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TIGHTENING THE NOOSE ON TRIBAL CRIMINAL JURISDICTION: DURO v. REINA

I. INTRODUCTION

From the commencement of our government, Congress has passed acts to regulate . . . intercourse with the Indians; which treat them as nations [and] respect their rights . . . . All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States.¹

These words of Chief Justice John Marshall laid the course for American jurisprudence concerning Native Americans. The recognition of Native American tribal sovereignty has been an important part of the framework upon which federal Indian policy continues to be built. The goal of the United States government toward Indian tribes and nations is the promotion of sovereignty.² Within the last twenty years, the nation's highest court has demonstrated adherence to that goal repeatedly. In fact, all three branches of the federal government have purported to espouse the idea of sovereignty.³

Recently, however, several decisions by the United States Supreme

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³. In the executive branch, President Nixon introduced an Indian policy which promoted Indian self-determination. 6 WEEKLY COMP. PRES. DOC. 894 (July 8, 1970). President Reagan's Indian policy was to "reaffirm dealing with Indian tribes on a government to government basis and to pursue the policy of self-government for Indian tribes." 19 WEEKLY COMP. PRES. DOC. 99 (Jan. 24, 1983).


Court have limited the governmental rights of these sovereign Indian nations. Duro v. Reina is one such ruling. The judgment of the Court in Duro was based on erroneous assumptions. These mistaken assumptions led the Court to improper applications of the canons of construction that govern the interpretation of federal Indian law and usurpation of congressional powers. Eurocentric attitudes toward Native Americans are apparently the culprit. The decision in Duro could result in dangerous conditions in Indian country. In order that true tribal sovereignty continues to be upheld, Indian tribes must have criminal jurisdiction over any Indian, including non-members, who commits a crime on tribal land.


6. The Duro Court assumed that a non-member Indian would be discriminated against in a tribal court. Id. at 2063-65. A similar assumption about tribal courts appeared in Oliphant. 435 U.S. at 210-12.


8. Eurocentrism toward Indian tribes is obvious in several Court decisions. In United States v. Sandoval, the Court described the United States “as a superior and civilized nation,” as compared to Indian tribes. United States v. Sandoval, 231 U.S. 28, 46 (1913). In Ex parte Crow Dog, the Court reasoned that the federal government could not prosecute an Indian for murder because:

   "It is a case where . . . [the] law . . . is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life . . . which judges them by a standard made by others and not for them . . . and makes no allowance for their inability to understand it. It tries them, not by their peers . . . but by superiors of a different race . . . and which is opposed . . . to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality."


A chauvinistic attitude in Brendale is evidenced by Justice Steven's statement that tribes retain regulatory authority only over those lands on its reservation in which the “essential character” of the land has been defined. Brendale, 492 U.S. at 433-35. In other words, the Indians must be using lands for Indian activities like “hunting, fishing, and gather[ing] roots and berries.” Id. This stereotyped outlook toward Indians was noted by other members of the Court. Id. at 464-65. See also Russel L. Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 OR. L. REV. 363 (1986).

9. Federal law defines Indian country as:

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

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

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

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II. STATEMENT OF THE CASE

Albert Duro was an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians. A permanent resident of California, Duro was living on the Salt River Reservation at the time of events leading to this dispute. Two culturally distinct tribes, the Pima and the Maricopa, make up the Pima-Maricopa Indian Community on the Salt River Reservation. The community is a federally recognized tribe. Duro was not eligible for membership in the Pima-Maricopa Tribe. Hence, he could not vote, hold office or serve on a jury under the control of the Pima-Maricopa Tribe. However, Duro had lived on the reservation for several months and was employed by a community owned business.

On June 15, 1984, Phillip Brown, a fourteen-year-old enrolled member of the Gila River Indian Tribe, was shot and killed on the Salt River Reservation. On June 19, 1984, Duro was arrested by federal agents and charged with murder in connection with Brown's death. Later, when the federal charges were dismissed, Duro was turned over to the custody of the Pima-Maricopa Community Court. The community court charged him with the illegal firing of a weapon on the reservation.

Duro then filed a motion to dismiss, asserting that the community court did not have jurisdiction over him because he was not a member of the tribe. Upon denial of that motion, Duro filed a writ of habeas corpus in the United States District Court for the District of Arizona. The district court granted the writ, holding that the subjection of a non-member Indian to tribal jurisdiction, where non-Indians are exempt, would result in a breach of constitutional equal protection.

10. Duro, 110 S. Ct. at 2056.
11. Petitioner's Brief at 2, Duro (No. 88-6546).
13. Id. at 2.
15. See SALT RIVER COMMUNITY CONST. art. 2, § 1.
16. SALT RIVER COMMUNITY CONST. art. VI, § 1; art. III, § 1.
17. The Gila River Tribe does not reside on the Salt River Reservation.
20. Duro, 110 S. Ct. at 2058.
Reversing the decision of the district court, the Ninth Circuit Court of Appeals ruled that tribal courts retain jurisdiction over crimes committed "by Indians against other Indians without regard to tribal membership." The court determined that the federal statutory scheme left criminal jurisdiction over non-member Indians in the hands of the tribes. The notion that the exercise of such jurisdiction over non-members would be a denial of equal protection rights was rejected. Finally, the court pointed out the potential jurisdictional void if tribes were denied criminal jurisdiction over non-member Indians.

Application of the statutory scheme to Indians was based upon "their status as Indians." This treatment emphasized the unimportance of the distinctions between member and non-member Indians. Additionally, tribes retain jurisdiction over all crimes not divested by the federal government. Because most crimes by Indians against Indians are specifically excepted in the statutory scheme, tribes must retain criminal jurisdiction over non-member Indians.

The court then determined that the exercise of tribal criminal jurisdiction over Duro was not a violation of his equal protection rights. The court of appeals pointed out that federal jurisdiction over Indians is based upon a "totality of circumstances . . . in which no one factor is dispositive." Accordingly, tribal courts using this process to define tribal criminal jurisdiction are not guilty of impermissible racial discrimination. Additionally, the court of appeals approved the Pima-Maricopa

21. 821 F.2d 1358 (9th Cir. 1987), modified, 851 F.2d 1136 (9th Cir. 1988), rev'd, 110 S. Ct. 2053 (1990). Between the time of the original Ninth Circuit decision and the revision in 1988, another circuit court dealt with a similar case. In Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988), the Eighth Circuit held that a tribal court's exercise of jurisdiction over non-member Indians was inconsistent with a tribe's dependent status. The Duro court's revision rejected the analysis of the Greywater opinion. Duro, 851 F.2d at 1139 n.1.

22. Duro, 851 F.2d at 1143.

23. The equal protection rights to which Duro was entitled are found not in the United States Constitution but in the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988). In Talton v. Mayes, the Court declared that the Fourteenth Amendment was applicable only to the states, but was not relevant to Indian tribes. Talton v. Mayes, 163 U.S. 376 (1896). In 1968 the Indian Civil Rights Act was passed giving Indians a comparable Indian Bill of Rights. Indian Civil Rights Act, § 202, 25 U.S.C. § 1302 (1988).

24. Duro, 851 F.2d at 1145-46.


26. Id.

27. Id. at 1143.

28. Id. at 1142-43.

29. Id. at 1143-45. The district court had contended that the extension of tribal court jurisdiction to non-member Indians was impermissibly based on race. Id. at 1143.

30. Id. at 1144 (quoting Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 518 (1976)).

31. Id.
tribal court's exercise of jurisdiction because of Duro's contacts with the community. The court of appeals further stated that the extension of criminal jurisdiction to non-member Indians would result in better law enforcement on the reservation.

III. LAW PRIOR TO THE CASE

A. Federal Criminal Jurisdiction Statutory Scheme

Criminal jurisdiction within Indian country is a complex subject with confusing procedural and policy issues. The confusion arises primarily from the several statutes controlling jurisdiction. The Major Crimes Act, the General Crimes Act, the Assimilative Crimes Act, and Public Law 280 all impose different jurisdictional schemes on Indian country. Within these statutes, the legislature has attempted to reconcile traditional American criminal justice with the concept of Indian tribal sovereignty. The general principle of sovereignty mandates that Indian tribes have control over their people and their territory.

In Ex parte Crow Dog, the United States Supreme Court addressed a case in which a Sioux, Crow Dog, killed Spotted Tail, another Sioux. Crow Dog was punished for his crime by his tribe in the traditional Sioux manner. He was required to provide restitution to the victim's family or relatives. However, officials of the territory of Dakota, in which the Sioux reservation was located, were not satisfied. Crow Dog was charged in federal district court with murder. Upon conviction, Crow Dog was sentenced to death. Upon the filing of a writ of habeas corpus, the case was heard by the United States Supreme Court. The Court ruled that tribes had exclusive jurisdiction over a criminal prosecution which involved Indians on the reservation. As a result, Crow Dog was freed.

The United States Congress, in response to Ex parte Crow Dog,
passed the Major Crimes Act.\textsuperscript{44} This Act extends federal criminal jurisdiction into Indian country for certain crimes. Federal jurisdiction now covers extreme crimes, such as murder, sexual offenses, and arson, which are committed in Indian country. This was the first statute to extend federal jurisdiction to crimes committed by Indians within Indian country. However, the courts had previously assumed some limited criminal jurisdiction over Indian country.

In 1817, Congress passed the General Crimes Act,\textsuperscript{45} also known as the Federal Enclave Act. This Act provides general federal jurisdiction over federal enclaves such as national parks and forests.\textsuperscript{46} An important exception to the grant of federal jurisdiction is that no jurisdiction exists where only Indians are involved, where treaty rights are applicable to the situation, or where an Indian has already been punished by tribal law.\textsuperscript{47}

State criminal laws were incorporated into the federal legal system by the Assimilative Crimes Act.\textsuperscript{48} In the absence of an applicable federal statute, this law extends the criminal laws of the surrounding state into federal enclaves.\textsuperscript{49} Therefore, if an act was not a crime under federal law but was punishable under the surrounding state's law, it became tantamount to a federal offense. In 1946, the United States Supreme Court specifically applied the Assimilative Crimes Act to Indian country.\textsuperscript{50}

\textsuperscript{44} The Major Crimes Act reads:

\begin{quote}
Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
\end{quote}


\textsuperscript{45} The General Crimes Act reads:

\begin{quote}
Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

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


\textsuperscript{46} KICKINGBIRD, supra note 40, at 17.


\textsuperscript{50} Williams v. United States, 327 U.S. 711 (1946).
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apply to the Assimilative Crimes Act.51 This proposition has not been universally accepted.52

A final aspect of the federal criminal statutory scheme in Indian country is the effect of Public Law 280.53 This law gives particular states civil and criminal jurisdiction over either all or specified tribes in the named states.54 In those states, the affected Indian land would be subject to the criminal and civil laws of the state but not regulatory statutes.55 Even if a state enacted regulatory laws with criminal enforcement provisions, those sanctions should not apply to Indians in Indian country in a Public Law 280 state.56

The jurisdictional confusion in Indian country moves from the theoretical realm to reality when authorities attempt to apply the statutes. Several factors must be considered in determining whether a particular sovereign has jurisdiction. Is the state in question a Public Law 280 state? Is the crime a felony or a misdemeanor? Is either a perpetrator or a victim an Indian? If either is an Indian, is he enrolled in a recognized tribe? Given varying circumstances, each of these factors could change the propriety of jurisdiction.

B. Judicial Interpretation of Jurisdiction

The first major judicial attack on the sovereignty of tribes within their borders after the passage of the Major Crimes Act was United States v. McBratney.57 That decision gave states the right to exercise criminal jurisdiction over crimes occurring between non-Indians within

54. With regard to criminal jurisdiction, Public Law 280 states:
   Each of the States or Territories listed [in this section] . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed [in this
   section] . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.
   Public Law 280, § 2(a). The states which presently assert full or partial criminal jurisdiction under Public Law 280 are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Id.
57. 104 U.S. 621 (1881).
Indian country. While that decision continues to be criticized today, it has been cited as controlling law.

In *Oliphant v. Suquamish Indian Tribe*, the United States Supreme Court ruled that Indian tribal courts have no jurisdiction over non-Indians. This decision was in direct conflict with previous decisions and has been severely criticized. The Court purported to base its decision on the historical and legal annals of criminal jurisdiction within Indian country, which exhibited an ageless presumption against tribal criminal jurisdiction over non-Indians. While the Court recognized that tribes retain aspects of sovereignty, the Court maintained that a tribal exercise of criminal jurisdiction over non-Indians would be "inconsistent with [tribal] status" as dependent nations. By removing jurisdiction over non-Indians from tribal courts, the Supreme Court actually made it more difficult for Native American nations to maintain order and safety on their lands.

The central issue in *United States v. Wheeler* was whether tribal power to subject tribal members to the criminal jurisdiction of the tribe is an aspect of inherent sovereignty or a power delegated by the federal government. The Supreme Court concluded that criminal jurisdiction

58. Id. at 624.
59. See Kickingbird, supra note 40, at 22 (the authors argue that McBratney should be limited to its particular facts); Royster & Fausett, supra note 51, at 210 nn.36, 37.
62. Id. at 195.
63. See United States v. Mazurie, 419 U.S. 544, 557 (1975) (recognizing the sovereign power of Indian nations over matters affecting their members and territory); Williams v. Lee, 358 U.S. 217, 221-22 (1959) (recognizing the power of tribal courts over non-Indians concerning actions within Indian country); Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 92 (8th Cir. 1956) (recognizing "the inherent rights of sovereignty" which allowed the Oglala Sioux nation to make and enforce criminal laws).
66. Id. at 206.
67. Id. at 208.
68. Id. (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), rev'd sub nom, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
69. Id.
70. 435 U.S. 313 (1978).
71. Id.
over tribal members is an inherent sovereign power. The tribe in question, the Navajo, had never surrendered this power, nor had the power been implicitly divested by the dependent status of the tribe. In Wheeler, the Court acknowledged that tribes retain all inherent sovereign powers until Congress acts to remove those powers. The Court also reaffirmed that Indian tribes possess “sovereignty over both their members and their territory.”

In Ross v. Neff, the Tenth Circuit ruled that police officers subordinate to the state of Oklahoma have no jurisdiction in Indian country. The court reasoned that unless Congress has made specific exceptions, only the tribe and the federal government have criminal jurisdiction in Indian country. The extension of state law into Indian country was rejected even though the court recognized the possibility that a jurisdictional void might result if neither tribal nor federal entities exercised jurisdiction.

A review of prior law reveals a tale of confusion involved in criminal jurisdiction in Indian country. Therefore, only a generalized summary is proffered here. Crimes committed by Indians within Indian country which are specifically included in the Major Crimes Act are under the exclusive jurisdiction of the United States. Non-Indians committing a crime against Indians within Indian country are under the jurisdiction of the federal government. Crimes committed by Indians within Indian country which do not give rise to the authority of the federal government, usually minor crimes, are under the exclusive jurisdiction of the tribal courts. Finally, crimes committed by non-Indians against other

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72. Id. at 323-24.
73. Id.
74. Id. at 326.
75. Id. at 322-23.
76. Id. at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).
77. 905 F.2d 1349 (10th Cir. 1990).
78. Id. at 1352. The lack of criminal jurisdiction by state police officers within Indian country only applies to Indian crimes as specified in 18 U.S.C. § 1152. A state does have criminal jurisdiction within Indian country over crimes occurring between non-Indians. See United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240, 241-42 (1896); New York ex rel. Ray v. Martin, 326 U.S. 496, 497 (1946).
79. Ross, 905 F.2d at 1352.
80. Id. at 1353.
82. Id. at 714; Donnelly v. United States, 228 U.S. 243, 271-73 (1913). But see Indian Reservation Special Magistrate: Hearing Before the Senate Select Comm. on Indian Affairs, 99th Cong., 2d Sess. 13 (1986) (the Department of Justice takes the view that state criminal jurisdiction is concurrent with federal jurisdiction for crimes by a non-Indian against an Indian). For a criticism of this view, see Royster & Fausett, supra note 51, at 220-21 n.52.
83. United States v. Johnson, 637 F.2d 1224, 1231 (9th Cir. 1980).
non-Indians within Indian country fall under the exclusive jurisdiction of the state. 84

IV. DECISION

A. The Majority

In Duro v. Reina, 85 the Supreme Court ruled that tribal courts do not have criminal jurisdiction over non-member Indians. 86 The Court concluded that tribal jurisdiction over non-Indians is inconsistent with a tribe's status as a dependent sovereign. 87 The Court recognized that a basic attribute of sovereignty is the power of criminal jurisdiction over any person within a sovereign's borders. 88 However, the Court said that Native American tribes can no longer be thought of as sovereign in this sense. 89 Focusing on what it called the "unique and limited character" of tribal sovereignty, the Court concluded that the power of tribes to control internal relations did not include power over non-members. 90 Since tribes are dependent on the United States, they may no longer exercise power concerned with external relations. 91 Understanding criminal jurisdiction over non-members for crimes occurring within tribal borders to be the exercise of an external power, the Court ruled that tribes had been divested of that power. 92

The Court also asserted that a tribe only had power to control its "internal self-governance." 93 Given Duro's inability to directly participate in Pima-Maricopa governmental functions, the majority ruled that he remained outside the tribe's jurisdiction. 94 Criminal actions by non-member Indians against the tribe are viewed as not affecting "internal governance," 95 and therefore, these actions are outside the jurisdiction of

86. Id. at 2059.
88. Duro, 110 S. Ct. at 2060.
89. Id.
90. Id. (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).
91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at 2060-61.
96. Id. at 2060.
Although the respondent argued that historical evidence supported tribal court jurisdiction over non-member Indians, his claim was rejected. The fact that federal jurisdictional statutes and regulations apply to all Indians regardless of membership status was apparently irrelevant. Instead, the Court focused on a few early Solicitor General opinions that indicated criminal jurisdiction over non-member Indians might not exist for the tribes.

The Court also refused to grant tribes criminal jurisdiction over non-member Indians because to do so would introduce "unwarranted intrusions . . . [upon the] personal liberty" of those non-member Indians. Because tribal membership is limited, the constitutional rights of non-member Indians could supposedly be violated in the courts of a tribe with which the non-member might be unfamiliar. The Court considered the contacts test promoted by the court of appeals, whereby any Indian with close ties to a reservation would be subject to that tribe's criminal jurisdiction. The majority determined this test to be unreasonable because a distinction would have to be drawn between non-Indians and non-member Indians.

Contrary to the Ninth Circuit's convincing argument, the Court denied that a new jurisdictional void would occur as a result of the Duro decision. The claim of an impending jurisdictional void was compared to an argument rejected in Oliphant. According to the Court, a sufficient federal jurisdictional scheme was in place to meet law enforcement needs.

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97. Id. at 2060-61.
98. Id. at 2061-63.
101. Duro, 110 S. Ct. at 2062.
102. Id. at 2063.
103. Id. (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).
104. Id. at 2063-65.
105. Id. at 2064.
106. Examples are marriage, employment, and residency. For a similar rule in the federal civil jurisdictional field, see International Shoe Co. v. Washington, 326 U.S. 310 (1945). But see Peter Fabish, Note, The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina, 110 S. Ct. 2053 (1990), 66 WASH. L. REV. 567 (1991). The commentator suggests the Court correctly rejected the contacts test because "[i]t would be impractical and unnecessary to require tribal courts to perform a complex analysis of interests for every minor crime within their jurisdiction." Id. at 584.
108. Duro, 110 S. Ct. at 2065.
109. Id.
110. Id.
needs.\textsuperscript{111} If any void would materialize, the Court laid the responsibility of mending it with Congress.\textsuperscript{112}

B. The Dissent

In his dissent, Justice Brennan\textsuperscript{113} attacked the majority’s view that the \textit{Duro} decision necessarily followed from the \textit{Oliphant} reasoning.\textsuperscript{114} He criticized the majority for erroneously basing its conclusion on the reasoning from a case involving non-Indians, not \textit{non-member Indians}.\textsuperscript{115} Since Congress had explicitly exempted Indian against Indian crimes, Brennan asserted there was an implicit understanding that tribes retained jurisdiction over those crimes.\textsuperscript{116}

Brennan also argued that a jurisdictional void would result from the decision in \textit{Duro}.\textsuperscript{117} Moreover, the fact that the void would result under the majority’s holding supported the conclusion that the intent of Congress was that tribes were to have jurisdiction over all Indians within Indian country.\textsuperscript{118} Since Congress did not distinguish between member and non-member Indians in the jurisdictional scheme, Brennan argued that logic dictated Congress had intended for tribes to retain criminal jurisdiction over non-members.\textsuperscript{119}

Brennan countered the “inconsistent status” argument of the majority by pointing out that the status of the tribes is determined by Congress.\textsuperscript{120} Therefore, since jurisdiction over non-member Indians lies with the tribes, it is clear that criminal jurisdiction over all Indians within Indian country is consistent with the dependent status of the tribes.\textsuperscript{121}

Finally, Brennan addressed the potential for discrimination against non-members in tribal court. He cited the Indian Civil Rights Act\textsuperscript{122} as a vehicle to guarantee the rights of any person prosecuted in a tribal court.\textsuperscript{123} Brennan specifically referred to the equal protection provision

\begin{itemize}
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id at 2066.
  \item \textsuperscript{113} Justice Brennan’s dissent was joined by Justice Marshall.
  \item \textsuperscript{114} \textit{Duro}, 110 S. Ct. at 2066-67 (Brennan, J., dissenting).
  \item \textsuperscript{115} Id. at 2068.
  \item \textsuperscript{116} Id. at 2069.
  \item \textsuperscript{117} Id. at 2070.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 2071.
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} 25 U.S.C. § 1301 (1988).
  \item \textsuperscript{123} \textit{Duro}, 110 S. Ct. at 2072 (Brennan, J., dissenting).
\end{itemize}
and the due process clause, along with the remedy of habeas corpus, as an affirmation of the rights of a person tried before a tribal court. He concluded that the guarantee of these rights "ensures that each individual is tried in a fair proceeding."

This decision has deprived all Indian tribes of an inherent right to maintain safety and order within their borders. In reaching its decision, the Court professed to have followed an analysis similar to other Indian law cases emphasizing tribal sovereignty. However, a closer examination of the Court's holding in Duro shows their decision was reached in spite of this principle and the corresponding congressional intent, not because of them.

V. ANALYSIS

When the Supreme Court denied tribal criminal jurisdiction over non-member Indians, it failed to consider the realities of the situation in Indian country. The decision set over two centuries of federal policy and precedent on its head. In reaching its decision, the Court disregarded established rules regarding Indian law in order to support the desired outcome. In the process, the Court revealed a thought process dominated by a Eurocentric bias that has affected prior Indian law rulings.

The Court claimed that the Duro decision was a necessary extension of previous cases. However, as Justice Brennan pointed out in his dissent, the congressional enactments relied on in Oliphant were concerned

127. Id.
128. Id. at 2067.
129. Id. at 2059.
130. See Nell J. Newton and Philip S. Deloria, Tribal Court Criminal Jurisdiction Over Non-member Indians, 16 ANN. FED. BAR ASS'N: INDIAN L. CONF. 89 (1991). The authors maintain that, instead of only two types of Indians in Indian country, there are three. First are tribal members living on their own reservations who are subject to tribal and federal jurisdiction. The second type is Indians enrolled in one tribe but living on the reservation of another. Even though Duro will divest tribal jurisdiction over Indians in this category, they remain "Indians" for other federal purposes. Finally, there are those who racially are Indian but are not enrolled in any tribe for whatever reason. The authors contend that the third group is larger than anyone imagines and will multiply the negative effects of Duro on the reservation. Id. at 96-97.
131. Id. at 90.
132. Id. at 99-102.
133. See supra note 8.
134. Duro, 110 S. Ct. at 2059.
with non-Indians. The Court incorrectly applied the same analysis in Duro that was used in Oliphant to divest tribal jurisdiction over non-member Indians. Further, the fact that the majority opinion quoted, as a compelling argument against tribal jurisdiction over non-members, an incorrect summary from Wheeler underscores the weakness of the Court's holding in Duro.

The Duro majority acknowledged that the enforcement of laws against every person within a sovereign's borders was an inherent power. Nonetheless, the Court claimed that Oliphant recognized the divestiture of all jurisdiction except that needed to control internal relations among tribal members. However, Oliphant only dealt with jurisdiction over non-Indians. The Court also admitted that the power of criminal jurisdiction over non-members had never been explicitly divested. The logical conclusion, then, is that since no such divestiture has occurred, the tribes must retain criminal jurisdiction over non-members.

In relying upon Oliphant to fortify its decision, the Court neglected to mention sections of the majority opinion contrary to its holding in Duro. The Oliphant Court looked to In re Mayfield in which Native American nations were held to retain criminal jurisdiction over all Indians. Also cited in Oliphant was a 1960 Senate Report that acknowledged "Indian tribal law is enforceable against Indians only . . . ." These authorities were used by the Oliphant majority to prove that tribes no longer had criminal jurisdiction over non-Indians. Without commenting on criminal jurisdiction over non-members, it is clear

135. Id. at 2068 (Brennan, J., dissenting).
136. Id.
137. The Duro Court stated, tribes "cannot try nonmembers in tribal courts." 110 S. Ct. at 2059 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)). While this statement is found in Wheeler, that quote is a summary of the holding in Oliphant, a case concerned solely with non-Indians. A correct summary of Oliphant would have stated that tribes cannot try non-Indians in tribal courts. Therefore, the use of Wheeler to prove the particular point is an elementary jurisprudential error.
138. Duro, 110 S. Ct. at 2060.
139. Id. at 2060-61.
141. Id. at 197. See, e.g., FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1986) ("[P]owers . . . vested in an Indian tribe are . . . inherent powers . . . which [have] never been extinguished.")
142. "[U]ntil Congress acts, the tribes retain their existing sovereign powers." Wheeler, 435 U.S. at 323.
143. See Oliphant, 435 U.S. at 204-05, 211.
144. 141 U.S. 107, 115-16 (1891).
145. Oliphant, 435 U.S. at 204 (citing In re Mayfield, 141 U.S. at 115-16).
146. Id. at 205 (quoting from S. REP. No. 1686, 86th Cong., 2d Sess. 2-3 (1960)).
that a presumption in favor of tribal jurisdiction over all Indians should have existed.

In a similar vein, the Court's reliance on *Wheeler* was ill-founded. The issue in *Wheeler* was whether an Indian tribe draws its power from the federal government or whether it derives its power to punish offenses committed against the tribe from the concept of tribal sovereignty.\(^\text{147}\) The Court agreed that the tribe had never surrendered the sovereign power to punish tribal offenders.\(^\text{148}\) However, *Wheeler* did not address non-member Indians. The word "non-member" was only used in dicta and even then was used incorrectly at least once.\(^\text{149}\) In fact, whenever tribal criminal jurisdiction over non-member Indians was discussed in *Wheeler*, the power of tribes to try non-members was upheld.\(^\text{150}\) Clearly, *Duro* does not follow from *Oliphant* and *Wheeler*; rather, it conflicts with them.\(^\text{151}\)

The Court also inaccurately stated that the dependent status of the tribes provided a basis for inferring a divestiture of tribal criminal jurisdiction over non-members.\(^\text{152}\) It is well established that Indian tribes can no longer determine their external relations, such as entering into treaties or trade agreements with foreign governments.\(^\text{153}\) However, it is a strained leap of logic to the Court's determination that the enforcement of criminal laws against members of the tribal community within tribal boundaries was not a power the tribe would need to control the internal workings of the reservation.\(^\text{154}\) The majority seemingly set internal criminal jurisdiction on equal footing with tribal "foreign" relations.

\(^{147}\) *Wheeler*, 435 U.S. at 328-30.

\(^{148}\) *Id.* at 323-24.

\(^{149}\) See *supra* note 137.

\(^{150}\) "Congress carried forward the intra-Indian offense exception because 'the tribes have exclusive jurisdiction' of such offenses . . . .' *Wheeler*, 435 U.S. at 324-25 (quoting H.R. REP. No. 474, 23d Cong., 1st Sess. 13 (1834)). The Court again pointed out Congress' acknowledgement of tribal criminal jurisdiction over all Indians. "Their right of self government and to administer justice among themselves . . . has never been questioned; and . . . the Government has carefully abstained from . . . punishing crimes committed by one Indian against another in the Indian country." *Id.* at 325-26 n.23 (quoting S. REP. No. 268, 41st Cong., 3d Sess. 10 (1870)).

\(^{151}\) See *supra* notes 113-16 and accompanying text.

\(^{152}\) *Duro* v. Reina, 110 S. Ct. 2053, 2060 (1990).

\(^{153}\) *Wheeler*, 435 U.S. at 326. See *Worcester* v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (the two cases forbade tribes entering into commercial or governmental relations with foreign powers); and Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (denying the tribes the right to freely alienate their land).

\(^{154}\) It is easier to understand when the results of other Indian law cases are considered. See *Lyng* v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Employment Div. v. Smith, 494 U.S. 872 (1990). It also becomes easier to understand when the attitude of the Supreme Court justices toward Indian law cases are considered. One commentator suggested the Indian law decisions from the Court were a result of the Justices' dislike of writing opinions on the subject. See
Distinguishing between member and non-member Indians in relation to governmental functions has been approved in other instances. For example, in *Washington v. Confederated Tribes of Colville Indian Reservation*, states were held to have the power to tax non-member Indians residing on reservations. The Court in *Duro* cited *Colville* to warrant equating non-member Indians with non-Indians for the purposes of tribal criminal jurisdictional. However, the language the *Duro* court extracted from *Colville* concerned a state’s power to tax, a far cry from tribal criminal jurisdiction. The *Duro* Court failed to include in its discussion of *Colville* the fact that the power of the tribe to tax non-members was unaffected by the presence of the same taxing power in the state. The only grounds for the member and non-member distinction in *Colville* was the clarification of state taxing power in Indian country.

The *Duro* majority’s reliance on *Montana v. United States* for the proposition that tribal courts have no jurisdiction over non-members is equally difficult to reconcile. The Court established that non-members were not within tribal civil jurisdiction in that case. However, the Court simultaneously established an exception to that rule. Non-members can be subject to tribal jurisdiction if the non-member’s activity affects the economic stability, self-governing ability, or the health and welfare of the tribe. The *Montana* reasoning, however, should lead to a result opposite of the *Duro* decision. Certainly, criminal activity within the tribe’s border adversely affects that tribe’s integrity and welfare.

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156. *Id.* at 161.


159. *Id.* at 152-53.

160. *See Duro*, 110 S. Ct. at 2067-68 n.1. The *Colville* Court intimated that if a federal statute existed which explicitly or implicitly preempted state taxation of non-member Indians, it would have disallowed *Washington’s* assertion of taxing power. *Colville*, 447 U.S. at 160-61. Likewise, the fact that jurisdiction over minor crimes is denied by federal statutes to state and federal governments, thereby implicitly remaining with the tribes, leads to the conclusion that *Duro’s* claim should have been denied. *See supra* notes 44-56, 81-86 and accompanying text.


164. *Id.* at 565-66.

TRIBAL CRIMINAL JURISDICTION

The majority's reasoning that Duro's inability to enter into the political process of the Pima-Maricopa tribe precluded tribal criminal jurisdiction is inconsistent with prior case law. In Williams v. Lee, the Supreme Court concluded that it was "immaterial" that a respondent in a civil case was not a tribal member. Simply the fact that the transaction in question took place on the reservation made jurisdiction with the tribal court appropriate. The lack of assent by non-members to tribal sovereignty was also rejected as a limit to jurisdiction in Merrion v. Jicarilla Apache Tribe. The Court declared "the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."

A United States citizen travelling into a foreign country should understand that he would be subject to all the laws of the foreign country, even if he had no chance of obtaining citizenship in that foreign nation. If the individual does not wish to place himself within the jurisdiction of the other country, he must simply remain outside that sovereign's borders.

Historically, tribes have retained power over all Indians in their territory. This is emphasized by the fact that Congress specifically acted to confer federal jurisdiction over different crimes in Indian country. Again, the fact that Congress and the Supreme Court recognized the need for such explicit action underscores the fact that the inherent sovereign power of Native American nations to exercise criminal jurisdiction over non-member Indians has never been taken away and therefore remains intact.

167. Id. at 223.
168. Id.
169. 455 U.S. 130 (1982).
170. Id. at 147 (emphasis added).
171. Justice Brennan pointed out that if the inability to participate in government is a bar to criminal jurisdiction then states "could not prosecute nonresidents, and [the United States] could not prosecute aliens who violate our laws." Duro, 110 S. Ct. at 2071 (Brennan, J., dissenting).
174. Id.
176. The exercise of criminal jurisdiction is an aspect of sovereignty. Duro, 110 S. Ct. at 2060.
177. Any sovereign power which has never been extinguished remains a power of the sovereign. United States v. Wheeler, 435 U.S. 313, 323 (1978). The Wheeler Court claimed that tribal court criminal jurisdiction over non-member Indians was an area in which the "implicit divestiture of sovereignty" had occurred. Id. at 326. However, the cases cited in support of that claim do not
Both the Court\textsuperscript{178} and Congress\textsuperscript{179} have recognized that Indians constitute a separate class, based not on a racial status but a political classification.\textsuperscript{180} Therefore, the subjection of non-member Indians to tribal criminal jurisdiction while prohibiting the subjection of non-Indians is not illegal racial discrimination. It is simply a recognition of the stated United States policy of encouraging Indian self-government.\textsuperscript{161}

The presence of a jurisdictional void in Indian country\textsuperscript{182} has become a reality. The current jurisdictional scheme covers all major crimes in Indian country and all other crimes except those occurring between Indians, those crimes already punished in tribal court, and those covered by treaty provisions.\textsuperscript{183} While the Court recognized the serious effect minor crimes\textsuperscript{184} could have on Indian communities,\textsuperscript{185} the Court refused to grant tribes jurisdiction over those crimes.\textsuperscript{186} This denial, coupled with the absence of jurisdiction over minor intra-Indian crimes by the federal and state governments,\textsuperscript{187} clearly leaves a void.\textsuperscript{188}

The Court also stated that any potential void was not enough to show that non-member jurisdiction belonged to the tribes.\textsuperscript{189} However, in \textit{Wheeler} the Court cited the possible absence of power over law breakers as a reason for their decision.\textsuperscript{190} The Court never attempted to explain why “undesirable consequences”\textsuperscript{191} in one case compelled

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\item[180.] Morton, 417 U.S. at 549.
\item[182.] \textit{Duro}, 110 S. Ct. at 2070 n.3 (Brennan, J., dissenting).
\item[183.] \textit{See supra} notes 39-56 and 81-84 and accompanying text.
\item[184.] Examples of such minor crimes are assault, domestic disputes, and the illegal discharge of a firearm.
\item[185.] \textit{Duro}, 110 S. Ct. at 2065.
\item[186.] \textit{Id}.
\item[187.] \textit{See supra} note 83 and accompanying text.
\item[188.] The dangerous situation that could develop in Indian country is evidenced in the declaration of the Tenth Circuit that a state could not assume jurisdiction in Indian country even if the federal government and the tribe yielded their law enforcement responsibilities. Ross v. Neff, 905 F.2d 1349, 1353 (10th Cir. 1990). \textit{See also In re Denetclaw}, 320 P.2d 697, 701 (Ariz. 1958) (the Ross court cited Denetclaw as another example of courts declaring themselves unable to enforce laws where they have no jurisdiction).
\item[189.] \textit{Duro}, 110 S. Ct. at 2065-66.
\item[191.] \textit{Id}.
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jurisdiction, but equally undesirable consequences in another case did not.\textsuperscript{192}

Congress has realized a jurisdictional void exists in Indian country\textsuperscript{193} and has undertaken temporary action to remedy it.\textsuperscript{194} While this enactment has provided a momentary respite, it is clear that more far-reaching action is needed. Ironically, the Supreme Court provided a range of possible solutions to the problem within the \textit{Duro} decision.\textsuperscript{195}

The Court's suggestion that Public Law 280 be utilized\textsuperscript{196} to close the jurisdictional void is not viable. Tribes that still retain criminal and civil jurisdiction do not wish to surrender it.\textsuperscript{197} Many states that did assume jurisdiction under Public Law 280 have since renounced it, refusing to exercise jurisdiction under it.\textsuperscript{198}

Another possible solution is the development of tribal-state compacts or tribal-tribal compacts. New Mexico enjoys a tribal-state compact which allows tribal police officers to act as state officers when arresting non-Indians.\textsuperscript{199} The Attorney General of Oklahoma recently issued an opinion which said such agreements would be constitutional in the state of Oklahoma.\textsuperscript{200} However, a previous opinion by the same official,\textsuperscript{201} which held otherwise,\textsuperscript{202} and the presence of a new Attorney

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\item[192.] \textit{Duro}, 110 S. Ct. at 2065-66.
\item[195.] \textit{Duro}, 110 S. Ct. at 2066.
\item[196.] \textit{Id}.
\item[197.] This is evidenced by the fact that since the 1968 amendments to Public Law 280 (tribal consent is required before a state can assume jurisdiction), no tribe has consented.
\item[198.] See \textit{Duro} 110 S. Ct. at 2066; Royster & Fausett, supra note 51, at 215-16 n.44. In \textit{Duro}, the Court pointed out that Arizona clearly indicated its desire to not have criminal jurisdiction over Indian country within Arizona.
\item[199.] N.M. STAT. ANN. § 29-1-11 (Michie 1990).
\item[201.] Robert Henry, Attorney General of Oklahoma.
\item[202.] 1984 Op. Att'y Gen. Okla. 197. This opinion was based on an understanding of OKLA. CONST. art. II, § 12, which states, "No member of Congress from this State, or person holding any office of trust or profit under the laws of any other State, or of the United States, shall hold any office of trust or profit under the laws of this State." In withdrawing this opinion, the Oklahoma Attorney General stated that 1984 Op. Att'y Gen. Okla. 197 could not be supported by existing case law. 1990 Op. Att'y Gen. Okla. No. 32, p.14 n.7 (citing United States v. Wheeler, 435 U.S. 313 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959)).

An earlier opinion by an Oklahoma Attorney General, 1979 Op. Att'y Gen. Okla. 345, which
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General in Oklahoma should indicate that obtaining such compacts may not be a panacea. Also, jurisdiction through agreement is based upon the implicit assumption that tribes do not have sovereign power over their own territory.\(^{203}\)

The Court also recommended that Congress should address the problem of a jurisdictional void.\(^{204}\) Congress heeded the Court's directive and on May 14, 1991, a bill\(^{205}\) was passed in the House of Representatives that would recognize that tribes have always had the right to enforce criminal jurisdiction over non-member Indians within Indian country.\(^{206}\) This bill serves a dual purpose. First, it would solve the problem of a jurisdictional void. Second, this legislation recognizes that tribal criminal jurisdiction over non-member Indians is an inherent power.\(^{207}\) The Court's reaction to this legislation is difficult to anticipate. The Court recognizes that Congress "has the ultimate authority over Indian affairs."\(^{208}\) However, the Court has also indicated that any legislation which subjected a United States citizen\(^{209}\) to the authority of a criminal tribunal where the citizen's constitutional rights were not guaranteed would be subject to judicial scrutiny.\(^{210}\) The Duro opinion indicated that the Indian Civil Rights Act was an insufficient counterpart to the United States Bill of Rights.\(^{211}\)

VI. CONCLUSION

A careful probe of the Duro decision evidences a bounty of inconsistencies and incorrect conclusions. Traditional, well-established concepts conflicted with 1984 Op. Att'y Gen. Okla. 197 by allowing cross-deputization and had apparently been overlooked when the 1984 opinion was issued, was modified to correspond to the opinion issued on March 1, 1991.

203. Recently, in Oklahoma, the real danger of a lack of law enforcement apparently overrode objections to surrendering some aspects of sovereignty. The leaders of the Sac and Fox Nation and the Iowa Tribe of Oklahoma signed a cross-deputization agreement with Governor David Walters. Walters, Tribes Approve Law Enforcement Pact, TULSA WORLD, Oct. 3, 1991, § A6; Indian Tribes, Walters Sign Law Enforcement Compacts, DAILY OKLAHOMAN, Oct. 3, 1991, at 10. Agreements between four tribes, including the Sac and Fox, Iowa, Citizen Band Potawatomi, and Kickapoo were also signed. The stated purpose of these agreements was to "improve law enforcement . . . within each tribe's boundaries." Walters, Tribes Approve Law Enforcement Pact, TULSA WORLD, Oct. 3, 1991, at A6.

204. Duro, 110 S. Ct. at 2066.


207. Id. at H2988.

208. Duro, 110 S. Ct. at 2066.


210. Duro, 110 S. Ct. at 2064.

211. Id.
of sovereignty were disregarded and tones of intolerance toward tribes were conspicuous. While this decision represents a new threat to the Indian community, given recent Supreme Court pronouncements concerning Indian rights, the result is hardly surprising.

Tribes must develop the political strength to effectively seek solutions to their unique problems. Resolve among the various Indian nations and inter-tribal cooperation is imperative if an already endangered way of life is to be preserved in some meaningful way. Congress and the judiciary must be urged to re-examine their argumentation and reasoning. These American institutions must restore to the Indians the fruits of promises made many years ago—the inherent right to autonomous power within Indian country.

Kenneth Factor