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Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after *Duro v. Reina* Note

Benjamin J. Cordiano

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UNSPOKEN ASSUMPTIONS: EXAMINING TRIBAL JURISDICTION OVER NONMEMBERS NEARLY TWO DECADES AFTER *DURO V. REINA*

BENJAMIN J. CORDIANO

*In a series of decisions beginning in 1978 with *Oliphant v. Suquamish Indian Tribe*, the Supreme Court has stripped Indian tribes of the ability to prosecute all criminal offenders within the borders of their territory. A decade after holding that non-Indians were not subject to the criminal jurisdiction of Indian tribes, the Supreme Court, in *Duro v. Reina*, held that Indian tribes do not possess criminal jurisdiction over Indians that were not members of the tribe. The decision created a jurisdictional void: for certain types of crimes neither the federal, state, nor tribal governments possessed the power to prosecute nonmember Indian offenders.*

*Congress acted quickly to rectify the jurisdictional gap caused by the Court's decision in *Duro*, passing legislation which became known as the "Duro Fix." The "Duro Fix" has been upheld by the Supreme Court in the double jeopardy context, but the Court has not yet heard a case involving an equal protection or due process challenge to the legislation. If such a challenge materializes, the law could see a return to the reasoning used by the *Duro* Court.*

*This Note examines the Supreme Court's reasoning in *Duro* and uses nearly twenty years of anecdotal evidence, case law, and congressional findings to show that the Court relied on flawed assumptions about the nature of nonmember criminal jurisdiction in the modern tribal context. By examining the modern realities of two tribes, the Grand Traverse Band of Ottawa and Chippewa Indians and the Confederated Tribes of the Colville Reservation, this Note concludes that the Supreme Court's reasoning in *Duro* is flawed and that criminal jurisdiction over nonmember Indians is crucial to tribal self-governance and maintenance of reservation life.*

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UNSPOKEN ASSUMPTIONS: EXAMINING TRIBAL JURISDICTION OVER
NONMEMBERS NEARLY TWO DECADES AFTER *DURO V. REINA*

BENJAMIN J. CORDIANO*

I. INTRODUCTION

The newly formed United States government began entering into treaties with the Indian nations in 1778.¹ The treaties constituted international agreements between two nations and illustrate that initially the United States treated the Indian nations as full sovereigns.² Fifty years later, in an opinion by Justice Marshall, the Supreme Court declared that Indian tribes were not foreign nations under the Constitution, but instead domestic dependent nations.³ In 1871, Congress enacted a statute declaring that Indian tribes would no longer be recognized as “independent nations” with whom the United States may contract by treaty.⁴ The sovereignty of Indian tribes is not made clear in the United States Constitution, which refers to Indian tribes only for the purpose of declaring that Congress has the power to regulate commerce with them.⁵ Thus, the status of Indian tribes within our political system has been defined over the years by a mixture of Supreme Court jurisprudence and Congressional action.

One aspect of sovereignty that Indian tribes have not retained is the ability to prosecute all criminal offenders within the borders of their territory.⁶ In 1978, in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that non-Indians were not subject to the criminal jurisdiction of Indian tribes.⁷ The Court stated that although Indian tribes retain certain “quasi-sovereign” authority, they are prohibited from exercising powers that are “inconsistent with their status.”⁸

In *Duro v. Reina*, decided a decade later, the Supreme Court continued

* Boston College, B.S. 2004; University of Connecticut School of Law, J.D. Candidate 2009. I would like to extend my gratitude to Professor Bethany Berger for her guidance, suggestions and encouragement throughout the writing process. I also wish to thank Mr. John Petoskey, Chief Judge Wilson Brott, and Chief Justice Anita Dupris, whose willingness to help made this Note possible. Finally, I thank my colleagues on the law review for all of their hard work and dedication.

¹ Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13.

² See *id.* (describing the agreement as between the “United States of North-America” and the “Delaware Nation”).

³ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (stating Indian nations may be more correctly denominated “domestic dependent nations”).

⁴ 25 U.S.C. § 71 (2000).

⁵ U.S. CONST. art. I, § 8, cl. 3.

⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

⁷ *Id.*

⁸ *Id.* at 208.

to whittle away at tribal sovereignty, holding that Indian tribes did not possess criminal jurisdiction over Indians who were not members of the tribe.⁹ Although the decision ostensibly rested on *Oliphant*, it in fact turned on concerns more applicable to an equal protection or due process analysis, such as the characteristics of tribal justice systems and the place of nonmember Indians within them.¹⁰ The decision created a jurisdictional void for certain types of crimes; neither the federal government, state government, nor the tribes possessed the power to prosecute nonmember Indian offenders for certain types of offenses.¹¹ Congress acted quickly to rectify the jurisdictional gap left by the Court's decision in *Duro*. Six months after the decision, Congress enacted Public Law 101-511, amending the definition of tribal "powers of self government" in the Indian Civil Rights Act to include, "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."¹² This became known as the "Duro Fix."¹³

In 2004, the Supreme Court heard the first case challenging the "Duro Fix."¹⁴ In *United States v. Lara*, the Court, in the context of a double jeopardy challenge, upheld the Congressional power to recognize and affirm tribal sovereignty in the context of criminal jurisdiction over nonmember Indians.¹⁵ Notably, the Court did not resolve whether the Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States.¹⁶ If the Supreme Court hears a case challenging the Duro Fix under either equal protection or due process grounds, the law could see a return to the reasoning used by the Court in *Duro v. Reina*. This Note examines the Supreme Court's reasoning in *Duro* and argues that the Court relied on flawed assumptions about the nature of nonmember criminal jurisdiction in the modern tribal context.

Part II of this Note sets forth the scope of criminal jurisdiction in Indian country and examines the judicial limitations placed on tribal criminal jurisdiction in *Oliphant* and *Duro*.¹⁷ It will also discuss the Duro Fix and the subsequent challenge in *United States v. Lara*, and outline the equal protection analysis applied to measures affecting Indian people. Part

⁹ *Duro v. Reina*, 495 U.S. 676, 692 (1990).

¹⁰ *See id.* at 693–96 (discussing the "special nature" of tribal courts).

¹¹ *See id.* at 697–98 (stating that its decision did not imply endorsement of the theory of a jurisdictional void and that "if the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs").

¹² Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified as amended 25 U.S.C. § 1301(2) (2000)).

¹³ *United States v. Lara*, 541 U.S. 193, 196 (2004). This Note will refer to Public Law 101-511, amending 25 U.S.C. § 1301, as the "Duro Fix."

¹⁴ *Id.*

¹⁵ *Id.* at 199–206.

¹⁶ *Id.* at 205.

¹⁷ *See* 18 U.S.C. § 1151 (2000) (defining "Indian Country").

III analyzes closely the *Duro* Court's assumptions regarding tribal criminal jurisdiction over nonmember Indians, using a number of sources to show that these assumptions are incorrect given modern realities in Indian country. Part IV focuses this empirical lens, closely examining the realities of nonmember criminal jurisdiction in Indian country in the context of two tribes: the Grand Traverse Band of Ottawa and Chippewa Indians and the Confederated Tribes of the Colville Reservation. This Note concludes that the Supreme Court's reasoning in *Duro* does not adequately reflect the characteristics of modern Indian tribes and that criminal jurisdiction over nonmember Indians is crucial to tribal self-governance and maintenance of reservation life.

II. JUDICIAL LIMITATIONS ON CRIMINAL JURISDICTION IN INDIAN COUNTRY

A. *Criminal Jurisdiction in Indian Country*

As the Supreme Court has noted, "criminal jurisdiction over offenses committed in Indian country is governed by a complex patchwork of federal, state, and tribal law."¹⁸ Whether a crime committed in Indian country may be prosecuted by the United States, the state, or a tribe, depends on a variety of factors.¹⁹

The Indian Country Crimes Act ("ICCA") provides that the general laws of the United States as to the punishment of offenses committed in any place within the exclusive jurisdiction of the United States extend to Indian country.²⁰ The ICCA contains two important exceptions: the jurisdiction of the federal government does not extend to offenses committed by one Indian against the person or property of another Indian, nor does it extend to any Indian committing any offense in Indian country who has been punished by the local law of the tribe.²¹ Therefore, although the federal government has broad jurisdiction in Indian country, it generally has no jurisdiction for crimes between Indians and may not prosecute Indian offenders who have already been punished by the tribe.

The Indian Major Crimes Act ("MCA") enumerates fourteen offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction.²²

¹⁸ *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (citations omitted).

¹⁹ As will be illustrated, these may include the identities of the victim and the defendant, the nature of the crime, and the existence of specific statutory provisions governing jurisdiction.

²⁰ 18 U.S.C. § 1152 (2000).

²¹ *Id.*

²² *Id.* § 1153 (2000) (identifying offenses covered under the statute including, among others, murder, manslaughter, kidnapping, and assault with a dangerous weapon). The statute was passed in reaction to *Ex Parte Crow Dog*, in which the Supreme Court held that the federal government had no jurisdiction to try an Indian for the murder of another Indian. *Ex Parte Crow Dog*, 109 U.S. 556

Importantly, the statute, unlike the ICCA, does not contain an exception for crimes committed between two Indians.²³ It remains an open question whether federal jurisdiction is exclusive of tribal jurisdiction.²⁴ Further, the Assimilative Crimes Act compensates for the less exhaustive federal criminal code by applying the appropriate state criminal law to cases in which the federal government has jurisdiction, but federal statutes have not defined the crime.²⁵

Generally, state authority to prosecute crimes involving Indians in Indian country is pre-empted as a matter of federal law.²⁶ States, however, do possess exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian country.²⁷ Congress has plenary authority to alter these “jurisdictional guideposts,” and has done so with respect to certain states.²⁸ In 1953, Congress passed Public Law 280, which granted a number of states authority to exercise general criminal jurisdiction over Indians in Indian country and made the ICCA and MCA inapplicable in those areas.²⁹ However, the vast majority of Indians have never been subject to Public Law 280. Since it was passed, the statute has been unpopular with both states and tribes and the inadequacies of Public Law 280 have led to endemic lawlessness in many parts of Indian country.³⁰

The Supreme Court has held that “tribes possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”³¹ Therefore, tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law.³² The Court has held, however, that tribes have been divested of their inherent power to prosecute non-

(1883); see *Keeble v. United States*, 412 U.S. 205, 209–12 (1973) (describing the Court’s holding in *Ex Parte Crow Dog* and the Congressional response).

²³ 18 U.S.C. § 1153.

²⁴ *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990); see *Wetsit v. Stafne*, 44 F.3d 823, 826 (9th Cir. 1995) (finding that tribes retain jurisdiction over crimes within the MCA but dismissing the habeas corpus petition on the grounds that the petitioner failed to exhaust her tribal court remedies).

²⁵ See 18 U.S.C. § 13 (2000) (stating that any person guilty of an act which, although not made punishable by any enactment of Congress, would be punishable if committed within the jurisdiction of the State, shall be guilty of like offense and like punishment).

²⁶ *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993).

²⁷ *United States v. McBratney*, 104 U.S. 621, 624 (1881).

²⁸ *Negonsott*, 507 U.S. at 103.

²⁹ 67 Stat. 588, 588–60 (codified as amended at 18 U.S.C. § 1162 (2000) (mandatory states) & 25 U.S.C. § 1321 (2000) (optional states)).

³⁰ Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1409 (1997) (examining Public Law 280 as the source of lawlessness rather than its remedy); see Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 TULSA L. REV. 113, 129 (2002) (discussing inadequacies of Public Law 280 that have led to “endemic lawlessness” in many parts of Indian country).

³¹ *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

³² *Id.* at 326 (“[T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.”).

Indians by virtue of their dependent status.³³

Indian tribes, because their sovereignty predated the formation of the Union, are not bound by the United States Constitution.³⁴ Although the Bill of Rights therefore does not apply to tribal governments, the Indian Civil Rights Act (“ICRA”) imposes similar restrictions on tribes.³⁵ The ICRA contains, among others, an equal protection and due process provision, a prohibition from compelling any person in a criminal case from being a witness against himself, a double jeopardy clause, and a takings clause.³⁶ Although the ICRA mirrors the Bill of Rights in many important ways, key differences remain that are relevant in the criminal context. The Sixth Amendment to the Constitution, applicable to the federal government and later incorporated against the states through the Fourteenth Amendment, requires that indigent defendants in criminal cases have access to effective assistance of counsel at the expense of the state.³⁷ The ICRA, although securing the right to assistance of counsel in criminal proceedings, does so only at the defendant’s own expense.³⁸ In addition, the Sixth Amendment requires that defendants in criminal proceedings be afforded an impartial jury comprised of one’s peers.³⁹ The ICRA requires that tribal courts provide a jury at the defendant’s request where imprisonment is a potential punishment; however, there is no provision concerning the jury’s impartiality or its makeup, beyond a numerical requirement.⁴⁰ The Fifth Amendment demands that no person be held to answer for an infamous crime unless on presentment or indictment of a grand jury.⁴¹ The ICRA contains no references to indictment by grand jury;⁴² nevertheless, it should be noted that the United States Supreme Court has not found that particular provision to be incorporated against the

³³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208–09 (1978).

³⁴ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”); *Talton v. Mayes*, 163 U.S. 376, 383–84 (1896) (holding that the Fifth Amendment is inapplicable to tribal actions).

³⁵ 25 U.S.C. § 1302 (2000) (“No Indian tribe in exercising powers of self-government shall . . . compel any person in any criminal case to be a witness against himself . . . 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.”).

³⁶ *Id.*

³⁷ U.S. CONST. amend. VI; see *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (discussing applicability of the right to counsel against the states through the Fourteenth Amendment’s Due Process Clause).

³⁸ 25 U.S.C. § 1302(6).

³⁹ U.S. CONST. amend. VI; see *Duncan v. Louisiana* 391 U.S. 145, 156 (1968) (discussing the right to be tried by a jury of one’s peers as an “inestimable safeguard,” and holding it applicable against the states through the Fourteenth Amendment’s Due Process Clause).

⁴⁰ 25 U.S.C. § 1302(10) (“No Indian tribe in exercising powers of self-government shall . . . 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.”).

⁴¹ U.S. CONST. amend V.

⁴² 25 U.S.C. § 1302 (2000).

states through the Fourteenth Amendment's Due Process Clause.⁴³ The only remedy available in federal court to enforce the ICRA is a writ of habeas corpus, which effectively limits federal review under the Act to criminal cases and other matters involving deprivations of personal freedom.⁴⁴

To summarize generally, tribal courts have jurisdiction only over offenses involving an Indian offender. Further, tribes are limited by the ICRA to imposing punishments of up to one year in prison and a fine of \$5000.⁴⁵ For offenses enumerated in the MCA, the federal government has jurisdiction even if the crime is between two Indians, and otherwise has jurisdiction only if the crime is between an Indian and a non-Indian. Tribal courts have no jurisdiction over non-Indian offenders, and, outside Public Law 280 states, the state has jurisdiction only where the crime involves two non-Indians.

B. *Oliphant v. Suquamish Indian Tribe*

In *Oliphant*, the Suquamish tribe sought to prosecute two non-Indian residents of the Port Madison Reservation: Mark Oliphant, for assaulting a tribal officer and resisting arrest, and Daniel Belgarde, arrested by tribal authorities for reckless driving after he led tribal police officers on a high-speed race along the Reservation highways that ended only when Belgarde collided with a tribal police vehicle.⁴⁶ Both defendants applied for a writ of habeas corpus to the United States District Court, which was denied and later affirmed by the United States Court of Appeals for the Ninth Circuit.⁴⁷ The Supreme Court granted certiorari to decide whether tribal courts have criminal jurisdiction over non-Indians.⁴⁸

The Court first determined that tribes historically had not assumed criminal jurisdiction over non-Indians by treaty or custom, although the evidence was equivocal.⁴⁹ Next, the Court examined federal enactments to determine whether Congress had recognized criminal jurisdiction over non-Indians. The Court relied on an "unspoken assumption" by Congress that tribes lack criminal jurisdiction over non-Indians, and expanded a nineteenth century decision in which the court reached an "implicit conclusion" that although Congress never expressly forbade such

⁴³ *Hurtado v. California*, 110 U.S. 516, 534–35 (1884).

⁴⁴ 13 U.S.C. § 1303 (2000); see Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 n.64 and accompanying text (2003) (citing non-criminal cases in which the habeas provision has been invoked).

⁴⁵ 25 U.S.C. § 1302(7).

⁴⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

⁴⁷ *Id.* at 194–95.

⁴⁸ *Id.* at 195.

⁴⁹ *Id.* at 197–200, 208.

jurisdiction, it was a necessary result of repeated legislation.⁵⁰ Finally, the Court determined that the inherent sovereignty of tribes is limited not only by treaty restrictions and congressional divestiture, but also when the inherent sovereignty of tribes is inconsistent with their status.⁵¹ Upon incorporation into the territory of the United States, the exercise by tribes of separate powers was constrained where it conflicted with that of the overriding sovereign.⁵² Tribes necessarily surrendered their power to try non-Indians because of the overriding sovereign's "great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty."⁵³

As Professor Bethany Berger has noted, the *Oliphant* Court's decision "created something wholly new in Indian Law, the principle that simply by incorporation within the United States tribes had lost inherent criminal jurisdiction over non-Indians."⁵⁴ Although the Court's decision has been vigorously criticized by scholars,⁵⁵ it remains law that tribal courts have no criminal jurisdiction over non-Indians.⁵⁶

C. *Duro v. Reina*

The United States Supreme Court continued the divestiture of tribal sovereignty begun in *Oliphant* with its decision in *Duro v. Reina*, holding that the retained sovereignty of a tribe does not include the right to try nonmember Indians.⁵⁷ Albert Duro, an enrolled member of a band of Cahuilla Mission Indians, is a native of California who, before 1984, lived most of his life outside an Indian reservation.⁵⁸ In 1984, he resided on the Salt River Reservation with a female tribal member and worked for a tribal

⁵⁰ *Id.* at 203–04 (citing *In re Mayfield*, 141 U.S. 107, 115–16 (1891)).

⁵¹ *Id.* at 208.

⁵² *Id.* at 209.

⁵³ *Id.* at 210.

⁵⁴ Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1056 (2005).

⁵⁵ See Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) ("A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal."); Berger, *supra* note 54, at 1056 ("By patching together bits and pieces of history and isolated quotes from nineteenth century cases, and relegating contrary evidence to footnotes or ignoring it altogether, the majority created a legal basis for denying jurisdiction out of whole cloth."); Catherine B. Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 AM. INDIAN L. REV. 51, 54 (1981) (stating that Rehnquist's "misuse of precedent and other authority, his failure to apply traditional canons of construction, his false assumptions and poor arguments have served as fertile ground for criticism").

⁵⁶ See *Duro v. Reina*, 495 U.S. 676, 682 (1990) ("Under this Court's holding in *Oliphant v. Suquamish Indian Tribe*, tribal courts have no criminal jurisdiction over non-Indians.") (citation omitted).

⁵⁷ *Id.* at 679.

⁵⁸ *Id.*

construction company.⁵⁹ As an enrolled member of another Indian tribe, Duro was not eligible for enrollment in the Salt River Pima-Maricopa Indian Community, the reservation's governing tribe.⁶⁰ On June 15, 1984, Duro allegedly shot and killed a fourteen-year-old boy within the boundaries of the reservation. The victim was a member of the Gila River Indian Tribe of Arizona, a separate tribe occupying a separate reservation.⁶¹ A complaint was filed in United States District Court, charging Duro with murder and aiding and abetting murder under 18 U.S.C. §§ 2, 1111, 1153.⁶² Duro was arrested by federal agents in California, but the indictment was later dismissed on the motion of the United States Attorney.⁶³ The tribe then took custody of Duro and charged him with illegal firing of a weapon on the reservation, a misdemeanor crime punishable at that time by up to six months imprisonment and a \$500 fine.⁶⁴ After the tribal court denied his motion to dismiss the prosecution for lack of jurisdiction, Duro filed a petition for habeas corpus in the United States District Court.⁶⁵

The district court granted the writ, holding that any assertion of criminal jurisdiction by the tribe over a nonmember Indian would violate the equal protection guarantees of the ICRA; since the tribe could not prosecute non-Indians under *Oliphant*, to subject a nonmember Indian to tribal jurisdiction would constitute discrimination based on race.⁶⁶ The United States Court of Appeals for the Ninth Circuit vacated the district court's order, in an opinion that was later revised.⁶⁷ The Ninth Circuit found that the district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race.⁶⁸ Rather, the court concluded that, "for the purpose of federal jurisdiction, Indian status is 'based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive.'"⁶⁹ Using this definition, the court then determined that Duro's contacts with the tribe, such as residing with a member on the reservation and his

⁵⁹ *Id.* The Salt River Reservation, which occupies approximately 50,000 acres east of Scottsdale, Arizona, was authorized by statute in 1859 and established by Executive Order in 1879. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 679–80. 18 U.S.C. § 1153 (2000), commonly known as the Major Crimes Act, subjects Indians to federal jurisdiction for certain enumerated offenses. *See Id.* § 2 ("Whoever commits an offense against the United States or aids, [or] abets . . . its commission, is punishable as a principal."); *Id.* § 1111 (defining murder); *see also supra* note 22 and accompanying text (discussing the Major Crimes Act).

⁶³ *Duro*, 495 U.S. at 679–80.

⁶⁴ *Id.* at 681 (citing 25 U.S.C. § 1302(7) (1982)).

⁶⁵ *Id.* at 681–82.

⁶⁶ *Id.* at 682.

⁶⁷ *Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987), *modified*, 851 F.2d 1136 (9th Cir. 1988).

⁶⁸ *Duro v. Reina*, 851 F.2d at 1144.

⁶⁹ *Id.* (quoting Robert Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 518 (1976)).

employment with the tribe, justified tribal jurisdiction.⁷⁰ The court concluded that the need for effective law enforcement on the reservation provided a rational basis for the classification.⁷¹ The court found that its conclusion was strengthened by the fact that a contrary holding would create a jurisdictional void in which neither the federal government, states, nor tribes could try nonmember Indians for misdemeanor crimes.⁷²

Between the first and second sets of opinions from the Ninth Circuit, the Eighth Circuit, in *Greywater v. Johnson*, held that tribal courts do not possess inherent criminal jurisdiction over nonmember Indians.⁷³ The Ninth Circuit declined to follow the Eighth Circuit's reasoning,⁷⁴ and the Supreme Court granted certiorari to resolve the split in circuits.⁷⁵

The Court rejected the Ninth Circuit's approach and stated that the rationale of its decisions in *Oliphant* and *United States v. Wheeler*, a case decided sixteen days after *Oliphant*, compelled the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.⁷⁶ The tribes and the United States sought to distinguish *Oliphant* by showing that tribes historically asserted criminal jurisdiction over nonmembers and that all previous congressional legislation applied to all Indians without respect to membership in a particular tribe. The Court rejected this argument.⁷⁷ Similarly, although *Wheeler* involved a tribal member's double jeopardy challenge, the *Duro* Court nonetheless found its analysis of inherent tribal sovereignty persuasive.⁷⁸ According to the *Duro* Court, following *Wheeler*, the retained sovereignty of the tribes is only that needed to control their own internal relations, and to preserve their own unique

⁷⁰ *Duro*, 851 F.2d at 1144.

⁷¹ *Id.* at 1145.

⁷² *Id.* at 1145–46.

⁷³ *Greywater v. Johnson*, 846 F.2d 486, 493 (8th Cir. 1988). In *Greywater*, three members of the Turtle Mountain Band of Chippewa Indians were arrested on the Devils Lake Indian Reservation in North Dakota and charged with possession of alcohol in a motor vehicle, public intoxication, and disorderly conduct. *Id.* at 487. The defendants moved the Sioux Tribal Court to dismiss the charges against them, maintaining that the tribal court had no criminal jurisdiction over nonmembers of the Devils Lake Sioux Tribe. *Id.* After the tribal court denied the motions, the defendants filed writs of habeas corpus in the United States District Court, which were denied pending exhaustion of the tribal court proceedings. *Id.* at 487–88. On appeal, the Eighth Circuit reversed the district court and directed that the writs be issued, holding that the tribe did not possess criminal jurisdiction over the defendants. *Id.* at 493. Although the court acknowledged that *Oliphant* concerned only non-Indians, it interpreted the Supreme Court's analysis to compel the same conclusion as to nonmembers of the tribe, whether Indian or not. *Id.* at 491.

⁷⁴ *Duro*, 851 F.2d at 1140 n.1.

⁷⁵ *Duro v. Reina*, 495 U.S. 676, 684 (1990).

⁷⁶ *Id.* at 684–85.

⁷⁷ *Id.* at 689. Justice Brennan, in his dissent, argued that in fact the evidence is stronger and tends to support such jurisdiction. See *id.* at 703–04 n.2 (Brennan, J., joined by Marshall, J., dissenting) (“[T]he historical record reveals that Congress and the Executive had indeed considered the question of intertribal crime.”).

⁷⁸ *Id.* at 685.

customs and social order.⁷⁹

The Supreme Court did not explicitly address the equal protection question; nevertheless, much of the majority opinion concerned whether nonmember Indians were similarly situated to non-Indians on reservations, and the due process concerns raised by tribal courts.⁸⁰ The Court found that for purposes of criminal jurisdiction, a nonmember's relationship with a tribe is the same as a non-Indian's: Duro could not vote, hold office, or serve on a jury under Pima-Maricopa authority. Therefore, exercising jurisdiction over him would not fall within the powers necessary for tribal self-governance.⁸¹

The *Duro* Court also focused on the "special nature" of tribal courts.⁸² Tribal courts, it stated, are influenced by the unique customs, languages, and usages of the tribes they serve and their legal methods may depend on "unspoken practices and norms."⁸³ Significant to the Court was the fact that the Bill of Rights does not apply to tribal governments.⁸⁴ Although the Court recognized that the ICRA provides guarantees of fair procedure, it found that these were not equivalent to their constitutional counterparts, citing the right to appointed counsel for indigent defendants as an example.⁸⁵

The Court recognized that tribal members, each of whom is also a citizen of the United States, are subject to tribal tribunals, but stated that tribal sovereignty over members comes from the consent of its members, and declared that in the criminal context, membership marks the bounds of tribal authority.⁸⁶ The voluntary character of tribal membership and the right of participation in a tribal government, the authority of which rests on consent, justified the exercise of criminal jurisdiction over tribal members.⁸⁷

Without "endors[ing] . . . the theory of a jurisdictional void" that would arise if tribes lacked jurisdiction over minor crimes by nonmember Indians, the Court declared that this concern was not dispositive.⁸⁸ The

⁷⁹ *Id.* at 685–86. As Professor Berger notes, this hackneyed vision of tribal communities lies at the heart of the opinion. Berger, *supra* note 54, at 1062. The Court ignored the modern realities of tribal communities in its vision of tribal governments acting only to preserve unique customs untouched by time, despite the fact that Duro's own situation helped illustrate these. *Id.* Duro, although not a member of the tribe, lived with a tribal member on the reservation and was employed by the tribe, and his victim was also a resident of the reservation though he was a member of a separate, though historically related tribe. *Id.* at 1062–63.

⁸⁰ *Duro*, 495 U.S. at 688, 693.

⁸¹ *Id.* at 688.

⁸² *Id.* at 693.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 694.

⁸⁸ *Id.* at 697.

Court offered several solutions for any void created by the decision. It first noted that the MCA applies to major felonies such as the alleged murder in *Duro*, then suggested tribes could exercise their “traditional and undisputed power” to exclude persons whom they deem undesirable from their lands.⁸⁹ Further, the *Duro* Court stated that states may, with the consent of the tribes, assist in law enforcement on the reservation by assuming jurisdiction through Public Law 280.⁹⁰ The Court also suggested that reciprocal agreements between tribes might operate to give separate tribal governments jurisdiction over each other’s members.⁹¹ Lastly, the Court stated that “if the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.”⁹²

1. *The Duro Fix*

The reaction in Indian country to the Supreme Court’s decision was immediate; within ten days, the National Congress of American Indians (“NCAI”) had convened a meeting of tribal, Bureau of Indian Affairs and congressional representatives to discuss the implications of the case and possible responses.⁹³ The Deputy Director and Senior Counsel of the Senate Committee on Indian Affairs stated that “millions of people were calling all the time The outcry was clear and it was solid and everybody knew we had to fix it.”⁹⁴ Congress responded to the Court’s invitation to overrule *Duro*; six months after the decision, Public Law 101-511 was passed, amending the definition of tribal “powers of self-government” in the ICRA to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”⁹⁵

The initial legislation was effective only until September 30, 1991.⁹⁶ In the year that followed, Congress held “extensive hearings.”⁹⁷ Congress determined that nonmember Indians own homes and property, are part of the labor force, are frequently married to tribal members, receive tribal services, and have other close ties to tribes, and therefore it was

⁸⁹ *Id.* at 696.

⁹⁰ *Id.* at 697.

⁹¹ *Id.*

⁹² *Id.* at 698.

⁹³ Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 11 (2004).

⁹⁴ *Id.*

⁹⁵ Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990) (codified at 25 U.S.C. § 1301(2)(2000)).

⁹⁶ H.R. REP. NO. 101-938, Amendment No. 314 (1990) (Conf. Rep.).

⁹⁷ S. REP. NO. 102-153, at 13 (1991).

appropriate to include them within the jurisdiction of tribal courts.⁹⁸ Congress also concluded that the historical record supported this jurisdiction, noting that “[u]ntil the Supreme Court ruled in the case of *Duro*, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years.”⁹⁹ On October 28, 1991, Congress made the legislation permanent.¹⁰⁰

2. *Challenging the Duro Fix: United States v. Lara*

In *United States v. Lara*, the Supreme Court heard the first direct challenge to the Duro Fix: whether Congress had the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority.¹⁰¹ Billy Jo Lara was an enrolled member of the Turtle Mountain Band of Chippewa Indians in North Dakota. He was married to a member of the Spirit Lake Tribe, also of North Dakota, and resided with his wife and children on the Spirit Lake Reservation.¹⁰² As a result of several incidents of serious misconduct, the Spirit Lake Tribe issued an order excluding Lara from the reservation. After violating the order, Lara was stopped by federal officers, and he struck one of the arresting officers.¹⁰³ Lara was prosecuted by the Spirit Lake Tribe for violence to a policeman, plead guilty and served ninety days in prison. The federal government then charged Lara with the federal crime of assaulting a federal police officer, the elements of which were similar to the tribal offense.¹⁰⁴

Lara brought a double jeopardy claim, arguing that the federal government’s prosecution violated the Fifth Amendment.¹⁰⁵ The government argued that the dual sovereignty doctrine determined the outcome of Lara’s claim. Under the dual sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions brought by separate sovereigns.¹⁰⁶ In the government’s view, the tribe was exercising its own inherent tribal authority in prosecuting Lara, as Congress recognized and affirmed in the Duro Fix.¹⁰⁷ The Eight Circuit, reversing the district court, held that the tribal court, in prosecuting Lara, was exercising federal prosecutorial power delegated by Congress and therefore the dual sovereignty doctrine did not apply, and the Double Jeopardy Clause barred

⁹⁸ *Id.* at 7.

⁹⁹ S. REP. NO. 102-168, at 2 (1991).

¹⁰⁰ Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991).

¹⁰¹ *United States v. Lara*, 541 U.S. 193, 196 (2004).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 196–97.

¹⁰⁵ *Id.* at 197.

¹⁰⁶ *Id.* (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985)).

¹⁰⁷ *Lara*, 541 U.S. at 198 (2004).

the second prosecution.¹⁰⁸

The Supreme Court disagreed, holding that Congress can constitutionally authorize tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.¹⁰⁹ The Court found that Congress possessed the constitutional power to lift restrictions on the tribes' criminal jurisdiction over nonmember Indians and cited several considerations that led it to this conclusion.¹¹⁰ The Court noted first that Congress has broad general powers to legislate with respect to Indian tribes, a power the Court has consistently referred to as "plenary and exclusive."¹¹¹ This plenary authority has been interpreted to allow Congress to both restrict and relax restrictions placed on tribal sovereign authority, which has historically caused major changes to the "metes and bounds of tribal sovereignty."¹¹²

The *Lara* Court also stated that it is within Congress' power to modify the degree of autonomy enjoyed by a dependent sovereign that is not a state.¹¹³ Looking to prior precedent, the Court concluded that it had based previous interpretations of inherent tribal authority upon a variety of sources, one of which was Congressional legislation. This source was subject to change and indeed had been changed in the wake of the Court's ruling in *Duro*.¹¹⁴ The Court further noted that the change at issue in the case was a limited one and in large part concerns a tribe's authority to control events that occur upon the tribe's own land.¹¹⁵

The Court explicitly declined to reach the merits of *Lara*'s due process and equal protection claims, finding that they were not properly presented in the context of his double jeopardy claim, and noting that other defendants in tribal proceedings remain free to raise such claims.¹¹⁶ In his concurring opinion, Justice Kennedy noted that the case did not require the Court to address these difficult constitutional questions; however, he strongly suggested that the Court should resolve this issue in the future, calling it a "most troubling proposition."¹¹⁷ According to Justice Kennedy, "the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented."¹¹⁸

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 210.

¹¹⁰ *Id.* at 200.

¹¹¹ *Id.*

¹¹² *Id.* at 202.

¹¹³ *Id.* at 203.

¹¹⁴ *Id.* at 206–07.

¹¹⁵ *Id.* at 204.

¹¹⁶ *Id.* at 209.

¹¹⁷ *Id.* at 212–14 (Kennedy, J., concurring).

¹¹⁸ *Id.* at 212.

Although the Supreme Court has not resolved this particular issue, it has given guidance on the application of the Equal Protection Clause to federal measures classifying Indian people. Federal power to enact laws dealing specially with Indian tribes is explicitly provided by the Indian Commerce Clause and implicitly by the Treaty Clause.¹¹⁹ These measures, and federal practice since the founding of the United States, have led to an entire title of the U.S. Code composed of laws applicable only to Indian tribes and their members.¹²⁰ Classifications of members of Indian tribes, moreover, do not turn primarily on race, but instead on their membership in uniquely sovereign entities.¹²¹ Therefore, the Supreme Court has held that federal measures classifying Indians will be upheld so long as they can be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”¹²² Although the Ninth Circuit has upheld the Duro Fix under this standard,¹²³ more recent statements by the Court suggest that it may scrutinize an equal protection challenge to the Duro Fix more carefully.¹²⁴

Many commentators have discussed the possible outcomes of a challenge to the Duro Fix on both due process and equal protection grounds.¹²⁵ The outcome of such a case is not within the scope of this

¹¹⁹ See U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. CONST. art. II, § 2, cl. 2 (Treaty Clause); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974).

¹²⁰ *Mancari*, 417 U.S. at 552.

¹²¹ *Id.* at 553 n.24; see *United States v. Antelope*, 430 U.S. 641, 646 (1977) (stating that federal regulation of Indian affairs is not based on impermissible classifications; “[r]ather, such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians’”) (citations omitted).

¹²² *Mancari*, 417 U.S. at 555. The Court stated that it had “on numerous occasions . . . upheld legislation that single[d] out Indians for particular and special treatment” and cited several examples. *Id.* at 554–55; see *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (noting that “[i]t is settled” that the federal government may “enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive”); *Antelope*, 430 U.S. at 646–47 (applying this framework to uphold the application of federal criminal jurisdiction to Indian defendants).

¹²³ *Means v. Navajo Nation*, 432 F.3d 924, 932–33 (9th Cir. 2005).

¹²⁴ See *United States v. Lara* 541 U.S. 193, 211–13 (2004) (Kennedy, J., concurring) (discussing the “troubling proposition” reached by the majority and suggesting that the government may not subject a citizen to the criminal jurisdiction of a third entity beyond the limited extent that a member of a tribe consents to the jurisdiction of his own tribe); *Id.* at 231 (Souter, J., dissenting) (stating that the Court should stand by its explanations in *Oliphant* and *Duro* and hold that Congress is without authority to enact the Duro Fix because “Congress cannot control the interpretation of the statute in a way that is at odds with the constitutional consequences of the tribes’ continuing dependent status”); *Rice v. Cayetano*, 528 U.S. 495, 519–20 (2000) (stating that the *Mancari* opinion “was careful to note . . . that the case was confined to the authority of the [Bureau of Indian Affairs], an agency described as ‘*sui generis*’”) (citations omitted); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243–45 n.1 (1995) (Stevens, J., dissenting) (suggesting that the majority’s insistence on applying the label “strict scrutiny” to benign race-based programs will force the conclusion that “the special preferences that the National Government has provided to Native Americans since 1834 [are] comparable to the official discrimination against African-Americans that was prevalent for much of our history”).

¹²⁵ See, e.g., Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 318–19 (2004) (discussing possible constitutional limitations on the ability of Indian tribes to prosecute nonmember Indians after *Lara*); Anna

Note. It seems likely, however, that the Court would use such a challenge to revisit the concerns about nonmember Indians and tribal courts that characterized *Duro v. Reina*. Because these concerns relied on flawed analysis and incorrect assumptions, it is important to review and correct them now.

III. EXAMINING THE *DURO* COURT'S ASSUMPTIONS

A. *Tribal Self-Government and Tribal Integrity*

The *Duro* Court recognized that tribes can extend jurisdiction where needed to preserve tribal integrity and self-determination, but implicitly held that exercising criminal jurisdiction over nonmember Indians did not fall within this category.¹²⁶ The Court stated that for purposes of the criminal jurisdiction at issue in *Duro*, nonmember Indians were similarly situated to non-Indians.¹²⁷ This reasoning is flawed and, in fact, the exercise of criminal jurisdiction over nonmembers is crucial to tribal integrity and self-determination. Both the characteristics of most tribes today and reservation demographics belie the Court's conclusions; reservations often have a significant number of nonmember Indians, with an average percentage of twelve percent.¹²⁸

In addition, Congress found that nonmember Indians are closely integrated into reservation affairs, substantially more so than are non-Indians; nonmember Indians own homes and property on reservations, are part of the labor force on reservations, and frequently are married to tribal members.¹²⁹ Nonmembers also receive the benefits of programs and services provided by the tribal government, such as health care services at tribal hospitals and clinics, and their children attend tribal schools.¹³⁰ A high rate of marriage between member Indians and nonmembers is certainly a significant factor to be considered. In a survey of 103 tribes

Sappington, *Is Lara the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception*, 7 WYO. L. REV. 149, 175–80 (2007) (discussing the Supreme Court's speculation that tribal criminal jurisdiction over nonmembers may be subject to constitutional limits, and depending on how Congress structured its delegation, tribal jurisdiction could run afoul of the Due Process and Equal Protection Clauses); Alex Tallchief Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 50–51, 61–70 (2004) (“[E]xplor[ing] the questions left unanswered by *Lara*: whether a tribal prosecution undertaken pursuant to the *Duro* Fix denies due process and equal protection to those nonmember Indians.”); Will Trachman, Comment, *Tribal Criminal Jurisdiction After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847, 851–52 (2005) (examining the proper standard of review as well as the merits of possible equal protection and due process claims).

¹²⁶ See *Duro v. Reina*, 495 U.S. 676, 688 (1990) (describing certain types of jurisdiction as “vital to the maintenance of tribal integrity and self-determination”).

¹²⁷ *Id.*

¹²⁸ S. REP. NO. 102-153, app. E at 58 (1991).

¹²⁹ *Id.* at 7.

¹³⁰ *Id.*

conducted by the NCAI in 1991, eighty percent of tribes reported that nonmember Indians were married to tribal members.¹³¹ Ninety-two percent reported that nonmember Indians worked on their reservations and twenty-five percent reported that nonmembers held interests in trust or restricted Indian land on their reservations.¹³²

It is inevitable that some portion of the nonmember Indian population residing on reservations will commit minor crimes. Indeed, according to a report prepared by the United States Department of Justice, the rate of violent crime experienced by Indians was more than twice the national average between 1992 and 2001.¹³³ Further, although the *Duro* Court characterized the jurisdiction as being over “relatively minor crimes,”¹³⁴ by far the most common type of violent victimization among Indians was simple assault.¹³⁵ Further, the assault rate among Indians was more than twice the rate experienced by other races.¹³⁶ If a tribe could not exercise criminal jurisdiction over nonmember Indians, no sovereign would have the power to prosecute a significant portion of reservation populations which commit the most common violent crime occurring within reservation borders. When compared to a 1999 Department of Justice Report, the rate of simple assault has increased, making tribal jurisdiction over these types of crimes even more necessary.¹³⁷

B. Tribal Court Systems

The Supreme Court stated in *Duro* that the special nature of tribal courts makes a focus on “consent” more appropriate. Although the Court noted that modern tribal courts include “familiar features” of the judicial process, it stated that they are influenced by unique customs, languages, and usages of the tribes they serve.¹³⁸ Further, the Court noted that often tribal courts are subordinate to other branches of government.¹³⁹ Although the preservation of tradition and custom continues to be of utmost importance to any tribe, a report prepared by the American Indian Law Center found that tribal justice systems are predominantly Western-style,

¹³¹ S. REP. NO. 102-168, app. E at 58 (1991).

¹³² *Id.*

¹³³ STEVEN W. PERRY, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME, at iv (2004).

¹³⁴ *Duro v. Reina*, 495 U.S. 676, 696 (1990).

¹³⁵ PERRY, *supra* note 133, at 6.

¹³⁶ *Id.*

¹³⁷ LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 3 (1999) (noting that the rate of simple assault, the most common type of violent crime experienced by Indian victims, was fifty-six percent).

¹³⁸ *Duro*, 495 U.S. at 693.

¹³⁹ *Id.*

patterned after state and federal models.¹⁴⁰ Of the tribes responding to the survey, seventy-eight percent had written codes defining their laws, with many of the codes incorporating federal, state or municipal laws.¹⁴¹ Nearly all of the tribal court systems have an appeals process.¹⁴² According to the survey, although seventy-five percent of the responding tribes have some laws based on Indian customs, such laws were primarily applied to tribal members.¹⁴³

As to the Court's statement that tribal courts are often subordinate to other political branches, the American Indian Law Center survey contradicts this notion; in fact, the survey reports that very few tribal justice systems report political interference with the work of the courts.¹⁴⁴

C. Tribal History Concerning Jurisdiction over Nonmembers

According to the *Duro* Court, historical evidence regarding criminal jurisdiction over nonmember Indians is "less clear" than the record supporting jurisdiction over members. However, the Court felt that "on balance" the historical record supports the view that inherent tribal jurisdiction extends only to tribe members.¹⁴⁵ The historical evidence became more clear during the congressional hearings on the Duro Fix. Professor Richard Collins stated during the hearings that "in the period from the founding of the Republic until the latter part of the last century . . . [t]ribes exercised authority over members of other tribes who married into the tribe, were adopted into its families, or otherwise became part of the tribal community voluntarily."¹⁴⁶ Numerous tribal leaders stated during hearings in both the House and the Senate that tribes had historically exercised criminal jurisdiction over members of other tribes.¹⁴⁷

¹⁴⁰ AMERICAN INDIAN LAW CENTER, SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES 22 (2000) [hereinafter *AILC Survey*].

¹⁴¹ *Id.* at 15, 18.

¹⁴² *Id.* at 23.

¹⁴³ *Id.* at 15, 19.

¹⁴⁴ *Id.* at vii.

¹⁴⁵ *Duro v. Reina*, 495 U.S. 676, 691 (1990).

¹⁴⁶ *The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on H.R. 972 Before the H. Comm. on Interior and Insular Affairs*, 102d Cong. 155 (1991) [hereinafter *House Hearing*] (statement of Professor Richard Collins).

¹⁴⁷ *See Id.* at 94 (statement of Michael T. Pablo, Chairman, Confederated Salish and Kootenai Tribes of the Flathead Nation) (stating that historically, the Confederated Salish and Kootenai Tribes have always exercised criminal jurisdiction over members of other tribes); *id.* at 102 (statement of Zane Jackson, Chairman, Warm Springs Tribal Council) ("[Since] the Warm Springs Reservation was first established . . . our people have exercised jurisdiction over Indians from other tribes who came to visit or live on our reservation . . . it was always the traditional law of our people that Indians from other tribes who came into our sovereign territory were subject to our laws."); *id.* at 178 (statement of Donna M. Christensen, Attorney General, Navajo Nation) ("The Navajo people have interacted with other tribes from the beginning of our history. Not surprisingly, the Navajo people, like other tribes, have always exercised what is known as criminal jurisdiction over nonmember Indians when necessary."); *see also Impact of the Supreme Court's Ruling in Duro v. Reina: Hearing on S. 962 and S. 963 Before the S. Select Comm. on Indian Affairs*, 102d Congress, pt. 2 at 36 (1991) [hereinafter *Senate Hearing*]

Upon consideration of the evidence presented at the hearings, Congress concluded that “[u]ntil the Supreme Court ruled in the *Duro* case, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years.”¹⁴⁸ Congress found that previous legislation with respect to Indian tribes indicated that it had not acted to divest tribal governments of their inherent authority to exercise criminal jurisdiction over nonmember Indians; “[i]nstead, the assumption in Congress has always been that tribal governments do have such jurisdiction, and Federal statutes reflect this view.”¹⁴⁹

D. ICRA and Defendants’ Rights

Although the ICRA guarantees protections to criminal defendants in tribal court that are, for the most part, analogous to the protections guaranteed by the Constitution, the *Duro* Court stated that it was “significant that the Bill of Rights does not apply to Indian tribal governments.”¹⁵⁰ The rights significant in the criminal context not expressly protected under the ICRA are the right to appointed counsel and to grand jury indictments.¹⁵¹ The right to appointed counsel for indigent defendants is certainly an important protection under the Bill of Rights and the Court understandably is hesitant to look past this difference between the Constitution and the ICRA. The Court, however, does not discuss the fact that many tribes, although not required under the ICRA, do indeed provide a right to appointed counsel or defense advocate, or require the

(statement of Lawrence D. Wetsit, Chairman, Fort Peck Tribal Executive Board) (“The Fort Peck Assiniboine and Sioux Tribes have historically always enjoyed jurisdiction over nonmember Indians on our reservation.”); *id.* at 62 (statement of Robert Lewis, Governor, Pueblo of Zuni) (“We have exercised jurisdiction over non-Zuni Indians for over 450 years within the legal framework of Spain, Mexico, and the United States in a fair and impartial way.”).

¹⁴⁸ S. REP. NO. 102-168, at 2 (1991); *see* H.R. REP. NO. 102-261, at 3 (1991) (Conf. Rep.) (stating that “tribal governments have always held” the right to exercise such jurisdiction as a matter of inherent authority).

¹⁴⁹ S. REP. NO. 102-168, at 3 (1991). Congress also cited with approval Justice Brennan’s account of previous federal legislation with respect to Indian tribes, as contained in his dissenting opinion, which reached the conclusion that there was a “congressional presumption that tribes had power over all disputes between Indians regardless of tribal membership.” *Id.* at 3–4.

¹⁵⁰ *Duro*, 495 U.S. at 693; *see supra* notes 35–42 and accompanying text (discussing key differences between the Bill of Rights and ICRA protections).

¹⁵¹ *See* 25 U.S.C. § 1302 (2000) (enumerating specific protections). As noted earlier, the ICRA also makes no mention of the impartiality of juries in the criminal context. *Id.* The Sixth Amendment expressly guarantees an impartial jury and has been interpreted to also guarantee a right to a fair cross section of the community. U.S. CONST. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). Although the ICRA does not specifically address these protections, it does include a broad guarantee that no person shall be denied the equal protection of the law or deprived of liberty or property without due process of law. 25 U.S.C. § 1302(8). It also specifies that the jury must be comprised of at least six persons. 25 U.S.C. § 1302(10).

judge to safeguard the rights of a defendant with no legal representation.¹⁵² Certain tribes are also required by their own constitutions or by tribal policy to provide appointed counsel to indigent defendants.¹⁵³ Congress has also specifically authorized funding for legal assistance services to Indian tribes, which should increase the availability of appointed counsel in tribal courts.¹⁵⁴

The ICRA does not require that defendants be indicted by grand jury in criminal cases. The Fifth Amendment requires an indictment by Grand Jury for “infamous crimes,” which have been interpreted to mean any offense punishable by imprisonment for a term of over one year.¹⁵⁵ Since the ICRA does not authorize punishments involving more than one year of imprisonment, the right to a grand jury would not attach.¹⁵⁶ Further, the Supreme Court has held that this right has not been incorporated into the Fourteenth Amendment’s Due Process Clause and therefore need not be observed by the states.¹⁵⁷ The ICRA further provides a right to habeas corpus review after the exhaustion of tribal court remedies.¹⁵⁸ This serves as a significant safeguard for defendants alleging violations of basic fairness in tribal prosecutions.¹⁵⁹

A comprehensive empirical study of tribal court opinions involving individual rights claims suggests that concerns regarding tribal court treatment of rights under the ICRA are grossly overstated, if not entirely misplaced.¹⁶⁰ Professor Rosen concludes that:

[T]his Article’s findings counsel strongly against the proposals advanced by some commentators and members of Congress that federal court jurisdiction over ICRA be expanded, or tribal court jurisdiction curtailed, because tribal

¹⁵² See *AILC Survey*, *supra* note 140, at 27 (noting that many tribal court systems provide indigent defendants with defense attorneys or defense advocates, while others require that the judge assure the protection of defendants’ rights).

¹⁵³ *House Hearing*, *supra* note 146, at 177 (statement of Donna M. Christensen, Attorney General, Navajo Nation); see *Senate Hearing*, *supra* note 147, at 64 (statement of Burton Hutchinson, Chairman, Northern Arapaho Tribe of the Wind River Reservation of Wyoming) (“Public defender services are provided to any indigent person requesting through the Wind River Legal Services.”).

¹⁵⁴ 25 U.S.C. § 3663 (2000).

¹⁵⁵ See FED. R. CRIM. P. 7(a) (stating that an offense must be prosecuted by an indictment if punishable by death or imprisonment for more than one year); see also FED. R. CRIM. P. 7 advisory committee’s note I (“[A]ny offense punishable by imprisonment for a term of over one year is an infamous crime.”).

¹⁵⁶ See 25 U.S.C. § 1302(7) (stating that tribal governments may not impose punishment greater than imprisonment for a term of one year and a fine of \$5000, or both).

¹⁵⁷ *Hurtado v. California*, 110 U.S. 516, 538 (1884).

¹⁵⁸ 25 U.S.C. § 1303.

¹⁵⁹ See H.R. REP. NO. 102-61, at 6 (1991) (stating that defendants in tribal court proceedings “[have] a remedy for violations of basic fairness which Congress imposed on tribes through a writ of habeas corpus in federal court”).

¹⁶⁰ 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, 582 (2000).

courts have not responsibly interpreted ICRA . . . Tribal courts have found significant individual protections in ICRA even though they express the values of due process, equal protection, and so on, in ways that reflect and support tribal culture. This finding casts doubt on the wisdom of curtailing the powers of the tribal courts.¹⁶¹

In an extensive study of cases before the Navajo courts, Professor Berger similarly concludes that “[t]he data regarding the experience of nonmembers in Navajo courts do not support the assumption of the United States Supreme Court that nonmembers will be at a disadvantage in tribal courts.”¹⁶² In fact, nonmembers prevail slightly less than half of the time they appear before the Navajo courts, and the decisions reveal few troubling assessments of law or fact.¹⁶³ Although the Court is properly concerned with safeguarding individual rights, empirical tribal court evidence suggests that a broad assumption that the ICRA inadequately protects defendants’ rights, or that tribal courts possess bias against nonmembers, is improper.

E. *Membership and Consent*

The *Duro* Court asserts that 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 therefore in the criminal sphere membership marks the bounds of tribal authority.¹⁶⁴ The Court maintained that a nonmember like *Duro* was, for purposes of criminal jurisdiction, no different than a non-Indian.¹⁶⁵ It emphasized the idea of consent, stating that *Duro* could not become a member of the prosecuting tribe, hold office, or serve on a jury.¹⁶⁶ However, the Court’s assumption that nonmember Indians are similarly situated to non-Indians in reservation communities is inconsistent with modern realities. The NCAI survey cited by Congress found that eighty percent of responding tribes reported marriages between members and nonmembers and over ninety percent reported that nonmember Indians worked on their reservations.¹⁶⁷

In an amicus brief filed by eighteen Indian tribes in the *Lara* case, the tribes stated that “[t]he story of Spirit Lake and Billy Jo Lara is typical throughout Indian Country. Like Mr. Lara, Indians often choose to come

¹⁶¹ *Id.* at 582–83.

¹⁶² Berger, *supra* note 54, at 1094.

¹⁶³ *Id.*

¹⁶⁴ *Duro v. Reina*, 495 U.S. 676, 693 (1990).

¹⁶⁵ *Id.* at 688.

¹⁶⁶ *Id.*

¹⁶⁷ S. REP. NO. 102-153, app. E, at 58 (1991).

to other tribes' reservations and live in Indian communities."¹⁶⁸ The tribes noted that it is common for Indians to marry members of other tribes, live with parents who are members of other tribes, and be employed on reservations as nonmembers. Indians who choose to move to other tribes' reservations are entitled to receive services provided by those other tribes, and by the federal government, to all Indians regardless of tribal affiliation.¹⁶⁹ Further, although nonmembers often cannot vote in tribal elections, many tribes allow nonmember Indians to have significant involvement in tribal affairs, including employment on tribal government boards and commissions, as tribal police officers, or as judges in tribal court.¹⁷⁰

Under the Duro Fix, an "Indian" is defined as any person who would be subject to the jurisdiction of the United States under the MCA if he were to commit one of the enumerated crimes in that section.¹⁷¹ Under this definition, a person is subject to federal criminal jurisdiction as an "Indian" only if he is (1) of Indian ancestry, and (2) is enrolled or affiliated with a federally recognized tribe.¹⁷² Therefore, nonmember Indians that come within the criminal jurisdiction of a tribe under the Duro Fix will be enrolled members of some tribe, with full rights of participation in that tribe. Through this right, all enrolled members had an opportunity to express their view of the Duro Fix through their tribal governments at the time Congress was considering the amendments. Congress did not find any Indian tribe opposed to this measure.¹⁷³ The fact that the tribes were universally supportive of the Duro Fix, through their representative tribal governments and Congressional representatives, could therefore be seen as an approval from all tribal members.

The Court emphasized that a tribe's authority stems from the "consent"

¹⁶⁸ Brief on Behalf of Eighteen American Indian Tribes as Amici Curiae at 8, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22766745.

¹⁶⁹ *Id.*

¹⁷⁰ See *Senate Hearing*, *supra* note 147, at 44 (statement of Dale Kohler, Chairman of Law and Justice, Colville Tribal Business Council) (stating that nonmember Indians serve on Colville tribal boards and commissions); *id.* at 47 (statement of Donald W. Johnson, Chairman, Makah Tribal Council) (stating that Makah tribal law permits nonmember Indians to serve as judges and jury members in tribal court); *id.* at 55 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) (stating that the Yakima Nation employs nonmember Indians). The Grand Traverse Band of Ottawa and Chippewa Indians permits nonmembers to serve as judges in tribal court, and currently a nonmember, non-Indian is the Chief Judge of the Tribal Court. Telephone Interview with Wilson D. Brott, Chief Judge, Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court (Sept. 27, 2007) (notes on file with *Connecticut Law Review*). A report prepared for the Justice Department found that approximately ten percent of tribal law enforcement officers were nonmember Indians. STEWART WAKELING ET. AL., U.S. DEPARTMENT OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 25 (2001); see also *Senate Hearing*, *supra* note 147, at 46 (statement of Donald W. Johnson, Chairman, Makah Tribal Council) ("[A]bout [fifty] percent of [Makah tribal law enforcement] officers are nonmember Indians.").

¹⁷¹ 25 U.S.C. § 1301(4) (2000).

¹⁷² *United States v. Antelope*, 430 U.S. 641, 646-47 n.7 (1977).

¹⁷³ S. REP. NO. 102-168, app. E, at 59 (1991).

of its members and cites the fact that nonmembers may not vote in tribal government elections as evidence that consent has not been given.¹⁷⁴ However, there is no general requirement that sovereigns extend the voting franchise to all persons whom they subject to criminal jurisdiction.¹⁷⁵ Non-citizens of the United States have no entitlement to political participation but are nevertheless subject to federal criminal jurisdiction. Perhaps more analogous is the fact that a resident of one state who commits a crime in another state is certainly subject to that state's criminal jurisdiction, despite his inability to participate in the political process in that state. To require that all persons have voting rights in order for the government to maintain criminal jurisdiction is inconsistent with federal and state policies and is impractical on reservations where a nonmember has significant community ties but may lack the ability to vote based on his membership.

F. *Suggested Remedies*

The *Duro* Court answered the argument that they were creating a jurisdictional void by suggesting several different remedies that would be available to tribes and the federal and state governments in the wake of their decision.¹⁷⁶ None of these are viable alternatives to tribal criminal jurisdiction over nonmember Indians. The *Duro* Court's suggested remedies are simply unworkable and not realistic.¹⁷⁷ One suggestion proposed by the Court was that states' jurisdiction under Public Law 280 could be expanded, a remedy one commentator referred to as the Court's "most astonishing and offensive suggestion."¹⁷⁸ The reality is that in fact few Indians have been subject to Public Law 280 and it has been unpopular with both the tribes and states to which it applied.¹⁷⁹ Since Congress neither appropriated funds for state law enforcement in Indian country nor made Indian lands taxable by the states, the state governments resented the fact that they were given the duty of law enforcement but no means to pay for it.¹⁸⁰ Tribes also resented the fact that state jurisdiction was thrust upon them without their consent, a further erosion of their sovereignty.¹⁸¹

¹⁷⁴ *Duro v. Reina*, 495 U.S. 676, 694 (1990).

¹⁷⁵ See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–74 (1978) (holding that extension of a city's criminal jurisdiction to residents of adjoining areas who did not have voting rights did not violate the Equal Protection or Due Process Clauses).

¹⁷⁶ *Duro*, 495 U.S. at 696–98.

¹⁷⁷ See Wildenthal, *supra* note 30, at 129 ("Kennedy offered several weak proposals that simply underscored his ignorance of Indian law and Indian country.").

¹⁷⁸ *Id.*

¹⁷⁹ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 233 (4th ed. 2004); Wildenthal, *supra* note 30, at 129 ("The vast majority of Indians have never been subject to Public Law 280, which has been intensely unpopular with both states and tribes.").

¹⁸⁰ CANBY, JR., *supra* note 179, at 233; Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 699, 704 (2006).

¹⁸¹ CANBY, JR., *supra* note 179, at 233.

The result of these criticisms were amendments to the law requiring tribal consent before any state could assume jurisdiction; since these amendments were passed in 1968 there has been almost no expansion of Public Law 280.¹⁸² To suggest that Public Law 280 jurisdiction should now be expanded to close the jurisdictional gap created by the *Duro* decision makes little sense, considering that the law's shortcomings have led to lawlessness in many parts of Indian country.¹⁸³ Evidence received by Congress when it was considering the Duro Fix supports this conclusion. Tribal governments reported to Congress that even in those states with jurisdiction under Public Law 280, state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands.¹⁸⁴ In fact, several states with large Indian populations enacted measures calling on Congress to make the initial Duro Fix legislation permanent.¹⁸⁵

The Court also noted that federal statutes could be construed to grant the federal government jurisdiction over misdemeanor crimes between Indians.¹⁸⁶ Even if the statute were formally amended to expand federal jurisdiction, a further intrusion of tribal sovereignty contrary to longstanding federal policy, evidence suggests that this would prove unworkable. As Congress recognized, the “[c]rowded dockets of U.S. District Courts do not lend themselves to being ‘traffic court’ for this category of Indian reservation cases.”¹⁸⁷ The vast areas encompassed by some reservations would make it difficult and expensive to transport defendants, victims, witnesses and law enforcement officers to handle the arraignments, trials and sentences required in the prosecution of such crimes.¹⁸⁸ According to the Senate Report, in the wake of the *Duro* decision, tribal governments called upon federal and state law enforcement authorities to assist them in assuring that offenders of federal law would be prosecuted.¹⁸⁹ However, reports soon came to Congress that United States Attorneys, “overburdened with the prosecution of major crimes, could not

¹⁸² *Id.*

¹⁸³ See Goldberg & Champagne, *supra* note 180, at 729 (“[S]tate and county police in Public Law 280 jurisdictions either provide less satisfactory service than those in non-Public Law 280 jurisdictions, or have an assessment of their own effectiveness that is more divergent from community assessments than in non-Public Law 280 jurisdictions.”); see also Wildenthal, *supra* note 30, at 129 (“The inadequacies of Public Law 280 have led to endemic lawlessness in many parts of Indian country.”).

¹⁸⁴ S. REP. NO. 102-168, at 4 (1991).

¹⁸⁵ *Id.* Arizona, Montana, Nevada, North Dakota, and South Dakota “enacted measures calling upon the Congress to permanently reaffirm tribal government jurisdiction over non-member Indians who commit misdemeanor crimes.” *Id.* New Mexico was unable to pass a final bill before adjournment but a measure did pass the house unanimously and was reported on favorably by the state senate judiciary committee. *Id.* The International Association of Chiefs of Police enacted a similar resolution. *Id.* app. B at 47.

¹⁸⁶ *Duro v. Reina*, 495 U.S. 676, 697 (1990).

¹⁸⁷ H.R. REP. NO. 102-61, at 3 (1991).

¹⁸⁸ *Id.*

¹⁸⁹ S. REP. NO. 102-168, at 4 (1991).

assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of nonmember Indians.”¹⁹⁰ Even as to major crimes, for which the federal government has long had jurisdiction, the declination rate remains unsatisfactory to a majority of tribes.¹⁹¹ According to Congress, less than forty-three percent of all referrals were prosecuted in 1988 and less than forty percent of all referrals were prosecuted in 1989.¹⁹²

More recent data confirms this finding. A 2007 study published by *The Denver Post* determined that the overall declination rate by the federal government for reservation cases is just over sixty-two percent.¹⁹³ A six month investigation of twenty reservations by the newspaper revealed startling instances where serious reservation crimes go unpunished, putting residents at risk.¹⁹⁴ The report found that United States Attorneys and FBI investigators face huge challenges fighting crime on reservations; they are often viewed as outsiders and the remote locations and high levels of alcohol use by witnesses make prosecutions difficult.¹⁹⁵ The high declination rate is in part due to the fact that (1) federal prosecutors want to prosecute more high profile cases, such as major drug or white collar crime cases, and (2) federal prosecutors want to bring cases with a high likelihood of success.¹⁹⁶ In other instances it is not simply a lack of will that is the problem, but a question of numbers. On the Blackfeet Reservation, for example, there are only three federal agents assigned to investigate felony crimes, with each juggling up to fifty cases.¹⁹⁷ One

¹⁹⁰ *Id.*

¹⁹¹ S. REP. NO. 102-168, app. E, at 60 (1991) (reporting that sixty-three percent of responding tribes believed that the U.S. Attorney was not doing a good job of prosecuting major crime referrals). The Yakima Nation testified that under the MCA the declination rate when an Indian is the victim of a crime is very high. *Senate Hearing, supra* note 147, at 79 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation). For example, one anecdotal case involved the rape of a Yakima woman by two Indian men, one a tribal member and one a member of another tribe. *Id.* Since rape is a major crime, the tribe referred the case to the United States Attorney under the MCA. However, the tribe stated that as with the majority of tribal referrals, the United States Attorney’s office declined to prosecute either individual. As a result, under the Court’s ruling in *Duro*, the tribe was only able to prosecute the tribal member. *Id.*

¹⁹² S. REP. NO. 102-168, app. E, at 60 (1991).

¹⁹³ Michael Riley, *Lawless Lands: Principles, Politics Collide*, DENVER POST, Nov. 13, 2007, at A1 [hereinafter *Principles, Politics Collide*], available at http://www.denverpost.com/lawlesslands/ci_7446439 (last visited Aug. 13, 2008).

¹⁹⁴ Michael Riley, *Lawless Lands: Promises, Justice Broken*, DENVER POST, Nov. 11, 2007, at A1 [hereinafter *Promises, Justice Broken*], available at http://www.denverpost.com/ci_7429560 (last visited Aug. 13, 2008). Dozens of crimes were investigated including, for example, serious assault on the Fort Peck Reservation, a rape and incest case on the Navajo Reservation, and sexual assault of a six-year-old on the Crow Reservation. *Id.* Of these crimes, two were declined by federal prosecutors and one is still under investigation, nearly three years later. *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* One tribal prosecutor wryly stated that Indian country was the FBI’s “third-highest priority—terrorism, everything else and then Indian country.” Michael Riley, *Lawless Lands: Justice: Inaction’s Fatal Price*, DENVER POST, Nov. 12, 2007, at A1 [hereinafter *Justice: Inaction’s Fatal Price*], available at http://www.denverpost.com/ci_7437278 (last visited Aug. 13, 2008).

¹⁹⁷ *Justice: Inaction’s Fatal Price, supra* note 196, at A1.

United States Attorney noted that the lack of investigation of low-priority felonies erodes faith in justice on reservations just as much as would ignoring murders.¹⁹⁸ In light of the current problems with felony investigations and prosecutions, the Court's suggestion that federal jurisdiction be expanded is a dangerous idea and should not be considered a viable option.

Another measure suggested by the Court is to banish undesirable persons from reservation lands.¹⁹⁹ As one commentator has noted, "such a solution is both repugnant and unworkable."²⁰⁰ With the high rate of intermarriage between tribal members and nonmembers, the exclusion of nonmembers from the reservation—thus, perhaps dividing families—would be more of an intrusion upon essential liberties than criminal prosecution.²⁰¹ Further, as the *Lara* case illustrates, the exclusion power is not a practical way to preserve order among those who live on the reservation; the incident which brought *Lara* before the court arose out of attempts to enforce an exclusion order against him.²⁰² In the NCAI survey relied on by Congress, eighty-nine percent of responding tribes stated that excluding nonmember Indians was not a workable solution.²⁰³ The most frequently cited reasons were extensive intermarriage between members and nonmembers, the large presence of nonmember children and nonmember employment on the reservation.²⁰⁴

The *Duro* opinion also suggests that tribal governments could form reciprocal agreements to grant jurisdiction over one another's members.²⁰⁵ However, the Court does not address the fact that there would be a tremendous amount of practical difficulties involved with attempting to make enforceable agreements between over five hundred federally recognized tribes.

After suggesting these various remedies in a portion of the opinion that seems like more of an afterthought by the Court, it stated that "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has ultimate authority over Indian affairs."²⁰⁶ Of course, Congress did just that when it enacted the *Duro* Fix within six months of the Court's decision, but the significance of the anecdotal evidence received by Congress in the intervening period should not be

¹⁹⁸ *Id.*

¹⁹⁹ *Duro v. Reina*, 495 U.S. 676, 696 (1990).

²⁰⁰ L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 77 (1994).

²⁰¹ *Id.*

²⁰² *United States v. Lara*, 541 U.S. 193, 196 (2004).

²⁰³ S. REP. NO. 102-168, app. E, at 59 (1991).

²⁰⁴ *Id.*

²⁰⁵ *Duro v. Reina*, 495 U.S. 676, 697 (1990).

²⁰⁶ *Id.* at 698.

overlooked. The jurisdictional void stressed by the tribes and predicted by the Ninth Circuit became a reality. As the House Report stated, “[t]he Committee was inundated with anecdotal accounts describing serious jurisdictional law and order problems resulting from the Court’s holding. Nonmember Indian perpetrators on reservations could no longer be taken to the most accessible forums. Remote reservations with high rates of intermarriage with other tribes were facing chaos.”²⁰⁷ Congress received a large amount of testimony from tribes across the country facing serious problems as a result of the Court’s decision.²⁰⁸ For example, the Yakima Indian Nation reported that it was forced to dismiss pending charges against forty-three Indians because they were not formally enrolled members of the tribe.²⁰⁹ The Suquamish Indian Tribe testified that six cases had to be dismissed after the Court’s decision in *Duro*, and that it was unable to prosecute at least twelve other incidents.²¹⁰ The U.S. Attorney for the District of South Dakota and Chair of the U.S. Attorney’s Indian Affairs Subcommittee testified that the *Duro* decision created a sudden deprivation of long and widely-exercised jurisdiction causing a serious law enforcement problem in Indian country.²¹¹ He stated that the “the jurisdictional gap is real and adversely affects the tribe’s ability to protect reservation residents from violations of the law.”²¹²

The *Duro* Court’s conclusions, and the assumptions it relied on in reaching its conclusions, must be reexamined if the Court is faced with a due process or equal protection challenge to the *Duro* Fix. Practical realities involving law enforcement problems faced by many tribes in the wake of the Court’s decision should not be ignored, nor should the demographic realities of modern tribal communities. Nonmember 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. The alternatives suggested by the Court are, quite simply, unrealistic and unworkable. Evidence presented to Congress following the Court’s decision clearly illustrates this. Criminal jurisdiction over nonmember Indians is crucial to the maintenance of tribal self-government and the regulation of tribal integrity, and must be recognized as such.

²⁰⁷ H.R. REP. NO. 102-61, at 4 (1991).

²⁰⁸ *Id.*

²⁰⁹ *Senate Hearing, supra* note 147, at 79 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation).

²¹⁰ *Status of Jurisdictional Authority in Indian Country, an Assessment of Emerging Issues: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 12 (1991) (statement of Georgia George, Chairperson, Suquamish Indian Tribe).

²¹¹ S. REP. NO. 102-168, at 21 (1991).

²¹² *Id.* at 23.

IV. AN EXAMINATION OF TWO TRIBES

Nearly twenty years after the Court's decision in *Duro*, changing conditions and demographics in Indian country further illustrate the inaccuracy of many of the Court's assumptions. In order to analyze critically the applicability of the Court's reasoning to today's tribal communities, it is necessary to examine conditions "on the ground" in Indian country today. The significant number of Indian tribes in both Michigan and Washington make a study of the Grand Traverse Band of Ottawa and Chippewa Indians and the Confederated Tribes of the Colville Reservation particularly insightful when examining nonmember criminal jurisdiction.

A. *Grand Traverse Band of Ottawa and Chippewa Indians*

A historical question often asked of ethnologists who study Indian cultures is "[w]hich tribe lived in this area when white people first arrived?"²¹³ This question, however, is more properly a question of non-Indian history, as the very concept of "tribe" as it is used today had little meaning to native peoples before they had extensive contact with non-Indian settlers.²¹⁴ In Michigan, where the Grand Traverse Band of Ottawa and Chippewa Indians is located, the native people living there prior to contact with European settlers would have identified themselves collectively as "Anishnabeg," meaning "original man."²¹⁵ Beyond this, a native of this area would most likely have identified with a clan on the basis of his father's lineage, then with a particular band, a small local economic and sociopolitical group.²¹⁶

The Ottawa and Chippewa bands migrated from the Atlantic seaboard and in the sixteenth century formed the loosely-organized Three Fires Confederacy along with the Potawatomi.²¹⁷ They referred to themselves collectively as the Anishnabeg, spoke similar dialects of the Algonquin language, and shared many cultural beliefs and practices, including a clan system.²¹⁸ In 1836, the Treaty of Washington brought the largest cession of land to the federal government by Michigan Indians and led to statehood

²¹³ CHARLES E. CLELAND, RITES OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN'S NATIVE AMERICANS 39 (1992).

²¹⁴ *Id.*

²¹⁵ *Id.*; GEORGE WEEKS, MEM-KA-WEH: DAWNING OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS 2 (1992).

²¹⁶ CLELAND, *supra* note 213, at 39.

²¹⁷ WEEKS, *supra* note 215, at 2. A widely-cited explanation for the Anglicized word Ottawa is from "Ota'wa," meaning "to trade," and from the fact that the Ottawa were traders. *Id.* at 3. The traditional spelling is "Odawa," although this Note will refer to the more common spelling "Ottawa" since it is more widely recognized today. Chippewa is the English version of "Ojibwa," an early village on the north shore of Lake Superior. *Id.*

²¹⁸ *Id.* at 2-3.

for Michigan.²¹⁹ The treaty also created the artificial Ottawa and Chippewa Tribe, since the two bands had agreed to act in concert for treaty purposes.²²⁰ Currently, the Grand Traverse Band of Ottawa and Chippewa Indians is located across a six county service area in northwest Michigan²²¹ and has a membership total of approximately 4000 individuals.²²²

The Grand Traverse Band's court system stems from Article V of its Constitution, which vests the judicial power in a tribal court system composed of a court of general jurisdiction and an appellate court.²²³ The Constitution also contains a Judicial Independence clause, providing that "[t]he Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of government shall exercise powers properly belonging to the judicial branch of government."²²⁴ This is inapposite to the Court's assumption in *Duro* that tribal courts are often subordinate to other political branches,²²⁵ and consistent with the American Indian Law Center Survey which found little interference with the court systems by other branches of tribal governments.²²⁶

The Grand Traverse Band has an extensive criminal code of laws,²²⁷ which is inconsistent with the Court's assumption in *Duro* that tribes often depend on "unspoken practices and norms."²²⁸ Criminal jurisdiction is codified to extend to members of the Grand Traverse Band and all other Indians present within the territory of the Band.²²⁹ "Indian" is defined in the code to include a member of the Band, a member of any federally-recognized Indian tribe, band, or group, or a person of Indian blood who is generally considered to be American Indian by the Grand Traverse Band community.²³⁰ This is inconsistent with the Court's presumption in *Duro* that a nonmember Indian is similarly situated to a non-Indian for purposes of criminal jurisdiction.²³¹ Here, tribal jurisdiction will extend only to

²¹⁹ *Id.* at 9.

²²⁰ *Id.* at 10.

²²¹ *Id.* at 26. The six counties served are the Antrim, Benzie, Charlevoix, Grand Traverse, Leelanau, and Manistee. *Id.*

²²² Who is the Grand Traverse Band, http://www.gtb.nsn.us/documents/WhoistheGTB.pdfCopy_000.pdf (last visited Aug. 13, 2008) (membership total as of 2005).

²²³ THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art. V, § 1, available at <http://www.gtbindians.org/constitution.html> (last visited Aug. 13, 2008).

²²⁴ *Id.* at § 6.

²²⁵ *Duro v. Reina*, 495 U.S. 676, 693 (1990).

²²⁶ *AILC Survey*, *supra* note 140, at vii.

²²⁷ See GRAND TRAVERSE BAND CODE tit. 9 (2003), available at <http://www.tribalresourcecenter.org/ccfolder/travcode9crimoff.htm> (last visited Aug. 13, 2008) (defining, among others, criminal jurisdiction, sentencing, offenses, and affirmative defenses).

²²⁸ *Duro*, 495 U.S. at 693.

²²⁹ 9 G.T.B.C. § 101(d) (2003).

²³⁰ *Id.*

²³¹ *Duro*, 495 U.S. at 688.

those who are enrolled in a federally-recognized tribe, or have integrated themselves in the Band's community such that he or she is recognized as an Indian by the community.

Although specific statistics regarding the number of nonmembers living within the Band's territory are not kept by the tribe, the General Counsel of the tribe, John Petoskey, estimated that there are a significant number.²³² Mr. Petoskey stated that there are nonmembers who reside in public housing on the central reservation and that many are married to members.²³³ Specifically, there has traditionally been a high rate of intermarriage between members of the Ottawa and the Saginaw Chippewa Indian Tribes, due in large part to the federal allotment policy. During the federal government's policy of allotment, as land in traditional "Ottawa country" became largely occupied, the federal government allowed members to take trust allotments in traditional "Saginaw country," which is located southeast of the Band's current six county area.²³⁴ As a result, many members of the Grand Traverse Band have ancestral ties to both tribes, and may be eligible for enrollment in either tribe.²³⁵ Mr. Petoskey estimated that as many as a dozen individuals who grew up enrolled in the Grand Traverse Band, have dis-enrolled and enrolled in the Saginaw Chippewa Indian Tribe. This could be due in part to the higher per capita distribution from casino revenues individuals receive as members of the Saginaw Chippewa Indian tribe. However, these individuals remain living on Grand Traverse Band land, as they always have, and are deeply involved in the community.²³⁶ Nonmembers are eligible for tribal employment and can serve on tribal committees; although they cannot vote, they can and do attend tribal council meetings and have an opportunity to speak at those meetings.²³⁷

Wilson D. Brott, Chief Judge of the Grand Traverse Band Tribal Court, estimates that roughly ten percent or less of the criminal cases before the court involve nonmember Indians.²³⁸ Many of these cases involve members of the Little Traverse Bay Band of Odawa Indians or members of the Saginaw Chippewa Indian Tribe. Chief Judge Brott noted that there are many inter-tribal relationships and cautioned against the idea that there are "walls" between different Michigan tribes.²³⁹ This is consistent with the historical development of Michigan's tribes, who, as

²³² Telephone Interview with John Petoskey, General Counsel, Grand Traverse Band of Ottawa and Chippewa Indians (Sept. 21, 2007) (notes on file with *Connecticut Law Review*).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Telephone Interview with Wilson D. Brott, *supra* note 170.

²³⁹ *Id.*

discussed above, traditionally did not primarily identify themselves as members of specific tribes but as Anishnabeg.²⁴⁰ Chief Judge Brott also noted that many of the nonmember Indians appearing before the court are married to Grand Traverse Band members, and it is not uncommon for a family to have members of the Grand Traverse Band as well as members of other tribes.²⁴¹ Although nonmembers cannot vote in tribal elections, Chief Judge Brott pointed out that there are many ways that an individual can be involved in the community outside of the voting franchise. Like Mr. Petoskey, Chief Judge Brott noted that nonmembers can be employed by the tribe and although they cannot vote for the tribal council, they regularly attend meetings and have a voice that would be heard.²⁴² Nonmembers also get the benefits of tribal services, including health care, and often are raising children who attend tribal schools and are eligible for enrollment, if not formally enrolled. Chief Judge Brott acknowledged that in some instances there are cases of nonmember Indians who come to the reservation temporarily and do not have extensive ties to the community, but this is a rarer occurrence.²⁴³

A cross-deputization agreement between the Grand Traverse Band and the state and county sheriff's department was reached in 1990 and is an important law enforcement tool for the tribe.²⁴⁴ The agreement removes the jurisdictional question for purposes of arrest; an offender can be arrested by the state, county, or tribe and is brought to the county jail where he or she will be referred to the proper prosecutorial body once his or her status is determined.²⁴⁵

Although nonmember Indians cannot serve on Grand Traverse Band tribal court juries, Chief Judge Brott estimated that out of approximately 300–400 criminal cases before the court, which includes traffic cases, there have been only one or two jury trials in the previous four years.²⁴⁶ Plea agreements are reached in some cases and for those that go to trial, the vast majority are conducted as bench trials. Although all criminal defendants have a right to a jury trial, this right is often waived prior to the commencement of trial.²⁴⁷ The tribe does not provide counsel to indigent defendants, although Chief Judge Brott stated that in cases involving a pro se defendant, judges will assist defendants if necessary. This assistance could involve further explanation before and during trial to assure that the

²⁴⁰ See WEEKS, *supra* note 215, at 2–3 (discussing the region prior to the arrival of European settlers).

²⁴¹ Telephone Interview with Wilson D. Brott, *supra* note 170.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Telephone Interview with John Petoskey, *supra* note 232.

²⁴⁵ *Id.*

²⁴⁶ Telephone Interview with Wilson D. Brott, *supra* note 170.

²⁴⁷ *Id.*

defendant knows his rights and understands the legal process. During bench trials, judges can give the appropriate weight to hearsay evidence, or other evidence that may have been admitted without an objection from a pro se defendant, for example.²⁴⁸ Chief Judge Brott, who also has served as a prosecutor for the local state court in Leelanau County, stated that there are no major differences between the manner in which the tribal court conducts trials and the way they are conducted in the state court.²⁴⁹ Importantly, even if a certain tribal court operated with different procedure, the major protections are the same. All tribal courts are required to follow the ICRA and all adhere to basic principles of justice such as having a fair trial and an ability to be heard.²⁵⁰

Although the Grand Traverse Band does not publish its tribal court cases and therefore no specific opinions could be researched, Mr. Petoskey, who has been the Band's General Counsel for some twenty years, recalled two cases in the intervening period between the Supreme Court's decision in *Duro* and the *Duro Fix*.²⁵¹ The court chose to exercise jurisdiction over the defendant, and in neither case was the issue challenged by the defendant. Mr. Petoskey believed that this was most likely due to the fact that the nonmember defendants involved had been a part of the tribal community and would not object to the court's jurisdiction.²⁵² One of these instances involved a nonmember living in the Grand Traverse community and married to a member of the Band; he was arrested and prosecuted for an assault that arose out of a fight at a card game.²⁵³ This type of scenario exemplifies the need for tribal court jurisdiction over nonmembers for the preservation of law and order and tribal self-government. What could be seen as a relatively minor crime still must be prosecuted in order to maintain a safe community. According to Chief Judge Brott, based on his previous experience as a defense attorney, most nonmember Indians would prefer to be prosecuted in tribal court rather than state court.²⁵⁴ As previously stated, many are integrated into the tribal community and therefore the jury is truly composed of their "peers" despite the fact that nonmembers cannot serve on juries.²⁵⁵

If the *Duro Fix* were to be struck down, Mr. Petoskey believed the effect would be more drastic than it was in 1990 due to the fact that there is a larger population of nonmember Indians residing in Grand Traverse Band

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Telephone Interview with John Petoskey, *supra* note 232.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Telephone Interview with Wilson D. Brott, *supra* note 170.

²⁵⁵ *Id.*

country.²⁵⁶ Both Mr. Petoskey and Chief Judge Brott stated that if this occurred, the tribe would be forced to increase its reliance on federal prosecution.²⁵⁷ In many previous instances, however, the federal government has been unable to prosecute crimes occurring on the reservation for a variety of reasons.²⁵⁸ The federal court is also over two hundred miles away, and therefore for practical reasons it would most likely be difficult for the federal government to prosecute a large number of misdemeanor crimes occurring on the reservation.²⁵⁹ Exclusion orders are not a viable option in Chief Judge Brott's view; although the tribe has that option, it is very reluctant to exercise it since most often the individual would be integrated with the tribe through marriage and may have children living on the reservation and attending tribal schools. Further, as a practical matter, exclusion orders are very difficult to enforce.²⁶⁰

B. *Confederated Tribes of the Colville Reservation*

The Colville Reservation was established by Executive Order in 1872 and originally spanned over 2.8 million acres.²⁶¹ Today the reservation land base covers 1.4 million acres located in North Central Washington and the Confederated Tribes of the Colville Reservation has membership totaling over nine thousand.²⁶² Today's members are the descendants of twelve aboriginal tribes of Indians who resided throughout the Northwest and were largely nomadic, traveling with the seasons and their sources of food.²⁶³ The Confederated Tribes are a northerly component of an "Interior Salish" grouping that shared a common language called "Okanagan," although there were several different dialects.²⁶⁴ The Colville and other tribes intermarried with adjacent peoples, but this differed among the various divisions.²⁶⁵ For current Confederated Tribes members this means that they could have ancestral ties to several Northwest tribes, both

²⁵⁶ Telephone Interview with John Petoskey, *supra* note 232.

²⁵⁷ *Id.*; Telephone Interview with Wilson D. Brott, *supra* note 170.

²⁵⁸ Telephone Interview with John Petoskey, *supra* note 232.

²⁵⁹ Telephone Interview with Wilson D. Brott, *supra* note 170.

²⁶⁰ *Id.*

²⁶¹ 12 PLATEAU, HANDBOOK OF NORTH AMERICAN INDIANS 492-93 (Deward E. Walker, Jr. ed. 1998).

²⁶² Facts & Information, <http://www.colvilletribes.com/facts.htm> (last visited Aug. 14, 2008). The reservation currently has over 5000 residents, comprised of Colville members, nonmember Indians, and non-Indians. *Id.* Approximately half of the Confederated Tribes' members live on or adjacent to the reservation. *Id.*

²⁶³ *Id.* "The tribes, commonly known by English and French names, are: the Colville, the Nespelem, the San Poil, the Lake, the Palus, the Wenatchi (Wenatchee), the Chelan, the Entiat, the Methow, the southern Okanogan, the Moses Columbia and the Nez Perce of Chief Joseph's Band." *Id.*; see 12 PLATEAU, *supra* note 261, at 492 (listing the twelve tribes as well as the Kalispel, Spokane, and Coeur d'Alene).

²⁶⁴ 12 PLATEAU, *supra* note 261, at 238.

²⁶⁵ *Id.* at 239.

within and outside of the twelve tribes comprising the Confederated Tribes. This further illustrates the idea that tribal membership is not as static as the Court implied in *Duro*, and in fact involves intertribal relationships spanning many generations.

The Confederated Tribes' court system stems from its Constitution, which establishes a judicial branch, separate from the other branches of government, consisting of a tribal court and a court of appeals.²⁶⁶ Although the Confederated Tribes' Constitution does not contain a "judicial independence" clause similar to that found in the Grand Traverse Constitution, the judiciary is not subordinate to the Business Council, the governing body of the Tribes, but a separate branch of government.²⁶⁷

The Confederated Tribes have a comprehensive Law and Order Code, with titles ranging from Rules of Procedure to Natural Resources and the Environment.²⁶⁸ The criminal jurisdiction of the Tribes is codified and includes all crimes committed by any Indian within the boundaries of the Colville Reservation.²⁶⁹ "Indian" is defined as "a person who is recognized by an Indian Tribe as a member of that Tribe or is a descendant of such member."²⁷⁰ The structure of the tribal court system, as well as the comprehensive code provisions, are inconsistent with the *Duro* Court's assumptions that tribal courts are subordinate to other branches of government and have laws that depend on unspoken practices and norms rather than written codes.²⁷¹

In *Stead v. Colville Confederated Tribes*, the Colville Court of Appeals was presented with unique issues concerning tribal court criminal jurisdiction over a nonmember Indian following *Duro*.²⁷² Michael Stead was a member of the Rosebud Sioux Tribe but had resided on the Colville Reservation for ten years prior to his arrest for the misdemeanor offense of driving without a valid driver's license.²⁷³ Stead was cited by tribal police on August 2, 1991, and arraigned on August 12, at which point he was assigned a public defender. In a pre-trial motion filed on the day of the trial, Stead moved the court to dismiss for lack of jurisdiction. Stead argued that the court lacked jurisdiction over him as a nonmember, based on the Supreme Court's ruling in *Duro* and the recent expiration of Public

²⁶⁶ THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION CONST. AND BY-LAWS amend. X, § 1, available at <http://www.narf.org/nill/Constitutions/colvilleconst/colvilleconst.htm> (last visited Aug. 14, 2008).

²⁶⁷ See *id.* (establishing a separate branch of government consisting of the Colville Tribal Court of Appeals and the Colville Tribal Court).

²⁶⁸ See COLVILLE TRIBAL LAW AND ORDER CODE, available at <http://www.narf.org/nill/Codes/colvillecode/cctoc.htm> (showing the code consists of ten titles, each with multiple subparts).

²⁶⁹ COLVILLE TRIBAL LAW AND ORDER CODE, *supra* note 268, 1-1-431(b).

²⁷⁰ *Id.* at 1-1-363.

²⁷¹ *Duro v. Reina*, 495 U.S. 676, 693 (1990).

²⁷² *Stead v. Colville Confederated Tribes*, No. AP91-14281, 1993.NACC.0000003, ¶ 13 (Colville Ct. App. December 14, 1993) (VersusLaw).

²⁷³ *Id.* ¶¶ 15, 90.

Law 101-511, the initial *Duro Fix*.²⁷⁴ His motion was denied and he was brought to trial, convicted, and sentenced to a sixty day suspended sentence and three hundred dollar fine. On appeal, Stead argued essentially that the tribal court lacked jurisdiction to proceed to trial in light of his status as a nonmember Indian.²⁷⁵

The Appellate Court affirmed the trial court, holding that the *Duro Fix* was a recognition of the inherent jurisdiction of tribal courts over nonmember Indians that has always existed and continued uninterrupted despite the *Duro* decision.²⁷⁶ The Appellate Court cited approvingly Justice Brennan's dissenting opinion, stating that the notion of tribal authority to control the conduct of tribal members based on consent is inconsistent with federal and state policies.²⁷⁷ The Appellate Court further concluded that the jurisdictional void created by the Court's decision in *Duro* renders its reasoning suspect, and that the *Duro Fix* was enacted in response to an emergency situation in Indian country as a result of the *Duro* decision.²⁷⁸ The Appellate Court also noted the significance of Congress' recognition of the past federal practice of settling more than one tribe on a single reservation, and the fact that although nonmember Indians are not allowed to fully participate in all aspects of the tribal government, they are provided with a broad array of services by the tribe.²⁷⁹

The *Stead* decision illustrates that the *Duro* Court's assumption that non-Indians and nonmember Indians are similarly situated is simply erroneous. Stead's situation is similar to the defendants in both *Duro* and *Lara*, as well as Congressional findings during hearings on the *Duro Fix*: Stead had resided on the reservation for a decade and was an enrolled member of a federally recognized tribe.²⁸⁰ The notion that his rights as a citizen were being violated by the prosecution is misplaced; the tribe was exercising jurisdiction to maintain the safety of its residents on its roadways by prosecuting a member of a federally recognized tribe who chose to reside on the Colville Reservation for ten years. Stead was granted his rights under the ICRA and was also appointed with a tribal public defender, further calling into question the *Duro* Court's broad assumptions regarding procedural protections in Indian country.²⁸¹ This type of offense also highlights the need for tribal jurisdiction, since although driving without a license is a misdemeanor and can easily be

²⁷⁴ *Id.* ¶¶ 15–16. The first version of the *Duro Fix*, PL 101-511, expired on September 30, 1991.
Id. ¶ 16.

²⁷⁵ *Id.* ¶¶ 16–19.

²⁷⁶ *Id.* ¶ 71.

²⁷⁷ *Id.* ¶¶ 29–30.

²⁷⁸ *Id.* ¶¶ 32–40.

²⁷⁹ *Id.* ¶ 42.

²⁸⁰ *Id.* ¶ 15.

²⁸¹ *Id.*

characterized as a minor crime, it is crucial to the maintenance of the health and safety of reservation residents that the roadways be policed effectively.

Another case arising on the Colville Reservation, cited in the six-month *Denver Post* investigation, underscores the likely inadequacy of federal jurisdiction if the Duro Fix were struck down.²⁸² In that case, the federal government declined to prosecute a tribal member who raped his girlfriend's seven-year-old sister.²⁸³ Although the tribe's prosecutor stated that an expert forensic interviewer found the seven-year-old's testimony clear and credible, the Assistant United States Attorney, faced with a geographically distant case and a seven-year-old witness, simply declined to prosecute.²⁸⁴ The tribe's prosecutor successfully obtained a conviction in tribal court under misdemeanor charges,²⁸⁵ however, if the federal government cannot effectively exercise its current jurisdiction under the MCA, it is dangerous to assume that expanding that jurisdiction to cover misdemeanor offenses is a viable remedy were the Supreme Court to strike down the Duro Fix.

Anita Dupris, Chief Justice of the Colville Confederated Tribes Court of Appeals since 1995, estimates that approximately half of the reservation's ten thousand residents are either nonmember Indians or non-Indians.²⁸⁶ Although the tribe does not keep specific statistics as to how many nonmember Indians reside on the reservation, if consistent with the average cited by Congress, the reservation could be home to upwards of one thousand nonmember Indians, a significant number.²⁸⁷ Many nonmembers living on the Colville Reservation are there through intermarriage, and under the tradition and custom of the tribe, when an individual from another tribe marries a tribal member, he or she becomes a part of the tribe's community and is treated as such.²⁸⁸ Chief Justice Dupris believes that exercising criminal jurisdiction over nonmember Indians is crucial to tribal self-government and tribal integrity.²⁸⁹ This jurisdiction leads back to the basic idea of sovereignty and is a foundational building block of any society. A society must be able to monitor the laws and these laws must be enforceable in order to be a sovereign government; the Court's decision in *Duro* further eroded tribal

²⁸² See *Promises, Justice Broken*, *supra* note 194, at A1 (describing the case of Ronnie Tom).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Telephone Interview with Anita Dupris, Chief Justice, Colville Confederated Tribes Court of Appeals (Dec. 5, 2007) (notes on file with *Connecticut Law Review*).

²⁸⁷ See S. REP. NO. 102-153, app. E at 58 (1991) (citing an average nonmember population of twelve percent).

²⁸⁸ Telephone Interview with Anita Dupris, *supra* note 286.

²⁸⁹ *Id.*

sovereignty and was inconsistent with basic notions of Indian law.²⁹⁰

According to Chief Justice Dupris, the Supreme Court's conclusion that tribes had not traditionally exercised criminal jurisdiction over nonmembers is "patently false."²⁹¹ The Confederated Tribes have always exercised this type of jurisdiction, as was reflected in the Appellate Court's decision in *Stead*.²⁹² Although prior to the Indian Reorganization Act of 1934 many tribes may not have had western-style courts, this jurisdiction in some form has always been an aspect of tribal sovereignty.²⁹³ As to the use of unspoken practices and norms referred to in *Duro*, the Confederated Tribes' traditions and customs have been codified into its extensive criminal code. In this sense, it can be compared to a state's incorporation of its common law into its criminal code.²⁹⁴

As referenced in *Stead*, the Confederated Tribes has maintained a public defender's office since 1993.²⁹⁵ This is common throughout all tribes in Washington; although in some instances a lay advocate or public defender can be appointed, generally defendants in tribal courts will have assistance of counsel.²⁹⁶ Chief Justice Dupris does not believe that any of the *Duro* Court's suggested remedies are viable alternatives if the Duro Fix were struck down.²⁹⁷ Although the Colville Tribal Courts have good working relationships with the state, the state would have tremendous practical difficulties taking over the ten thousand cases heard annually by tribal courts.²⁹⁸ Federal jurisdiction is hardly more desirable. As previously discussed, even in situations where the federal government has jurisdiction under the MCA, such jurisdiction is not often exercised.²⁹⁹ According to figures published in the *Denver Post* study, the overall federal declination rate in Washington was over fifty-five percent for felony crimes between 2004 and the first nine months of 2007.³⁰⁰ Chief Justice Dupris believed that many of these cases were declined either because federal prosecutors want only "sure-bets," or the cases were not

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*; see *Stead v. Colville Confederated Tribes*, No. AP91-14281, 1993.NACC.0000003, ¶ 88 (Colville Ct. App. December 14, 1993) (VersusLaw) (finding that the tribe retained jurisdiction despite the expiration of PL 101-511).

²⁹³ Telephone Interview with Anita Dupris, *supra* note 286; see S. REP. NO. 102-168, at 1 (1991) ("Until the Supreme Court ruled in the case of *Duro*, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years.").

²⁹⁴ Telephone Interview with Anita Dupris, *supra* note 286.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See *supra* notes 193-96 and accompanying text (citing examples of federal inaction despite clear jurisdiction).

³⁰⁰ *Principles, Politics Collide*, *supra* note 193.

given a high enough priority.³⁰¹ As to the *Duro* Court's suggestion of exclusion, even if this were a desirable alternative for the tribe in a certain situation, these orders are very difficult to enforce.³⁰²

V. CONCLUSION

If faced with a challenge to the *Duro* Fix on either equal protection or due process grounds, the Supreme Court should reexamine its decision in *Duro* in light of nearly twenty years of anecdotal evidence, case law and congressional findings illustrating that its assumptions were incorrect and its reasoning flawed. The problems faced by tribes in the wake of the Court's decision in *Duro*, as well as the continuing law enforcement problems tribes face on today's reservations cannot be ignored. It has been demonstrated that the Court's historical findings were inaccurate, and that tribes exercised criminal jurisdiction over nonmembers for over two hundred years. With high rates of intermarriage and historically complex interrelationships between tribes, membership in a particular tribe is not as static as the Court suggests in *Duro*. As demonstrated by the Grand Traverse Band of Ottawa and Chippewa Indians, many of today's reservation residents have ancestral and historical ties to more than one tribe. Therefore, it is commonplace that those residing on a reservation may not be members of the presiding tribe. Tribes' ability to exercise criminal jurisdiction over nonmembers is crucial to the maintenance of self-government and tribal integrity, as nonmembers residing on reservations are most often integrated into the reservation community. Tribal governments must be able to exercise criminal jurisdiction over nonmembers committing crimes that would otherwise go unprosecuted if left to federal or state authorities. Although misdemeanor crimes do not often garner headlines, reducing these types of crimes is crucial for the maintenance of a safe community and therefore integral for effective tribal self-government.

The remedies suggested by the *Duro* Court were either unrealistic or unworkable and cannot be reasonably relied on as alternatives to the *Duro* Fix. Modern tribal characteristics and demographics, combined with the continuing law enforcement challenges faced by tribes today, make criminal jurisdiction over nonmember Indians an important aspect of tribal sovereignty that must be unambiguously recognized by the Supreme Court.

³⁰¹ Telephone Interview with Anita Dupris, *supra* note 286; see *Promises, Justice Broken*, *supra* note 194 (noting that the United States Attorney for the Eastern District of Washington stated "we're not in the business of taking cases we're going to lose").

³⁰² Telephone Interview with Anita Dupris, *supra* note 286.