness, these statistics demonstrate there is likely not a pervasive, pro-Indian bias in tribal courts.

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178. For example, Navajo judges are required to be enrolled Navajos, must speak Navajo and demonstrate familiarity with Navajo custom and culture, and do not have to be law school graduates. NAVAJO NATION CODE tit. 7, § 354(A)(1)–(5) (2005).

179. Berger, *supra* note 21, at 1074.

180. *Id.* at 1075. Although the study surveyed cases involving nonmembers generally rather than specifically non-Indians, 91.8 percent of the cases involved non-Indians and so should be considered generally representative of how non-Indians fare in tribal courts. *Id.* By comparison, plaintiffs win about 55 percent of civil jury trials brought in state courts nationwide. LYNN LANGTON & THOMAS J. COHEN, DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 3 tbl.2 (2009), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf. It should be noted, however, that civil plaintiffs did win a higher percentage of bench trials. *Id.* It is uncertain what the breakdown between judge and jury trials is in Navajo civil cases.

181. *See* Berger, *supra* note 21, at 1075–87. Compare David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001), which found that Indian tribes have lost 77 percent of cases brought before the Supreme Court since 1986. While the merits of the cases obviously play a large role in this statistic, this trend does imply that non-Indians fare better in tribal courts than Indians do in federal courts.

182. *See* Berger, *supra* note 21, at 1078–79.

183. *See* Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations From the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 252 (1996).

184. *See* Berger, *supra* note 21, at 1081–84.

185. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 693 (1990) (justifying the preclusion of nonmember criminal adjudications in tribal courts through the necessary avoidance of subjecting non-Indians to the influence of "unique customs, languages, and usages of the tribes").

A similar investigation of tribal court practice, conducted by the U.S. Commission on Civil Rights, was concluded in 1990. The Commission interviewed hundreds of tribal judges, tribal government officials, Indian law scholars, U.S. attorneys, and Bureau of Indian Affairs representatives, with the goal of addressing the fundamental fairness of tribal court application of the ICRA.[186] Given that contemporary commentators criticized the Commission for being a highly politicized conservative group that existed solely to push the Reagan administration's social agenda,[187] the pro-tribal results of the study are even more revealing.

The Commission reported that beyond problems associated with underfunding,[188] the four main shortcomings of tribal courts were the lack of judicial independence, the inability of judiciaries to review actions of the tribal council, a powerlessness to ensure accountability of tribal governments, and the lack of recognition of tribal judgments in federal courts.[189] In no way did the Commission's final report indicate that the tribes applied the law inconsistently, or with any pro-Indian bias. Rather, tribal courts performed admirably in the face of budgetary shortfalls and hostility from corrupt tribal executives who resented the constraints imposed by their own judiciaries. The Commission ultimately concluded that tribes would be best served by increased federal funding for their courts, and—even more significant for the present discussion—increased jurisdiction over nonmembers.[190] This would not have been the case had there existed widespread suspicion that the tribes would manipulate their laws to vindictively target non-Indians.

A larger and more comprehensive study was conducted by Mark Rosen, and examined tribal court practices based on cases published between 1986 and 1998 in the *Indian Law Reporter*.[191] Rosen found that tribal courts consistently interpreted the ICRA's due process provision to expansively protect

186. *See* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 1–2 (1991) [hereinafter COMM'N REPORT, ICRA].

187. *See* Jocelyn C. Frye et al., Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 476–87 (1987).

188. According to the Bureau of Indian Affairs, "[u]nsure funding levels make it very difficult to develop a court system that can grow steadily to meet community needs." COMM'N REPORT, ICRA, *supra* note 186, at 24. Tribal court officials reiterated that budgetary shortfalls hamper the administration of justice. *Id.* at 37–40.

189. *Id.* at 44.

190. *Id.* at 72–73.

191. *See* Rosen, *supra* note 171, at 510. These opinions were necessarily limited to Indian defendants under *Oliphant*, but are still useful for determining how tribes treat their own members in the criminal sphere. The *Indian Law Reporter* reports cases from federal, state and tribal courts, as well as administrative agencies, which pertain to Indian law and tribal affairs.

the rights of defendants.[192] Surveyed tribal court opinions repeatedly applied federal standards of due process to protect against self-incrimination, provide counsel for indigent defendants, and crack down on the traditional tribal punishment of banishment, among other things.[193]

To be fair, only ten of almost two hundred cases examined in the study involved non-Indians.[194] However, eight out of the ten displayed what Rosen determined to be "responsible and good faith interpretation of the ICRA."[195] Furthermore, in the two cases that showed traces of pro-Indian "activism,"[196] there were equally compelling arguments that the results were completely neutral; Rosen merely flagged the two cases as being slight deviations from the norm.[197] Overall, he found "no indication that tribal courts have succumbed to the temptation to favor the insider at the expense of outsiders,"[198] and that "outsider jurisprudence suggests that factors aside from political accountability and cultural affiliation have led tribal courts to engage in good faith attempts to apply ICRA."[199] As with the other studies, Rosen stressed that, based on the published record, tribal courts did not appear biased against non-Indians.[200]

A fourth study was conducted by Robert McCarthy, then director of the Indian law clinic at the University of Washington.[201] McCarthy examined

192. *Id.* at 530–32. Examples include tribal courts finding a due process violation when a tribe failed "to inform an employee that he had a right under personnel procedures to displace less senior workers," and courts requiring both "that terminated public employees be given the identical data relied upon by their supervisors" and "that judges inform persons jailed for contempt that they are entitled to a hearing of indigence at which they will be freed from jail if they demonstrate poverty," among others. *Id.* at 532.

193. *Id.* at 532–33, 535, 564.

194. *Id.* at 511, 573.

195. *Id.* at 573.

196. In the first of the cases allegedly displaying pro-Indian bias, the bare existence of a contract between an Indian and a non-Indian was interpreted to be prima facie evidence of an agreement to subject the contract to tribal law. Thorstenson v. Cudmore, 18 Indian L. Rep. 6051 (Cheyenne River Sioux Tribal Ct. App. 1991). However, this is consistent with the type of activity that would grant tribal court jurisdiction under *Montana*, and would likely be upheld as a legitimate application of federal law. The second, and more problematic, ruling held that a special tax against a non-Indian power utility did not violate equal protection. Pub. Serv. Co. of N.M. v. Tax Protest Panel, 18 Indian L. Rep. 6097 (Jicarilla Apache Tribal Ct. 1991). Even so, the Supreme Court has upheld special tribal taxes solely affecting non-Indians when the tax goes to "defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction," which would almost certainly have applied to *Public Service Co.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

197. Rosen, *supra* note171, at 576–77.

198. *Id.* at 578.

199. *Id.*

200. *Id.* at 579 ("When tribal courts do have jurisdiction over outsiders, there does not appear to be a pattern of abuse with respect to the outsiders who are pressing the ICRA claims.").

201. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998).

dozens of tribal court cases litigating each enumerated clause of the ICRA, searching for problematic issues in tribal court jurisprudence.[202] His conclusions mirror those of the aforementioned studies: tribal courts are as fair and unbiased as their state and federal counterparts, and the single biggest problem surrounding tribal judiciaries is underfunding.[203]

More specifically, McCarthy's study revealed that allegations of ICRA violations make up an extremely low percentage of tribal court caseloads. Between 1983 and 1996, fewer than 5 percent of reported tribal court adjudications involved ICRA challenges in either the criminal or civil context.[204] This could simply stem from the fact that many parties in tribal courts cannot afford to bring a subsequent suit under the ICRA.[205] However, one would assume that allegations of ICRA violations would appear more often if tribal courts were routinely misapplying the ICRA.

These surveys of tribal courts do not comprehensively represent the wide variety of Indian court practices, and non-Indian experiences in tribal courts are restricted to civil claims. Still, studies by a government agency, law professors, a legal clinical director, and evidence from tribal opinions themselves repeatedly prove that tribal courts are neither overtly incompetent nor biased. While tribal courts do face problems, particularly those related to a lack of funding, they appear to be as equally trustworthy and reliable as state and federal courts. Although more research on the subject is necessary, the majority of non-Indian concerns with tribal courts seem unfounded, unfairly assumed, or easily fixable by increasing tribal court budgets.

2. The Indian Civil Rights Act and Federal Habeas Corpus Review

The Indian Civil Rights Act[206] guarantees federal habeas review over any tribal criminal detention.[207] While there are "few cases in which habeas jurisdiction has actually been invoked under § 1303 [of the ICRA], and even fewer examining the jurisdictional prerequisites of § 1303,"[208] those few cases indicate that federal courts are extremely protective of a defendant's rights

202. *Id.* at 490–91.
203. *Id.* at 513–15.
204. *Id.* at 491.
205. Per capita, Indians are the poorest minority in the United States: as of the 2000 census, 25.7 percent of Indians lived below the poverty line. STATISTICAL ABSTRACT, *supra* note 66, at 29 tbl.682. While this survey did not differentiate between reservation residents and Indians in general, there is no reason to believe that reservation Indians are any more affluent than nonresident Indians. Given the destitute conditions on many reservations, exactly the opposite is likely.
206. 25 U.S.C. §§ 1301–1303 (2006).
207. *Id.* § 1303.
208. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 884–85 (2d Cir. 1996).

when conducting habeas review of tribal court criminal prosecutions.[209] As a result, the expanded tribal court criminal jurisdiction under the proposed statute would still be subject to federal review of tribal criminal convictions, adding another safeguard for non-Indians.

Moreover, obtaining habeas review of tribal decisions is significantly easier than for state or federal adjudications. For example, the Antiterrorism and Effective Death Penalty Act (AEDPA)[210] precludes habeas review of a criminal conviction unless the imprisonment was contrary to, or an unreasonable application of, Supreme Court precedent.[211] This statute, however, does not facially apply to Indian tribal court proceedings. Given that both state and federal courts are specifically covered by the AEDPA, and that federal statutes[212] and treaties[213] are not to be read to affect Indian interests absent clear congressional intent to the contrary, the AEDPA's restrictions on habeas review presumptively do not apply to tribal courts.

Critics might argue that even if federal courts retain unfettered habeas review of tribal court decisions, tribal court opinions often blend federal, state, and tribal law. Accordingly, so the argument goes, it would be too difficult for federal judges to parse through the varying legal concepts to find a reversible error. This argument is misguided. Even though tribal courts are free to apply concepts such as due process and equal protection in accordance with tribal custom, federal courts are not bound by tribal court interpretations of the ICRA when reviewing tribal decisions.[214] Instead, federal courts employ federal constitutional standards to determine whether a challenged tribal decision has violated a fundamental right under the ICRA.[215]

Because the federal notions of due process and equal protection developed outside of tribal legal systems, federal rejection of tribal interpretation of these concepts does not infringe upon tribal sovereignty.[216] This provides an added

209. *See, e.g.*, *id.* at 895–98 (finding that banishment from tribal lands without trial violated due process); Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) (vacating a tribal court decision in which the tribal trial court failed to timely rule on the petitioner's in forma pauperis motion); Wounded Knee v. Andera, 416 F. Supp. 1236, 1240–42 (D.S.D. 1976) (holding that a tribal judge acting both as prosecutor and adjudicator violated due process); Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969) (holding that tribal banishment of a member who "disrespected" a tribal elder during a criminal proceeding violated due process).

210. 28 U.S.C. § 2244 (2006).

211. *Id.*

212. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

213. *See* Antoine v. Washington, 420 U.S. 194, 199–200 (1975).

214. *See, e.g.*, Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136 (9th Cir. 2001) (choosing not to apply comity standard to tribal court judgment when the trial violated federal notions of due process).

215. Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988).

216. *See, e.g.*, White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973).

layer of protection for non-Indian defendants in tribal prosecutions, and encourages tribes to apply the law without discrimination so as to avoid being overturned on review. At the same time, federal habeas review still allows for the application of tribal tradition and custom so long as proceedings remain fair.

Overall, federal courts have significant leeway to vacate tribal criminal detentions that do not respect a defendant's rights. Accordingly, non-Indians subjected to tribal court prosecutions under the proposed statute would actually be at an advantage in terms of securing habeas review as compared to a defendant in a state or federal prosecution. Considering the opportunity for habeas review, the safeguards inherent in the ICRA and the proposed statute, and the demonstrated reliability of tribal judiciaries, criticisms about fundamental tribal court fairness and competence appear exaggerated at best.

IV. THE INHERENT REAFFIRMATION OF TRIBAL SOVEREIGNTY

In *United States v. Lara*,[217] the Supreme Court held that the *Duro* Fix reaffirmed inherent tribal sovereign power to prosecute nonmember Indians in tribal courts. Accordingly, the *Duro* Fix was not a congressional delegation for the purposes of dual sovereignty—the concept that separate sovereigns, such as a state and the federal government, may successively prosecute someone for the same crime without violating the prohibition against double jeopardy since their prosecutorial power stems from separate sources.[218] The proposed statute would reaffirm a broad scope of tribal criminal jurisdiction—broader than that in *Duro v. Reina*[219]—which the *Lara* court hesitated to support.[220] Debates about fairness and constitutionality aside, then, it must be determined whether Congress would be justified in classifying a statutory abrogation of *Oliphant v. Suquamish Indian Tribe*[221] as a reaffirmation of inherent tribal sovereignty, rather than as the delegation of federal power suggested by the *Oliphant* Court.[222]

The importance of this distinction is that a congressional delegation of authority would essentially transform tribal courts into reservation-based federal courts, denying tribes the flexibility to develop judiciaries in accordance with tribal custom. Rather than being bastions of tribal sovereignty, tribal

217. 541 U.S. 193 (2004).
218. *See* United States v. Wheeler, 435 U.S. 313, 321–22 (1978).
219. *See supra* Part I.A.3.
220. *Lara*, 541 U.S. at 204–05 ("[T]he change at issue here is a limited one. . . . Consequently, we are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status.").
221. 435 U.S. 191 (1978).
222. *See supra* Part II.A.

courts would merely "become mirror images of the dominant society"[223] and would lose the traits that make them culturally unique.

This Comment contends that the *Lara* holding indicates that tribal court criminal jurisdiction over both nonmember Indians and non-Indians is no longer inconsistent with the tribes' classification as domestic, dependant nations. This Part argues that tribal authority has merely been held in trust by the federal government since colonization, until such time as it became consistent with tribal status. Accordingly, the proposed statute should be considered a reaffirmation of tribal sovereignty, and not a Congressional delegation of authority.

A. Reaffirmation Versus Delegation: Preserving Tribal Cultural Heritage

A basic question worth answering before critiquing *Oliphant* is why the fundamental distinction between a reaffirmation of sovereignty and a delegation of authority would matter. After all, between the ICRA's bill of rights,[224] the GCA,[225] and the MCA,[226] tribal judiciaries are already heavily constrained by non-Indian authorities. So long as Congress sees fit to statutorily abrogate *Oliphant*, then, the difference between reaffirming and delegating power might seem inconsequential.

This distinction, however, has critical implications for tribes' ability to reflect, preserve, and develop their specific culture through their judiciaries. Inherent sovereignty allows tribes to preserve their own unique customs and social order and is "part of the [tribe's] primeval sovereignty, has never been taken away from them . . . and is attributable in no way to any delegation to them of federal authority."[227] Following this logic, tribes may tailor federal legal ideals around their traditional cultural practices, developing judicial systems that ensure the rights of court participants while simultaneously giving tribes an opportunity to maintain their traditions.[228]

Federally delegated authority, however, is considered an extension of federal power and requires full adherence to all facets of the Constitution.[229] Such a classification of expanded tribal criminal jurisdiction would have three significant consequences. First, the tribal practice of prosecuting lesser offenses

223. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 836 (2007).
224. 25 U.S.C. § 1302 (2006).
225. 18 U.S.C. § 1152 (2006).
226. *Id.* § 1153.
227. United States v. Wheeler, 435 U.S. 313, 328 (1978).
228. *See* Krakoff, *supra* note 84, at 1138.
229. United States v. Enas, 255 F.3d 662, 666–68 (9th Cir. 2001).

incidental to major crimes, which would be one of the most critical augmentations to tribal jurisdiction over non-Indians under the proposed statute, would violate double jeopardy prohibitions.[230] As is the case with delegated prosecutorial power to U.S. territorial courts, tribal courts would be exercising power authorized by the federal government, thus prohibiting dual prosecutions because "territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty."[231] By comparison, under the dual sovereignty doctrine, such successive prosecutions are acceptable when tribes exercise inherent sovereignty because multiple prosecutions by separate sovereigns (such as state and federal governments) do not violate double jeopardy.[232]

Second, the ICRA would essentially be abrogated. Tribes would no longer have a degree of flexibility and accommodation in their court structure, as is currently the case under the ICRA.[233] Rather, tribes would be constrained by the entirety of the Constitution, which scholars argue is a serious infringement onto tribal sovereignty.[234]

Third, tribes would be forced to Americanize their tribal court procedures and eliminate the vast majority of culturally sensitive aspects found therein. For example, some tribal courts consider restitution and fair treatment to be a fundamental aspect of due process analysis.[235] Others allow a council of elders to certify issues of tribal custom during court proceedings, or give matrilineal preference in family law cases to reflect tribal tradition.[236] More generally, tribes may reject federal concepts of due process or equal protection that conflict with unique tribal conceptions of fairness and restitution even though this often results in more protections for parties in court proceedings.[237] If tribes were forced to mirror federal courts, these and other tribal customary rules of procedure and common law would be subject to an onslaught of constitutional challenges; indeed, the threat of such challenges

230. *See generally Wheeler*, 435 U.S. at 313.

231. Puerto Rico v. Shell Co. (P.R.) Ltd., 302 U.S. 253, 264 (1937).

232. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985).

233. *See supra* Part II.C.

234. *See* Riley, *supra* note 223, at 802 ("[I]ncreased federal control over intra-tribal matters will likely mean the end of core aspects of tribal differentness. Thus, an accurate analysis of tribes as illiberal actors must address Indian nations' sovereign status.").

235. *See, e.g.*, Berger, *supra* note 21, at 1081–84; Krakoff, *supra* note 84, at 1154.

236. *See* Valencia-Weber, *supra* note 172, at 253–54.

237. Hopi Tribe v. Mahkewa, Nos. AP-002-92, AP-003-93 (Hopi App. Ct. July 14, 1995), *reprinted in* HOPI TRIBAL CASELAW (2003).

already motivates some tribal courts to adopt a federal model at the expense of traditional tribal dispute-resolution mechanisms.[238]

This final consequence is the ultimate flaw in the delegation model. Since 1970, the express goal of the federal government has been to further tribal self-determination by allowing Indian tribes to govern their own territories, further their cultural institutions, and rely less upon federal support.[239] *Oliphant* and its progeny notwithstanding, the Supreme Court has echoed this sentiment, repeatedly preserving the cultural and jurisdictional vitality of tribal courts when possible.[240] A reaffirmation of tribal sovereignty, then, is necessary to ensure that tribal courts can in fact retain this cultural vitality rather than sacrifice their unique, fundamental character in exchange for jurisdiction that should be theirs in the first place. Therefore, the distinction between a reaffirmation and delegation of authority is critical, and it is to this distinction that this Comment now turns.

B. Implicit Divestiture: An Historical Inaccuracy

In *Oliphant*, the Supreme Court ruled that "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.'"[241] This notion was later categorized in *United States v. Wheeler*[242] as an "implicit divestiture of sovereignty,"[243] and is currently known as the doctrine of implicit divestiture.[244] Although the exact boundaries of what is inconsistent with tribal status have changed over time,[245] Philip P. Frickey aptly summarizes the doctrine as being a case-by-case judicial determination of "whether

238. *See* Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. IND. L. REV. 329, 332–39 (1978).

239. *See* Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 566–67 (July 8, 1970) ("This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community . . . [a]nd we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.").

240. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855–56 (1985); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

241. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (emphasis and citation omitted).

242. 435 U.S. 313 (1978).

243. *Id.* at 326.

244. *See* Frickey, *supra* note 164, at 45.

245. *Compare* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) ("This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government."), *with Wheeler*, 435 U.S. at 326 (classifying implicit divestiture as applying only to "the relations between an Indian tribe and non-members of the tribe").

tribes have legitimate local interests implemented by appropriate lawmaking and law-applying procedures and institutions that transcend the interests of outsiders to be free from tribal authority."[246]

The nature of tribal sovereignty and the relationship between the tribes, the federal government, and the states was originally set forth in the foundational Indian law cases known as the Marshall Trilogy.[247] After examining the Marshall Trilogy and its progeny, the *Oliphant* Court claimed that there existed an "unspoken assumption"[248] among the executive, legislative, and judicial branches that tribal courts had never had the inherent sovereign authority to prosecute non-Indians. Further, the Court reasoned that after British colonization of America and the post-Revolutionary development of the United States government, tribal sovereignty was necessarily subordinated to the jurisdiction of the United States. This stripped the tribes of any powers that the Court considered inconsistent with their new status as domestic, dependent nations: namely, those powers that conflict with federal interests or unduly intrude upon the rights of United States citizens, such as prosecuting non-Indians in tribal courts.[249]

As Justice Rehnquist noted, any evidence introduced during a discussion of implicit divestiture "must be read in light of the common notions of the day and the assumptions of those who drafted them."[250] Surprisingly, the *Oliphant* Court relied almost exclusively upon sources from the mid-nineteenth century to generalize about the status of tribal courts in 1978, essentially imputing the characteristics of tribal courts from over a hundred years earlier onto the courts of the day. This logic is puzzling, especially given that the Indian Civil Rights Act, which revolutionized tribal court practice by pressing the majority of the Bill of Rights onto tribal governments and judiciaries, was not passed until 1968.[251] Thus, a discussion about the legitimacy of tribal criminal jurisdiction over non-Indians must recognize that before the passage of the ICRA, many

246. Frickey, *supra* note 164, at 71.

247. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (outlining and defining the nature of tribal title to their traditional lands after colonization); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (outlining and defining the guardian-ward relationship between the federal government and the tribes); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (determining that tribes are sovereign entities separate from classification as states or foreign nations, with a distinct and unique relationship with the federal government).

248. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 (1978).

249. *Id.* at 208–09. *See generally* Anna Sappington, *Is* Lara *the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception*, 7 WYO. L. REV. 149, 172–75 (2007).

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

251. 25 U.S.C. §§ 1301–03 (2006).

tribal court adjudications would have likely seemed cursory, against public policy, or outright unconstitutional in the eyes of non-Indians.[252]

The *Oliphant* Court did not make this distinction. As a result, the majority of its historical evidence about tribal court practice was outdated even in 1978. This misinterpretation of historical sources undercuts the basic existence of an implicit divestiture of tribal court criminal jurisdiction over non-Indians. For example, as proof of the historical assumption that tribal courts never had authority over non-Indians, the Court pointed to a proposed 1834 bill that attempted to strip Indian tribal courts of criminal jurisdiction over any U.S. official or citizen traveling through Indian country.[253] But, the statute was never enacted because "many Congressmen felt that the bill was too radical a shift in United States–Indian relations."[254] The fact that this bill was repudiated in such a manner leaves it of dubious precedential value.

Similarly, the Court cited an 1830 treaty with the Choctaw Tribe in which the tribe asked for the federal government's permission to prosecute white men in their territory.[255] Given that nineteenth-century Indian tribes had practically no political bargaining power against the federal government, one must question whether these treaties fairly represent tribal rights. Indeed, the federal government's repeated manipulation of treaty language eventually led the Supreme Court to develop protective canons of construction for Indian law cases, which "require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians."[256] Under this canon, a general statement of the Choctaw's recognition of their dependence on the federal government should not be read to unilaterally diminish their sovereign rights, as it is unclear that the Choctaw's legal

252. Prior to developing a formal court, the Coast Salish tribes in northwestern Washington mediated murders by having the perpetrator make sacrifices and apologize to the family of the victim; if this was not done, the family of the victim could retributively kill the perpetrator. BRUCE G. MILLER, THE PROBLEM OF JUSTICE: TRADITION AND LAW IN THE COAST SALISH WORLD 65–67 (2001). Similarly, in 1820, the Cherokee tribe passed a law that criminalized bringing white families onto the reservation, with penalties including fines and public whipping. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT app. 1, at 212, No. 12 (1975).

253. *Oliphant*, 435 U.S. at 201–02. It is interesting to note that this bill did not extend protections "to non-Indians who settled without Government business in Indian territory." *Id.* at 202 n.13 (emphasis omitted). This seems to make it an even weaker statement of anti-tribal authority than the *Oliphant* Court itself argued.

254. *Id.* at 202 n.13.

255. *Id.* at 197 ("[T]he Choctaws at the conclusion of this treaty provision 'express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations.'" (emphasis added) (quoting Treaty With the Choctaw, U.S.-Choctaw Nation, Sept. 27, 1830, art. IV, 7 Stat. 333)).

256. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 173, § 2.02[1], at 119.

infrastructure in 1830 would have even been sufficient to prosecute a non–tribal member under the standards required by the Court.

The *Oliphant* Court relied on this 1830 treaty as evidence that "it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect."[257] This reliance was misguided. Until *Oliphant*, the judicial rule of thumb was that Congressional action was required to *remove* sovereign power from tribal governments.[258] The notion that Indian tribes require an *affirmative grant* of authority by Congress in order to exercise sovereign rights was a startling conclusion within the *Oliphant* decision.

Overall, the *Oliphant* Court only considered two sources from the twentieth century, when tribal courts might have been deemed fair enough by modern standards that criminal jurisdiction over non-Indians would be consistent with their status. The first twentieth-century source cited in *Oliphant* was a U.S. Senate report for a proposed 1960 bill aimed at criminalizing the entering into Indian reservations for the purposes of unauthorized hunting or fishing; the report stated that "Indian tribal law is enforcible [sic] against Indians only; not against non-Indians."[259] However, like the proposed 1834 jurisdiction-stripping statute cited by the Court, this bill was never enacted, and another congressional policy group reported some years later that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians."[260] Again, the evidence cited by the *Oliphant* Court is susceptible to opposing inferences, and should not be considered dispositive.

The second source was a 1970 opinion from the solicitor of the Department of the Interior,[261] which concluded that "Indian tribes generally do not possess criminal jurisdiction over non-Indians, [as] such jurisdiction lies in either the state or Federal governments."[262] The solicitor relied upon two main sources to support this claim.

The first was *Ex Parte Kenyon*,[263] an 1878 case overturning tribal court jurisdiction over a white man that noted in dicta that "to give [the Cherokee tribal] court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be

257. *Oliphant*, 435 U.S. at 197.

258. *Cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139–41 (1982) (holding that the sovereign power of tribes to tax cannot be abridged without an act of Congress).

259. S. REP. NO. 86-1686, at 2 (1960).

260. AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 154 (Comm. Print 1977).

261. *Oliphant*, 435 U.S. at 201.

262. Criminal Jurisdiction of Indian Tribes over Non-Indians, 77 Op. Solic. Dep't Int. Indian Affairs 113, 115 (1970) [hereinafter Criminal Jurisdiction].

263. 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7,720).

an Indian."[264] However, *Kenyon* was decided narrowly on the grounds that the defendant's offense had occurred outside of Indian country, thus mooting any Cherokee claim to hear his case.[265] Indeed, the *Kenyon* decision expressly held that the territorial aspect of the case was wholly dispositive.[266] So, *Kenyon*'s treatment of general tribal-court jurisdiction over non-Indians was purely dicta, and not authoritative as to whether Indian tribes had unilaterally been divested of the right to prosecute non-Indians.

The second source relied on by the solicitor was the General Crimes Act.[267] The GCA, which extends federal law into Indian country, specifically retains tribal court jurisdiction over crimes committed by one Indian against another, as well as any jurisdiction specifically granted to the tribe via treaty.[268] The solicitor interpreted these clauses as stripping tribes of all other criminal jurisdiction over Indian country, arguing that it was "doubtful that any such jurisdiction which may have been vested in a tribe has survived."[269]

However, the notion of federal exclusivity over Indian country was expressly rejected in *United States v. McBratney*,[270] which recognized that, in certain instances, such exclusive federal criminal jurisdiction would unconstitutionally infringe on state sovereignty, and so cannot be absolute. The solicitor's statement, then, was based on hundred-year-old district court dicta and unfounded assumptions; perhaps this was why, as the *Oliphant* Court noted, the opinion was officially withdrawn without explanation in 1974.[271]

Essentially, the Court did not cite any explicit treaty or statutory provision that diminished tribal court jurisdiction over non-Indians, as would have been required under a traditional judicial examination of tribal sovereignty.[272] Instead, in order to conclude that tribes had been divested of criminal juris-

264. *Id.* at 355.
265. *Id.*
266. *Id.* Even the state of Washington, which filed an amicus brief in *Oliphant* to argue against tribal court jurisdiction over non-Indians, conceded that *Ex Parte Kenyon* was not controlling. *See* Brief of Attorney General of the State of Washington as *Amicus Curiae* in Support of Jurisdictional Statement at 10–11, *Oliphant*, 435 U.S. 191 (No. 76-5729), 1976 WL 181226.
267. Criminal Jurisdiction, *supra* note 262, at 114 (citing 18 U.S.C. § 1152 (2000)).
268. 18 U.S.C. § 1152 (2006).
269. Criminal Jurisdiction, *supra* note 262, at 115.
270. 104 U.S. 621 (1881).
271. *Oliphant*, 435 U.S. at 201 n.11.
272. *See, e.g.*, City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 226 (2005) (Stevens, J., dissenting) ("[O]nly Congress may abrogate or extinguish tribal sovereignty."); *see also* Frickey, *supra* note 164, at 34–35 ("Justice Rehnquist's majority opinion identified no treaty in which the tribe had ceded away its authority nor any federal statute that abrogated the tribe's police power. Under the traditional constructs, that should have ended the matter—the tribe retained its inherent territorial sovereignty." (citations omitted)).

diction, the *Oliphant* Court relied entirely on materials that were either outdated or lacked authority to begin with. By relying upon legislative silence to diminish tribal authority, and in the absence of explicit legislative intent to the contrary, the Court violated the precepts of settled Indian law and stripped tribes of their rights. Therefore, Congress could cite to *Oliphant*'s flawed interpretations of legislative acts and legal precedents as a justification for abrogating the decision and passing the proposed statute.

C. The *Duro* Fix and *United States v. Lara*: Expanding Tribal Jurisdiction

The implicit divestiture theory was unpersuasive in 1978, and in recent decades it has become even more apparent that tribal court authority over non-Indians is indeed consistent with tribal status. In *Duro v. Reina*,[273] the Supreme Court held that Indian tribes did not have the inherent authority to criminally prosecute nonmember Indians.[274] As discussed, Congress responded by passing the *Duro* Fix, which recognized and affirmed the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[275] In *United States v. Lara*,[276] the Supreme Court determined that the *Duro* Fix reaffirmed an inherent tribal right—that the jurisdiction to try any Indian in any tribal court had always been consistent with tribal status, if periodically usurped.[277] Standing alone, *Lara* indicates that tribal criminal jurisdiction has always been more expansive than the *Oliphant* Court assumed. A closer examination of the argument that prosecuting non-Indians is "'inconsistent with [tribal] status'"[278] proves that it lacks merit in the post-*Lara* world.

The *Duro* Fix's expansion of tribal sovereignty is predicated on the notion that all Indians share a collective heritage, identity, or culture—something that transcends tribal delineations and categorically separates Indians from non-Indians. This reasoning is necessary to justify inherent tribal court criminal jurisdiction over Indians only; absent such a collective identity, there would be no functional difference between a nonmember Indian and a non-Indian appearing in a tribal court, and the distinction would break down. By separating the population into Indians and non-Indians for the purposes of criminal jurisdiction, the *Lara* Court could comfortably classify the *Duro* Fix

273. 495 U.S. 676 (1990).
274. *Id.* at 677.
275. 25 U.S.C. § 1301(2) (2006).
276. 541 U.S. 193 (2004).
277. *See id.* at 196.
278. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (emphasis omitted) (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (1976)).

as an inherent reaffirmation of tribal court jurisdiction over all Indians, regardless of tribal affiliation.

However, the concept of a generalized Indian culture has repeatedly met resistance,[279] and there is little consistency on the matter in federal jurisprudence. In *Duro v. Reina*, the Supreme Court explicitly rejected the argument that tribes had inherent criminal jurisdiction over all Indians, reasoning that the sharp cultural and historical differences between tribes precluded such fungible jurisdiction.[280] Indian defendants raised similar arguments when challenging the constitutionality of the *Duro* Fix.[281] Prominent Indian law scholars also dispute the notion that there is an overarching concept of Indianness that would tie any Indian to any tribal court in the manner suggested by the *Duro* Fix.[282]

The problem with differentiating between nonmember Indians and non-Indians is that tribal governments do not make this distinction; rather, a person is either a tribal member (or eligible for tribal enrollment), or she is not.[283] Absent a generalized Indian heritage and culture, shared and understood by every Indian in the United States, it is difficult to see why tribal court jurisdiction over nonmember Indians is more consistent with tribal status than jurisdiction over non-Indians. A Cherokee and a Navajo might better

279. *See, e.g.*, Appellant's Opening Brief at *22–23, Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) (Nos. 01-17489, 99-CV-1057-PCT-EHC-SLV), 2002 WL 32145676 (arguing that Indian tribes are not culturally fungible in the context of a challenge to United States v. Lara); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (arguing that tribal-governmental relations must be addressed in a tribe by tribe manner, given the distinctions between different tribes); Karl Jeffrey Erhart, Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L.J. 727, 755 (1980) (arguing that the cultural and legal diversity among tribes can be as great as that between tribes and non-Indians).

280. Duro v. Reina, 495 U.S. 676, 695 (1990). In the pre-*Duro*-Fix era, other courts followed this reasoning. *See, e.g.*, Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988) ("The Devils Lake Sioux Tribe asserts no greater interest in the affairs of nonmember Indians than it has in those of non-Indians. As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians.").

281. Means v. Navajo Nation, 432 F.3d 924, 927 (9th Cir. 2005) ("Means testified that the difference between an Oglala-Sioux and a Navajo is analogous to the difference in nationalities between an American and a French person.").

282. *See, e.g.*, ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 3 (1978) ("The first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies, practiced a multiplicity of customs and lifestyles, held an enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to the many speakers, and did not conceive of themselves as a single people—if they knew about each other at all.").

283. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980) ("For most practical purposes [nonmember Indians] stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.").

understand the history of Indians in America than a white person, but this does not mean that either could vote in the other's tribal elections or run for office in the other's tribal government, or would fare better in front of the other's tribal judiciary. How is it, then, that it is somehow more consistent with tribal status for a tribe to have jurisdiction over a complete stranger who happens to be an Indian,[284] but not over a lifelong reservation resident and de facto tribal member who happens to be white?[285]

There is no real consistency to this distinction. Neither non-Indians nor nonmember Indians can fully participate in tribal government or politics. The only difference between the two is that the nonmember Indian is part of an ethnic group that is divided into independent and geographically scattered bands (which often have either no contact with or extreme animosity towards one another).[286] Following this logic, if it is consistent for tribal courts to have jurisdiction over nonmember Indians, from a functional perspective, it is equally consistent for a tribal court to have jurisdiction over non-Indians, especially in light of the safeguards found within the ICRA and the added protections of the proposed statute.[287]

This critique of the *Duro* Fix may seem to support the contention that tribes should not have criminal jurisdiction over any non–tribal member. However, the *Lara* Court correctly determined that tribal court jurisdiction over nonmember Indians was an inherent tribal power, as retained tribal sovereignty should be viewed to give tribes criminal jurisdiction over all reservation offenders absent congressional limitation.[288] The *Duro* Fix simply did

284. *See, e.g.*, *Means*, 432 F.3d at 924 (upholding Navajo tribal jurisdiction over an enrolled Oglala Sioux who was on the Navajo reservation visiting his inlaws).

285. *See, e.g.*, State *ex rel.* Poll v. Mont. Ninth Judicial Dist., 851 P.2d 405 (Mont. 1993) (denying tribal court jurisdiction over a Caucasian man who had been adopted by tribal members as an infant, lived and worked on the reservation, and married into the tribe).

286. *See, e.g.*, Greg P. MacKay, Note, *Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction; What About the Non-Member Indian?*, 1988 UTAH L. REV. 379, 400–01 ("There are very distinct racial, ethnic, and cultural differences between one tribe and the next. . . . As often happens among neighboring sovereigns, many of these tribal families hold great animosity for one another. A prime example of this turbulence is found in the midwestern tribes of the Chippewa and Sioux. For centuries these tribes have resided in bordering regions under varying degrees of intertribal war and conflict. Such deep rooted feelings go a long way toward expunging the misconception of Indian 'fungibility.'" (citation omitted)).

287. *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 39 (2003) ("One such reason [for expanded tribal court jurisdiction] could be a congressional finding that, because tribal judiciaries have now attained a higher level of sophistication and because [ICRA], which made most of the provisions of the Bill of Rights applicable to tribal prosecutions, also gives federal courts habeas corpus review of any tribal decisions alleged to be in violation of the Act." (citation omitted)).

288. United States v. Lara, 541 U.S. 193 (2004). For an argument that tribes have inherent criminal jurisdiction over all reservation offenses, see *infra* Part IV.D.

not go far enough, because it failed to address the fact that the reasoning that allowed it to be upheld by *Lara* applies equally to the argument that tribal court criminal jurisdiction should be expanded to include non-Indians. Indian tribal court jurisdiction over nonmember Indians is both statutorily and judicially authorized; and, there is no functional difference between nonmember Indians and non-Indians under tribal law.[289] Accordingly, the argument that tribes have been implicitly divested of criminal jurisdiction over non-Indians because it is inconsistent with their status lost vitality after *United States v. Lara*.

Instead, jurisdiction over nonmember Indians should be expanded to jurisdiction over nonmembers in general, as the same legal status and legal rules apply to both groups. Therefore, Congress could justify the proposed statute's abrogation of *Oliphant* as the logical extension of both the *Duro* Fix and *Lara*.

D. Pre-Constitutional Sovereignty: The Trust Relationship and Inherent Authority

If, as argued in Part IV.C, tribal criminal jurisdiction over non-Indians is consistent with tribal status, Indian tribes have not been implicitly divested of such authority. Thus, just as the *Duro* Fix overturned *Duro v. Reina* but was still a congressional reaffirmation of inherent sovereign power, a legislative repeal of *Oliphant* would not be a federal delegation of authority. As a result, tribes could continue to develop culturally sensitive legal codes, tribal court proceedings, and common law, free from the constraints of federal procedure.

Because tribal court criminal jurisdiction over nonmembers would be a radical change in practical tribal status, one might ask how it is that Congress can increase or augment sovereignty. Congress can do this because all rights taken by the federal government from Indian tribes are held in trust by Congress. This means that upon incorporation into the United States, Indian tribes had their sovereignty removed by and transferred to Congress—though not permanently. Because sovereign powers and inherent governmental authority cannot simply vanish, these tribal rights were held by the federal

289. *See, e.g.*, CONSTITUTION AND BY LAWS OF THE HOOPA VALLEY TRIBE art. VI, § 7, *available at* http://www.hoopa-nsn.gov/documents/Codes/ConstitutionBylaws.pdf ("Any member of the Tribe who will be at least eighteen (18) years of age on election day shall be eligible to vote, provided he has duly registered."); CONSTITUTION OF THE PRAIRIE BAND POTAWATOMI NATION art. VII, § 4(a), *available at* http://www.pbpindiantribe.com/our-constitution.aspx ("In order to be qualified for office and seek election to a seat on the Tribal Council a person must: (a) Be an enrolled member of the Prairie Band Potawatomi Nation.").

government in its capacity as the governing sovereign. Accordingly, as the guardian of tribal rights, Congress may return sovereign powers to the tribes.

The proposed statute, like the *Duro* Fix, would simply authorize Indian tribes "to reassume an inherent sovereign power that they had possessed before being incorporated within the United States."[290] Unlike a delegation of federal authority, this would not create sovereignty, but rather would relax jurisdictional constraints and allow tribes to partially reapply their original sovereignty.

By analogy, courts have held that Public Law 280's[291] federal jurisdictional retrocession over Indian reservations was a reaffirmation of inherent state sovereignty, precisely as this Comment argues that the proposed statute would be for tribes. In *Anderson v. Britton*,[292] an Indian criminal convicted in state court argued that Public Law 280 was an unconstitutional federal delegation of authority to the states.[293] The Oregon Supreme Court disagreed, holding that the "state has residual power over Indians and Indian territory, which is merely in suspension so long as the federal government chooses to occupy the field."[294] Accordingly, "the federal government may withdraw from the field and turn the subject matter back to the states."[295]

The defendant subsequently filed for habeas review in federal district court, which agreed with the Oregon Supreme Court and rejected the defendant's arguments.[296] Affirming, the Ninth Circuit wrote:

> The power over Indians was deemed not so inherently . . . federal as to apply beyond the extent to which the federal government has preempted the field, and the federal government could thus withdraw from the field and turn the subject matter back to the states when it chose to do so.[297]

Just as Public Law 280 reaffirmed the inherent police power of the original state sovereigns, the proposed statute would reaffirm the inherent police power of the original tribal sovereigns.[298]

The essential lesson of the Marshall Trilogy[299] supports this argument: "Indian nations [have] always been considered as distinct, independent political

290. Skibine, *supra* note 287, at 39.

291. The criminal provisions of PL 280 are codified at 18 U.S.C. § 1162 (2006) and 25 U.S.C. § 1321 (2006).

292. 318 P.2d 291 (Or. 1957).

293. *Id.* at 296–97.

294. *Id.* at 298.

295. *Id.* at 300.

296. *See* Anderson v. Gladden, 188 F. Supp. 666 (D. Or. 1960), *aff'd*, 293 F.2d 463 (9th Cir. 1961).

297. Anderson v. Gladden, 293 F.2d 463, 468 (9th Cir. 1961), *cert. denied*, 368 U.S. 949 (1961).

298. Tribes have been analogized to states for the purposes of legal rights in many areas of the law, most notably environmental regulation. *See, e.g.*, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).

communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by [the federal government]."[300] Before the establishment of the United States, then, Indian tribes possessed all the rights of a sovereign authority; these rights necessarily include unmitigated authority over their territory[301] and full police power.[302]

The Marshall Trilogy acknowledged that federal plenary power over tribes meant that tribal "rights to complete sovereignty, as independent nations, were necessarily diminished."[303] It placed equal emphasis, though, on the fact that any diminished powers were held in trust by the federal government pursuant to its role as the guardian of tribal affairs.[304] *Oliphant* missed this crucial point, insisting that through implicit divestiture, tribes had lost the authority to criminally prosecute non-Indians from the moment that tribes were incorporated into the United States.[305]

If Congress returned these rights to tribal courts,[306] it would not delegate federal power, but rather reaffirm the inherent tribal authority to police their own territories.[307] Even if tribal criminal jurisdiction was implicitly divested

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299. The Marshall Trilogy consists of the three seminal Indian law cases that defined the relationships between the tribes, the states, and the federal government. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (outlining and defining the nature of tribal title to their traditional lands post-colonization); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (outlining and defining the guardian-ward relationship between the federal government and the tribes); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (determining that tribes are sovereign entities separate from classification as states or foreign nations, with a distinct and unique relationship with the federal government).

300. *Worcester*, 31 U.S. (6 Pet.) at 519. While the Court alludes to Congressional plenary power doctrine, this was not an explicit federal policy until after *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

301. *See, e.g.*, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.").

302. *See* Frickey, *supra* note 164, at 68 n.322 ("Before European discovery of this continent, tribes had the local police power. The federal common-law decision in *Duro* preempted that police power over nonmember Indians; the *Duro* fix simply lifted the federal common-law preemption from the tribe's police power.").

303. *Johnson*, 21 U.S. (8 Wheat.) at 574.

304. *See Cherokee Nation*, 30 U.S. (5 Pet.) 1.

305. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–12 (1978).

306. Scholars made similar arguments about the *Duro* Fix before *Lara*. *See, e.g.*, Skibine, *supra* note 287, at 39 ("The [*Duro* Fix] should be construed as just authorizing the tribes to reassume an inherent sovereign power they had possessed before being incorporated within the United States. I do not see why this language has to be treated as a delegation of federal authority to the tribes instead of a congressional reaffirmation that such pre-existing tribal authority has from now on, been re-established."). My reading of the Marshall Trilogy supports this proposition, as tribes were meant to retain all powers of self-government not otherwise abrogated by Congress.

307. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 173, § 4.01[1][a] at 206 ("Perhaps the most basic principle of all Indian law . . . is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather

upon tribal incorporation into the United States, in light of the *Duro* Fix, *United States v. Lara*, increasingly sophisticated tribal courts, and the safeguards found in the ICRA and the proposed statute, such jurisdiction would be consistent with established tribal status.

Both states and Indian tribes are sovereign entities with an inherent right to govern their land. Pursuant to the federal plenary power over Indian affairs, however, the sovereign jurisdictional rights of the tribes have been held in trust by the federal government since tribal incorporation into the United States. All that is necessary to return this inherent, preconstitutional authority to the tribes is a congressional reaffirmation of sovereign jurisdiction, held to be constitutional as applied to tribes in *United States v. Lara* and as applied to states in *Anderson v. Gladden*.[308]

Nonmember Indians and non-Indians should share the same legal status in tribal courts; the concept of implicit divestiture was simply misapplied in *Oliphant*. Pursuant to the logic employed in the *Duro* Fix, then, the proposed statutory reaffirmation of jurisdiction over non-Indians should similarly be upheld as a legitimate return of dormant tribal sovereignty.

CONCLUSION

The jurisdictional morass resulting from the 1978 *Oliphant* decision has led to the persistent non-enforcement of criminal laws on Indian reservations, with devastating results for the tribes. Reservations are plagued by poverty, violence, and crime, and tribal courts are often powerless to prosecute many of the offenders who victimize reservation inhabitants. This frustrates state, federal, and tribal judiciaries alike.

The time has come to move away from *Oliphant*'s antiquated view of tribal-federal relations. Across the nation, tribal courts boast sophisticated judiciaries that deftly blend tribal custom and tradition with federal legal concepts. The proposed statute, if enacted, would reaffirm inherent tribal sovereignty and criminal jurisdiction over Indian country. Simultaneously, it would address the concerns of non-Indians by ensuring that defendants in criminal trials will be protected by a panoply of rights, including access to coun-

'inherent powers of a limited sovereignty which has never been extinguished.'" (emphasis added) (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978))); *see also* Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks: *A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 367 (2001) ("[T]hese judicially divested tribal powers should be conceptualized as having been transferred in trust upon the tribes' incorporation into the United States. As such, these powers are held in trust by the United States for the benefit of the tribes.").

308. 293 F.2d 463 (9th Cir. 1961), *cert. denied*, 368 U.S. 949 (1961).

sel, trial by jury, and inclusion of nonmembers in tribal jury pools. Such a congressional reaffirmation of inherent tribal sovereignty would further recognize that tribal courts are the proper forum in which to apply and adjudicate tribal law. Tribes are in the position to assert fair and impartial jurisdiction over non-Indians who commit crimes on their reservations, and a statute reaffirming tribal control over their territory is long overdue.

It has been over thirty years since *Oliphant*, and the main result has been to shield non-Indians from justice at the expense of tribal dignity. It is time for Congress to make clear that this has been thirty years too many.