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I. INTRODUCTION

Congress and the courts have grappled with Indian issues since the formation of our country.[1] The difficulty of resolving Indian issues stems partially from the difference between what being an "Indian" signifies to the Native American and what it signifies to Congress and to the courts. The determination of who is an Indian directly impacts the legal powers of a tribe and the tribe's ability to exercise jurisdiction within its reservation.

The Court of Appeals for the Ninth Circuit's decision of *Duro v. Reina*[2] centers on the basic question of who is an Indian and therefore subject to a tribe's exercise of criminal jurisdiction. The court's answer to the question of who is an Indian protects the tribe's sovereign interest in controlling the internal affairs of the reservation without unduly restricting the individual rights of nonmember Indians.[3]

In support of the court of appeal's decision to protect tribal sovereignty,[4] this note initially will discuss the facts and ration-

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1. Reference to Indians in the Articles of Confederation illustrates the early importance of Indian law. Article IX reads:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing of all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits not be infringed or violated.

Note also that the first Congress enacted four laws concerning Indians during its first five weeks in session. *See* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 13 (1987).

2. 821 F.2d 1358 (9th Cir. 1987).

3. *See infra* notes 83-87 and accompanying text.

4. Tribal sovereignty is a concept introduced to judicial decisions by the Marshall trilogy of cases decided in the early nineteenth century. The first of the Marshall trilogy was Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (controversy concerning whether title to land granted by Indians can be recognized by United States), which recognized an Indian right of occupancy on the land but found that the United States held title to the land. *Id.* at 590-94. Then, in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Marshall court addressed the question of whether tribes were to be treated as foreign nations for jurisdictional purposes. The case was an action brought by the Cherokee nation to enjoin the execution of certain Georgia laws concerning the tribe. The Court did not reach the merits of the case but dismissed on jurisdictional grounds in

ale of *Duro*. This note examines the impact of *Oliphant v. Suquamish Indian Tribe*,[5] the leading Supreme Court case analyzing tribal sovereignty in the context of criminal jurisdiction, and applies the analysis of that case to the facts of *Duro*.[6] The note

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a 2-2-2 split of the 7-member court (Justice Duvall absent). The Court set out the political nature of the Indian tribes as dependent domestic nations. *Id.* at 16. The dependent political nature of the Indian nations was underscored one year later in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In *Worcester* the Court held that "all intercourse with [Indians] shall be carried on exclusively by the [federal government]." *Id.* at 557.

The Marshall trilogy is a convenient starting point in discussing historical notions of tribal sovereignty. A more comprehensive starting point is the European Medieval or Renaissance periods. *See* Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983). The rights of the discovering country were developed during the Medieval and Renaissance periods, and these rights are key to the early Supreme Court decisions concerning the Indian.

The Marshall decisions laid the foundation for Federal Indian Law. The importance of these cases is shown by the fact that "[o]f all pre-Civil War Supreme Court cases, only three have been cited more than Worcester v. Georgia during the 1970's and 1980's. Those three are Marbury v. Madison; McCulloch v. Maryland; and United States v. Perez." D. GETCHES & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 51 (2d ed. 1986) (citations omitted). The basic premise of these decisions is that Indian tribes are "domestic dependent nations," *Cherokee*, 30 U.S. at 16, having an exclusive relationship to the United States that "resembles that of a ward to his guardian." *Id.* This premise creates the backdrop of tribal sovereignty that underlies modern federal Indian law. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) ("The Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read."). As one commentator observed, "Indian nations today remain 'quasi-sovereign' entities, with retained, inherent powers of self-government over their territory and their people." Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction over Crimes by and Against Reservation Indians*, 20 NEW ENG. L. REV. 247, 249 (1984-85); *see also* Morton v. Mancari, 417 U.S. 535, 554 (1974).

As quasi-sovereign entities "dependent" on the federal government, *Cherokee*, 30 U.S. at 16, tribes remain vulnerable to federally imposed limits on tribal sovereignty. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance*. But until Congress acts, the tribes retain their existing sovereign powers." United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added). Implied limitations on tribal jurisdiction may also exist. *See infra* notes 60-82 and accompanying text; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

5. 435 U.S. 191 (1978).

6. *Oliphant* is an important example of a judicially recognized limitation on tribal powers. In *Oliphant* two non-Indian residents of a reservation were charged and arraigned before the tribal court. *Id.* at 194. The proceedings were stayed pending a decision on jurisdiction. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over non-Indians. *Id.* at 195. The United States Supreme Court in *Oliphant* held that criminal jurisdiction over non-Indians was not within the scope of a tribe's powers as a dependent sovereignty. Thus, the doctrine of implied divestiture prevented the exercise of criminal jurisdiction over non-Indians. The Court's analysis centered on

demonstrates that the Ninth Circuit softened the blow of *Oliphant* in *Duro v. Reina*[7] by strictly interpreting the term "non-Indian"[8] to not automatically[9] include "nonmember Indians."[10] Finally, this note addresses questions surrounding the determination of who is an Indian for purposes of criminal jurisdiction.

II. THE *DURO* CASE

Albert Duro, an enrolled member of the Torrez-Martinez band of Mission Indians, had lived within the Salt River Indian Reservation (Reservation) for approximately three months at the time of the alleged crime. Duro lived with a girlfriend, who was a member of the Salt River Pima-Maricopa Indian Community (Community). He worked for a Community-owned company yet was not eligible for membership in the Community.[11]

Duro allegedly shot and killed a young boy who was neither a resident nor a member of the Community.[12] Criminal complaints were filed in the United States District Court for the District of Arizona and in the tribal court.[13] In the district court, Duro was indicted by a grand jury for first degree murder; however, the district court dismissed the indictment without prejudice on motion by the United States.[14]

"inherent limitations on tribal powers." *Id.* at 209. *Oliphant* brought into question the nature of tribal sovereignty and severely limited the tribe's sovereign powers in criminal matters.

7. 821 F.2d 1358 (9th Cir. 1987).

8. For purposes of this note, "non-Indian" will be defined as a person not of Indian descent.

9. *Duro* spoke only to nonmember Indians who had significant contacts with the tribe. *See infra* notes 78-82 and accompanying text. It is possible that the court's analysis would be different if applied to all nonmember Indians. This note speaks only to the limited class of nonmember Indians who have significant contacts with the tribe.

10. For purposes of this note, a "nonmember Indian" will mean (1) a person of Indian descent who is a member of a federally recognized tribe but resides on the reservation of a tribe other than the one he is a member of, or (2) a person of one half or more Indian blood who is not a member of any tribe but resides on a reservation. This definition resembles that found in the Indian Reorganization Act of 1934, 25 U.S.C. § 479 (1982). The Act states that "[t]he term 'Indian' . . . shall include all persons of Indian descent who are members of any recognized Indian tribe . . . [and] descendants of such members . . . and shall further include all other persons of one-half or more Indian blood." *Id.*

11. To be eligible for tribal membership, Albert Duro would have to be a descendent of a member of the Salt River Pima-Maricopa Indian Community.

12. *Duro* 821 F.2d at 1360.

13. *Id.* at 1359.

14. *Id.* at 1360. Neither the circuit court's opinion nor the parties' appellate briefs state precisely why the district court dismissed the original indictment.

Duro was then taken into custody by the Salt River Department of Public Safety[15] because the shooting, which occurred on the Reservation, violated the tribe's criminal code.[16] Duro sought and was denied dismissal for lack of criminal jurisdiction by the tribal court. Duro then petitioned for and was granted, by the district court, a writ of habeas corpus and/or a writ of prohibition. The appellants[17] appealed the district court's judgment, and the court of appeals vacated the lower court's grant of relief.[18]

In its decision the court considered whether precedent prevented the exercise of criminal jurisdiction over nonmember Indians. In particular, the court addressed the holding and rationale of *Oliphant*, which held that criminal jurisdiction over non-Indians was not within the scope of the tribe's powers.[19] Finally, the court addressed equal protection arguments holding that a tribe's exercise of jurisdiction over nonmember Indians who have significant contacts with the tribe is not a form of invidious discrimination.[20] In holding that tribes can exercise jurisdiction over nonmember Indians, the court supported its ideas with the practical framework of a rational basis test[21] and the principle of avoiding a jurisdictional void.[22]

To begin its discussion, the court stated that though there was a lack of "historical precedent"[23] in the exercise of tribal criminal jurisdiction over nonmember Indians, the Supreme

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15. *Id.* The Salt River Department of Public Safety is the police department for the Community.

16. The charge in the tribal court complaint was the discharge of a firearm within the boundaries of the Reservation, a misdemeanor. *Id.* Because of the Indian Civil Rights Act, *see infra* note 34, penalties a tribe can impose are extremely limited. Therefore, the tribe's criminal code covers only misdemeanors.

17. The appellants included Edward Reina (Chief of Police) and the Community itself. *Duro v. Reina*, 821 F.2d 1358, 1358-59 (9th Cir. 1987).

18. *Id.* at 1360.

19. *See supra* note 6.

20. *Duro*, 821 F.2d at 1362-64.

21. The court found that there was a rational basis for exercising criminal jurisdiction over nonmember Indians residing on the Reservation in order to protect the tribe's sovereign powers. *Id.* at 1363-64; *see also infra* notes 60-82 and accompanying text.

22. The following analysis shows how a void might have been created. If the Community could not exercise jurisdiction then only the state courts could have because, as seen by the facts, the federal government had chosen not to. *See Duro*, 821 F.2d at 1364 n.5. The court noted that no attempt to prosecute Duro had been made in the state courts and that there was some question as to whether a state court would exercise jurisdiction. Hence, if the tribe could not try Duro no court would have, thus creating a jurisdictional void. *Id.* at 1364; *see also infra* notes 69-77 and accompanying text.

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

Court had left the door open in *Oliphant* concerning tribal jurisdiction over nonmember Indians.[24] The circuit court noted that the Supreme Court's use of the term "non-Indian" in *Oliphant* and in post-*Oliphant* cases was imprecise and might not have been intended to include nonmember Indians.[25] The *Duro* court noted that the *Oliphant* analysis rested on three factors:[26] (1) the existence of a "historical[ly] shared presumption . . . that tribal courts do not have the power to try non-Indians;"[27] (2) the Treaty of Point Elliot[28] between the Suquamish and the federal government, which provided for federal criminal jurisdiction over non-Indians; and (3) the inconsistency between a tribe's dependent status and its exercise of criminal jurisdiction over non-Indians.[29] The court concluded that the *Oliphant* factors of implied limitations on tribal criminal jurisdiction do not prohibit the prosecution of nonmember Indians in tribal courts.[30]

The Ninth Circuit also dismissed an equal protection claim recognized by the district court.[31] The *Duro* court noted the Supreme Court's holding that governmental actions as to tribes are not based on racial classifications that violate the equal protection clause of the Constitution.[32] Because *Duro* spoke to the tribe's exercise of its sovereign powers, the Indian Civil Rights Act—and not constitutional equal protection provisions—applied.[33] Consistent with the Supreme Court's interpretation of equal protection, the Ninth Circuit held that the exercise of a tribe's sovereign powers over its members is not grounded in impermissible racial classifications violative of the Indian Civil Rights Act.[34]

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

25. *See infra* notes 100-07 and accompanying text.

26. *Duro*, 821 F.2d at 1361.

27. *Id.*

28. Treaty Between the United States and the Owamish and Suquamish Indians, Jan. 22, 1855, 12 Stat. 927.

29. *Duro*, 821 F.2d at 1361.

30. *Id.* at 1361-62.

31. *Id.* at 1362-64; *see also infra* notes 83-113 and accompanying text. The equal protection argument is that nonmember Indians are similarly situated to non-Indians and, therefore, the exercise of tribal criminal jurisdiction over nonmember Indians but not non-Indians is based on an impermissible racial classification.

32. *Id.* at 1362, (quoting United States v. Antelope, 430 U.S. 641, 645 (1977)): "[F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."

33. *Duro*, 821 F.2d at 1362 n.4.

34. *Id.* at 1362-63. The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03 (1982 & Supp.IV 1986), extends many of the principles of the Bill of Rights to tribal courts.

In *Duro* the issue was a nonmember Indian's status; hence, the critical question was whether jurisdiction over nonmember Indians is based on a prohibited racial classification.[35] The court noted that "[w]ho is an Indian turns on numerous facts of which race is only one"[36] and held that tribal courts could define their criminal jurisdictions according to their own notions of who is an Indian.[37] By permitting the tribal courts to determine who is an

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The text of the Act reads in part:

No Indian tribe in exercising powers of self-government shall-

§ 1302. Constitutional rights

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

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

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

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

§ 1303. Habeas corpus.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of this detention by order of an Indian tribe.

The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302-03 (1982 & Supp. IV 1986).

35. The Indian Civil Rights Act, *see supra* note 34, contains an equal protection provision that must be addressed. *Id.* § 1302(8).

36. *Duro*, 821 F.2d at 1363.

37. *Id.*

Indian for jurisdictional purposes, the circuit court allowed the tribal courts to exercise jurisdiction over nonmember Indians.

III. *DURO*'S APPLICATION OF *OLIPHANT*

The Department of the Interior has ruled that unless expressly limited by Congress or by treaty, the "full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."[38] A tribe's exercise of criminal jurisdiction stems from the tribe's inherent, internal sovereignty.[39] Therefore, it is theoretically possible to determine the scope of tribal criminal jurisdiction over nonmember Indians by examining the express limitations imposed upon that jurisdiction by Congress or by treaty. However, when there are no express limitations on tribal sovereignty, an examination of implicit limitations may also be necessary.

In *Oliphant* the Supreme Court looked beyond limitations expressed by Congress or treaties to establish an implied limitation of sovereign power. The Court held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[40] Finding that the exercise of criminal jurisdiction over non-Indians was inconsistent with a tribe's status as a dependent nation, the Court refuted tribal criminal jurisdiction over non-Indians. However, the court of appeals in *Duro* narrowly construed *Oliphant* so as to avoid implicit limitations on the exercise of criminal jurisdiction over nonmember Indians.[41]

As discussed previously,[42] the *Oliphant* decision rested on

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38. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).

A more complete statement by the Department of the Interior concerning the retained sovereign powers of the Indians reads:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, . . . but does not by itself affect the internal sovereignty of the tribe . . . . (3) These [internal] powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

Id.

39. Talton v. Mayes, 163 U.S. 376 (1896).

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

41. *See supra* note 30 and accompanying text.

42. *See supra* notes 26-29 and accompanying text.

three arguments for implied divestiture of Indian jurisdiction. These arguments are: (1) a historical presumption prevents present-day exercise of jurisdiction, (2) specific limiting provisions found generally in treaties prevent exercise of jurisdiction, and (3) the dependent status of tribes prevents exercise of jurisdiction. Each of these arguments will be applied to the *Duro* facts.

A. Express Limitations

Express limitations on criminal jurisdiction take the form of either congressional acts or treaties.

1. Congressional action and the absence of a historical presumption against jurisdiction

Four federal statutes expressly speak to criminal jurisdiction over Indians and over crimes committed on Indian lands:[43] the Indian General Crimes Act;[44] the Assimilative Crimes Act;[45] the Indian Major Crimes Act;[46] and Public Law 280.[47] With the

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43. The Indian Civil Rights Act does not specifically speak to jurisdiction but extends the principles of the Bill of Rights to Indian lands and thereby controls the manner in which a tribe uses its sovereign powers. Because it does not speak to jurisdiction, the Indian Civil Rights Act cannot be read to limit tribal criminal jurisdiction. However, the fact that it protects the civil liberties of those who participate in tribal courts is an argument in favor of tribal jurisdiction. If the fundamental rights secured by the Bill of Rights are adequately protected in tribal courts, the courts are a viable forum for dispute resolution.

44. The Indian General Crimes Act, 18 U.S.C. § 1152 (1982) reads:

> 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.

45. The Assimilative Crimes Act, 18 U.S.C. § 13 (1982) reads:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

46. The Indian Major Crimes Act, 18 U.S.C. § 1153 (1982 & Supp. IV 1986) reads in part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter,

exception of Public Law 280, none of these statutes expressly limits the criminal jurisdiction of the tribes.[48] Public Law 280 applies only to those states which have formally acquired criminal jurisdiction over Indians and over Indian lands.[49] Arizona has not applied for criminal jurisdiction under Public Law 280[50] and, therefore, the statute did not limit tribal jurisdiction in this instance.[51] Hence in Arizona and the other states to which Pub-

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kidnapping, 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.

47. Public Law 280 in part reads:

Each of the States or Territories . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . 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.

18 U.S.C. § 1162(a) (1982).

Public Law 280 gives civil and criminal jurisdiction over Indians and Indian lands to six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) and allows any other state to apply for jurisdiction. The law was indicative of the mind set of the Eisenhower Termination period because it was a step towards assimilating Indians into the states' judicial processes. *See* D. GETCHES & C. WILKINSON, *supra* note 4, at 353 ("[T]he termination era produced several assimilationist policies other than the termination acts themselves. The principal example is Public law 280 . . . ."). Thus, if the alleged crime in this instance had been committed on a Public Law 280 reservation or by a member Indian of a Public Law 280 reservation, the present question would be moot because the state automatically would have jurisdiction.

48. The Indian General Crimes Act refers to actions "by the local law of the tribe." *See supra* note 44. This language allows for concurrent jurisdiction. *See* United States v. Wheeler, 435 U.S. 313, 330-32 (1978) (because Tribal Courts derive their power from the inherent sovereignty of the tribe, concurrent jurisdiction can exist).

The Assimilative Crimes Act affects Indian country only through the Indian General Crimes Act and therefore would also allow for concurrent jurisdiction. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 532-36 (1976).

As to the possibility of concurrent jurisdiction under the Major Crimes Act: "It is unsettled whether the Major Crimes Act divests the tribal courts of concurrent jurisdiction . . . . Some commentators have found that the legislative history of the Act, coupled with the lack of any express statutory language divesting tribal jurisdiction, may mean that tribal courts retain their inherent jurisdiction." D. GETCHES & C. WILKINSON, *supra* note 4, at 401-02; *see also* Clinton, *supra*; Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 390 (1974).

49. *See supra* note 47.

50. After the passage of the Indian Civil Rights Act of 1968, a state cannot assume jurisdiction under Public Law 280 without the consent of the tribe. 25 U.S.C. § 1321(a) (1982). Therefore, it is unlikely that Arizona will ever acquire criminal jurisdiction over Indians.

51. If Arizona had chosen to obtain criminal jurisdiction under Public Law 280 then

lic Law 280 does not apply, "[n]o Act of Congress has denied tribal court criminal jurisdiction over non-Indians [or over nonmember Indians]. Indian legislation raises reasonable inferences of a presumed absence of jurisdiction, but inferences are ultimately inconclusive."[52]

The court of appeals found that the part of the *Oliphant* opinion that reviewed congressional action treating tribal jurisdiction was not applicable to *Duro*. The court explained that "the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. . . . [T]here are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member."[53] As seen by examining statutes and treaties, discussed below, there is no clear showing of a congressional intent to prohibit tribal prosecution of nonmember Indians.

2. *Treaties*

In *Duro*, no specific treaty provision concerning criminal jurisdiction over nonmember Indians was discussed. The absence of a specific treaty limitation indicates that tribal sovereignty extends to criminal jurisdiction over nonmember Indians.[54] Moreover, a brief overview of treaty provisions that relate to nonmember Indians demonstrates that tribal criminal jurisdiction should extend to nonmember Indians.

a. Rules of Construction. Treaties drafted as early as 1785 provide for federal enforcement against crimes between Indians and citizens of the United States.[55] Later treaties called for the United States to settle intertribal disputes.[56] Subsequent treaties also addressed offenses by or against nonmember Indians as they would similar offenses by or against non-Indians.[57] These

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the state would have had jurisdiction automatically, and the tribe would not have criminal jurisdiction over nonmember Indians, or for that matter any Indian.

52. Note, *Tribal Court Criminal Jurisdiction over Non-Indians: Testing the Limits of Retained Sovereignty*, 13 CORNELL INT'L L.J. 89, 95 (1980)

53. *Duro v. Reina*, 821 F.2d 1358, 1361 (9th Cir. 1987).

54. *See supra* note 38.

55. *See, e.g.*, Treaty Between the United States and the Cherokees, Nov. 28, 1785, arts. v, vi, vii, 7 Stat. 18, 19.

56. *See, e.g.*, Treaty with the Upper Yanktonais Indians, Oct. 28, 1865, art. 3, 14 Stat. 743.

57. *See, e.g.*, Treaty with the Umpquas and Calapooias, Nov. 29, 1854, art. 8, 10 Stat. 1125, 1127, which states that "if any of the said Indians commit any depredations

treaties demonstrate the absence of a consistent restriction of tribal criminal jurisdiction over nonmember Indians by means of treaty agreements.

Though no clear trend is distinguishable, certain treaties suggest that the Indian tribes and federal government at times agreed that tribes should exercise criminal jurisdiction only over their own members. Because in general treaties do not expressly speak to tribal criminal jurisdiction over nonmember Indians, it is uncertain whether these treaties prevent tribal prosecution of nonmember Indians. However, a general rule of construction for interpreting Indian treaties is that ambiguity is to be interpreted in the light most favorable to the Indians.[58] The interpretation most favorable to the Indians as a whole would be to read the treaties as not limiting tribal criminal jurisdiction.

b. Grant theory—that not expressly given is retained. Treaties were entered into with the understanding that the tribe was giving to the federal government what the tribe inherently possessed.[59] Therefore, the lack of consistent provisions addressing criminal jurisdiction over nonmember Indians weighs in favor of the tribe's inherent jurisdiction. The fact that express provisions were occasionally created to limit tribal jurisdiction over nonmember Indians shows that both the federal government and the Indians were aware that the tribes inherently had jurisdiction. Yet, the absence of a general consensus in treaties restricting criminal jurisdiction suggests that both parties assumed that this power should remain with the tribe.

B. Implicit Limitations—Jurisdiction Consistent With Tribal Status

The final point of *Oliphant* to apply is whether the exercise

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on any other Indians, the same rule shall prevail as that prescribed in this article in case of depredations against citizens."

58. "Three primary rules have been developed [in interpreting treaties]: ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians." Wilkinson & Volkmann, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 617 (1975) (footnotes omitted).

59. *See* United States v. Winans, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted").

of criminal jurisdiction over nonmember Indians is "inconsistent with their status."[60]

1. Tribal self-government

The Supreme Court in *Montana v. United States*[61] explained that *Oliphant* made only "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . inconsistent with the dependent status of the tribes."[62] It is necessary, the *Duro* court held, for the tribe to take action against all Indians who have significant contact with the tribe in order to protect tribal self-government and control internal relations.[63]

The tribe has an obvious interest in the peaceful governing of its sovereignty. "Tribal self-government appears to involve two different considerations: the interest of the tribe in the affairs of its political constituents and maintenance of tribal power within the reservation."[64] The importance of tribal criminal jurisdiction rests on the second consideration—maintaining tribal power within the reservation. The nonmember defendant's inability to participate in tribal government is irrelevant to a tribe's need to maintain control within the reservation through prosecution of criminal behavior. Therefore the argument that it is unfair to subject nonmembers to tribal jurisdiction because nonmember Indians, like non-Indians, are unable to participate in governmental activities and have no recourse against possible injustices[65] is overcome by the tribe's interest in self-

60. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

61. 450 U.S. 544 (1981).

62. *Id.* at 564-65.

63. For the rationale employed by the *Duro* court, see 821 F.2d at 1363.

64. Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L.J. 727, 729.

65. For an example of such an argument, see Brief of Appellee at 10, Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987). The Brief cites by analogy Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980):

> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes [nonmember Indians] stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.

See also Comment, *supra* note 64, at 753-54.

Though *Colville* is a tax case it is sufficiently analogous to be illustrative in this instance. In both *Colville* and *Duro* the overriding issue was the scope of tribal sovereign powers.

government.[66]

2. *Self-determination*

Allowing the tribe to exercise reasonable criminal jurisdiction is consistent with notions of self-determination. Since the Nixon presidency, federal Indian policy has entered into an era of self-determination. In 1970, President Nixon announced that:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[67]

Thus, federal Indian policy implies that the tribe's ability to provide for the safety of its people in a manner consistent with its customs and beliefs is a crucial part of their sovereignty and should be "determined by Indian acts and Indian decisions."[68]

A part of the public policy of self-determination is the practicalities of prosecuting criminal activities on the reservations. Despite the fact that no federal statute expressly authorizes the creation of tribal courts,[69] Congress has *de facto* recognized their existence.[70] Though the procedural style and structure of tribal courts differ from tribe to tribe,[71] the modern tribal court is a

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66. *See infra* notes 83-87 and accompanying text.

67. President's Message to the Congress Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

68. *Id.*

69. *See* Clinton, *supra* note 48, at 555.

70. For example, by controlling the powers of the tribal courts the Indian Civil Rights Act implicitly recognizes the tribal court's existence.

71. *See* Note, *supra* note 4, at 254-59.

> Modern tribal courts essentially are comprised of three types: (1) traditional tribal courts whose tribal governing body, acting as dispute resolver, enforces unwritten tribal rules and customs; (2) Courts of Indian Offenses, still in existence and provided for in federal regulations, which enforce a federally-promulgated Code of Indian Offenses; (3) modern tribal courts, established by the tribes themselves, but which are limited by federal regulations concerning the appointment of and qualifications of tribal court judges, and by the Indian Civil Rights Act of 1968 which extended basic procedural and substantive rights to any defendant tried in a tribal court.

Id. at 256 (footnotes omitted).

viable, necessary forum for civil or criminal litigation.[72] In fact,

> on many remote and inaccessible reservations, the tribe remains the only truly 'workable' authority present to enforce laws and maintain order . . . .
> [R]elatively 'minor' offenses . . . are unlikely to arouse a federal prosecutor's attention and therefore may never reach an overburdened federal judicial system. In effect [absent tribal criminal jurisdiction] the tribes are left with no judicial remedy.[73]

Along with the unlikelihood that the federal government would prosecute minor criminal offenses basic practical jurisdictional problems arise. The already burdensome confusion surrounding jurisdiction would worsen if nonmember Indians were exempt from tribal criminal prosecution.[74] For example, at the time of arrest it is difficult to accurately ascertain tribal membership, and, therefore, tribal policemen would not know if they could properly arrest the Indian suspect. The result would be to severely limit the tribal policemen's ability to take immediate action in enforcing tribal law.

The problems of criminal jurisdiction over nonmembers are also deepened by possible state prejudices or self-interests.[75] If jurisdiction were left to the states, the almost inherent animosity

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72. *See generally*, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE (D. Getches ed. 1978) (examining the history of tribal court systems and addressing their present-day strengths and weaknesses).

73. Note, *supra* note 4, at 273-74. One commentator has explained that:

> Federal law is not designed to cover the range of conduct normally regulated by local governments . . . . Federal authorities are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel for witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence.

Note, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. IND. L. REV. 291, 298 (1978) (quoting from Brief for Respondent at 65, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see also Jurisdiction on Indian Reservations: Hearings on S. 3092, Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27-28 (1985).

74. A concise summary of jurisdictional rules on a reservation is found in Comment, *supra* note 64, at 737. Jurisdictional rules produce a checkerboard effect as federal, state and tribal judicial systems jockey for control. *Id.*

75. *See* United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [Indians] are found are often their deadliest enemies."); Clinton, *supra* note 48, at 521 n.88 ("Juries in communities immediately adjacent to Indian reservations are likely to be more hostile to an Indian defendant, due to common racial prejudice, than a federal jury drawn from a broader cross section of the population.").

between the states and the Indians would have the potential of making state criminal prosecutions arbitrary, infrequent, and unduly harsh against the Indians.

Moreover, the jurisdictional problems create what the Ninth Circuit called a "jurisdictional void."[76] If tribal courts are not able to prosecute criminal acts by nonmember Indians on their reservations, it is unlikely that federal or state courts will effectively pick up the slack in any but the most notorious of crimes.[77] Hence, if no court is willing or able to prosecute criminal actions a void is created where crimes can be committed without fear of prosecution.

3. *Tribal community*

The *Duro* court also noted that "treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community."[78] The disruption of the communal nature of the tribe derives from the fact that within the reservation nonmember Indians often are not thought of differently; they are merely members of the Indian community.[79] Commentators note that "[c]oexisting with [the] abstract concept of tribal membership may be a tribal community composed of persons who are not all enrolled tribal members, but who nevertheless fully participate in the social, religious, and cultural life of the tribe if not its political and economic process."[80] Thus it is more realistic to allow the tribe to exercise necessary jurisdiction over those who are considered by the community to be Indians. This approach is harmonious with Felix Cohen's definition that an Indian is a person who (1) is of Indian descent and (2) is regarded as Indian by the community where he lives.[81]

The Ninth Circuit's emphasis on "significant contacts"[82] with the reservation meshes with the concept that an Indian,

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76. *Duro*, 821 F.2d at 1364.

77. *See supra* note 73 and accompanying text.

78. *Duro*, 821 F.2d at 1363.

79. Consider the underlying controversy in Santa Clara Pueblo v Martinez, 436 U.S. 49 (1978). Because of tribal laws the children of a "mixed marriage" were unable to enroll in the Santa Claran tribe though they lived on the reservation and their mother was Santa Claran. The children were technically nonmember Indians and yet were completely integrated into the Santa Claran community.

80. M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 413 (2d ed. 1983).

81. *See* F. COHEN, *supra* note 38, at 2.

82. *Duro*, 821 F.2d at 1363-64.

though not an enrolled member of the tribe, has become a member of the tribal community. The more contact a nonmember Indian has with the tribe, the more likely he is to influence its welfare and, therefore, the greater the importance of being able to regulate the activities of the nonmember to maintain the peace of the reservation.

4. Individual concerns are overcome

There already exists a framework to protect the individual rights of a nonmember Indian. For example, the Indian Civil Rights Act limits the penalties a tribal court can impose to one year in jail and $5,000 in fines[83] and provides for review in cases of incarceration.[84] Also, the four congressional acts discussed earlier[85] give criminal jurisdiction to the federal government. If a major crime occurs the federal judicial system can be invoked.

Moreover, the tribe's interest in protecting the day-to-day events on the reservation would not be met through federal channels.[86] Someone has to issue parking tickets; the tribe needs the power to do so. Minor criminal prosecutions do not unduly infringe nonmember Indian's rights and are essential to the tribe's orderly running of the reservation. Therefore, in this instance it is possible to protect the sovereignty of the tribe without unduly infringing on individual rights.

The argument that the animosity exists between different tribes, thus preventing fair judicial process, is not persuasive here. The test in *Duro* is that nonmember Indians who have significant contacts with the tribe and have been incorporated into the tribal communities are within the reach of the tribe's criminal jurisdiction.[87] If animosity exists among tribes, a member from one would not move to and become incorporated into the community of an enemy tribe.

Further, a nonmember Indian who chooses to associate with a tribe makes a concomitant choice to be subject to its jurisdiction. He makes that choice before committing a crime and can-

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83. Paragraph 7 of the Indian Civil Rights Act was amended in 1986. Previous to this time the penalties a tribe could impose were six months in jail or $500 in fines. Congress amended the Act to enhance the tribes ability to penalize drug trafficking on Indian reservations.

84. 25 U.S.C. § 1302 (1982 & Supp. IV 1986); *see supra* note 34.

85. *See supra* notes 44-47 and accompanying text.

86. *See supra* note 73 and accompanying text.

87. *See supra* notes 78-82 and accompanying text.

not thereafter argue that he escapes tribal jurisdiction merely because of his nonmember status.

In sum, because (1) no historical presumption, as would be demonstrated by Congressional acts, prevents extending tribal criminal jurisdiction to nonmember Indians, (2) treaty provisions do not prohibit tribal jurisdiction, and (3) the exercise of jurisdiction over nonmember Indians is not inconsistent with a tribe's status, the *Oliphant* analysis of implied divestiture does not prevent the exercise of criminal jurisdiction by the tribe over nonmember Indians.

IV. Who is an Indian?—The Problem Of Equal Protection

The second concern addressed by the court of appeals was whether allowing the tribe to exercise jurisdiction over nonmember Indians, though it cannot over non-Indians, is a violation of equal protection.[88] This question focuses on the legal significance of being an Indian and whether the treatment of Indians as a class is invidious discrimination. In answering this question, the first problem concerns the confusion that exists in historical evidence and decisional law as to what is meant by the term "Indian."

A. Race

One obvious method of deciding who is an Indian is by measuring blood quantum or race. Early case law treating statutes or treaties did not differentiate between nonmember and member Indians. Rather, these early cases defined Indians as one racial class.[89]

The language in *United States v. Rogers*[90] typifies that of early decisions. The *Rogers* Court affirmed the federal conviction of a non-Indian though he claimed to be an adopted member of the Cherokee tribe and thus exempt from federal jurisdiction. The Court explained that the exception for Indians in a congressional act dealt with "those who by the usages and customs of the Indians are regarded as belonging to *their race*. It

88. *Duro*, 821 F.2d at 1363-65.

89. *See, e.g.*, United States v. Candelaria, 271 U.S. 432 (1926) (Pueblo Indians are a tribe of Indians because "[a]lthough sedentary, industrious and disposed to peace, they are Indians in race . . . ."); Westmoreland v. United States, 155 U.S. 545 (1895) ("The term 'Indian,'. . . is one descriptive of race."); Taylor v. Brown, 147 U.S. 640 (1893) ("[land] grant is to a member of a race which is in a state of pupilage").

90. 45 U.S. (4 How.) 567 (1846).

does not speak of members of a tribe, but of the *race* generally,—of the family of Indians . . . ."[91] *Rogers* demonstrates that historically race was the determinative factor in dealing with Indians.

B. Member of a quasi-sovereign tribal entity

Recent decisions have steered away from the racial classification approach—perhaps because of the influences of the civil rights movement and the now stronger notion of equal protection.[92] This is evidenced in the Supreme Court's decision *Morton v. Mancari*,[93] in which the court stated that if congressional deferential treatment of Indians were to be thought of as invidious racial discrimination, "an entire Title of the United States Code (25 U.S.C) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[94] Therefore, the Court characterized Indians not as members of a racial group but as "members of quasi-sovereign tribal entities."[95]

However, four years later in *United States v. John*,[96] the Supreme Court recognized the federal government's power to deal with the Choctaws in Mississippi despite the larger group's removal from Mississippi and despite years of nonrecognition; in so holding, the Court made reference to race.[97] Hence, race continues to be considered by the Supreme Court as a viable factor in determining jurisdiction.

C. The importance of Duro*'s definition of who is an Indian*

The use of terms such as "Indian," "tribal member," and

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91. *Id.* at 573 (emphasis added).

92. The civil rights movement has created a sensitivity to any differentiation based on race because any such differentiation is vulnerable to abuse. The notion of equal protection has been strengthened as a safeguard against such abuse. Thus, though the Indians themselves may seek deferential treatment because of their unique cultural status, the Supreme Court, when supporting deferential treatment of Indians, is likely to use rationale other than racial classification.

93. 417 U.S. 535 (1974); *see also* United States v. Antelope, 430 U.S. 641, 646 (1977). "[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.*

94. *Morton* 417 U.S. at 552.

95. *Id.* at 554.

96. 437 U.S. 634 (1978) (Mississippi sought criminal jurisdiction over a Choctaw Indian).

97. *Id.* at 650 n.19.

"non-Indian" needs to be precise and consistent. Congress and the courts should be clear as to what class of people they are addressing so that there will be consistent enforcement of the laws upon which the Indian people can rely.

Unfortunately, Congress historically has carelessly interchanged specific terms (i.e. "enrolled Indian" and "Indian"[98]). Unless expressly defined in the statute, it is often difficult to determine if Congress is addressing tribal members specifically or Indians of any tribal affiliation when it states "any Indian."[99]

Even the most recent decisions of the Supreme Court are ambiguous in their use of the terms "non-Indian" and "nonmember Indian."[100] An examination of the four post-*Oliphant* Supreme Court decisions interpreting the Court's own use of the term "Indian" illustrates this ambiguity.[101] Both *Merrion v. Jicarilla Apache Tribe*[102] and *United States v. Wheeler*[103] contain language that states that *Oliphant* stands for the proposition "that tribes have no criminal jurisdiction over crimes committed by nonmembers within the reservation."[104] Yet, the Court in *National Farmers Union Ins. Cos. v. Crow Tribe*[105] and *Washington v. Confederated Tribes of the Colville Indian Reservation*[106]

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98. *See* 25 U.S.C. §§ 1321, 1322, 1326 (1982). In sections 1321 and 1322 Congress uses only the term "Indians," but section 1326 specifies "enrolled Indians." These sections create doubt as to whether sections 1321 and 1322 apply to enrolled members or to all Indians. It is also ambiguous as to whether "enrolled Indian" means enrolled in the specific tribe or in any federally recognized tribe.

99. *See* Comment, *supra* note 64, at 746-48.

100. The Ninth Circuit commented that "the [Supreme] Court has not used the terms non-Indian and nonmember precisely" in decisions subsequent to *Oliphant*. *Duro*, 821 F.2d at 1361.

101. The Ninth Circuit explained that the holdings of these cases "do not depend on making [the distinction between non-Indian and nonmember Indians] with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone." 821 F.2d at 1361. The dissent, however, found United States v. Wheeler, 435 U.S. 313 (1978), to have made explicit the conclusion that *Oliphant* applied as well to nonmember Indians. *Id.* at 1364-65 (Sneed, J., dissenting).

102. 455 U.S. 130 (1982) (twenty-one lessees challenged the Tribe's enactment of a severance tax on oil and natural gas removed from Tribal lands).

103. 435 U.S. 313, 326 (1978). An Indian defendant pled guilty to a minor offence in a Navajo Tribal court. Because of the same incident the defendant was later tried for rape in federal court. He challenged the prosecution on grounds of double jeopardy. The prosecution was upheld.

104. *Merrion*, 455 U.S. at 171 (Stevens, J., dissenting).

105. 471 U.S. 845, 853-55 (1985) (insurance company challenged tribe's exercise of jurisdiction in a tort case).

106. 447 U.S. 134, 153 (1980). Washington challenged a tribe's enactment of a cigarette excise tax. The court validated the tax on purchases by non-Indians.

treated the *Oliphant* decision as if it applied only to non-Indians.[107]

The uncertainty of the past underscores the importance of the *Duro* decision. *Duro* rests in part on a broad definition of who is an Indian and construes *Oliphant* to apply only to non-Indians. The court of appeals, quoting Robert N. Clinton, stated that "[f]or 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.' "[108]

The Ninth Circuit correctly built upon this notion of how to define who is an Indian by holding that the tribe could exercise criminal jurisdiction over "nonmember Indians who have significant contacts with [the] reservation."[109] The court listed Duro's residence on the Reservation, his relationship with his girlfriend—a Community member—and his employment with a Community-owned company as the significant contacts which justified the tribal court's treating Duro "as an Indian" for criminal jurisdictional purposes.[110]

Two important points follow from the circuit court's analysis. First, in classifying a person as an Indian, race is not the only criterion. Other rational factors impact the determination of who is an Indian. These factors reasonably relate to the sovereign interests of the tribe. Here there is a need to balance Indian sovereignty with the rights of nonmember Indians.[111] Establishing that the exercise of criminal jurisdiction over nonmember Indians is consistent with tribal status demonstrates the rational relationship between the ends of internal governance and the means of tribal jurisdiction over nonmember Indians. The importance of protecting tribal sovereignty supports the exercise of criminal jurisdiction over nonmember Indians by the tribe.

Second, the nonmember Indian is a member of the larger

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107. It is important to note that in neither *National Farmers* nor *Colville* did the Court expressly state that the *Oliphant* decision did not extend to nonmember Indians; but the Court merely applied *Oliphant* to the factual cases at bar, which dealt with non-Indians. This is important because though the language suggests that *Oliphant* is applicable only to non-Indians, the exclusion of nonmembers from the *Oliphant* reasoning may not have been the intent of the Supreme Court in these cases.

108. *Duro*, 821 F.2d at 1363 (quoting Clinton, *Criminal jurisdiction over Indian lands: A Journey Though a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 518 (1976)).

109. *Duro*, 821 F.2d at 1363.

110. *Id.*

111. *See supra* notes 83-87 and accompanying text.

class of all Indians. The larger class' interests are best served by protecting the sovereign powers it now enjoys. The Supreme Court in *Fisher v. District Court* [112] stated:

> [t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the [Tribe] under federal law . . . . [S]uch disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.[113]

If the *Oliphant* doctrine of implied divestiture is applied to nonmember Indians, the federal government will have restricted the tribe's sovereign powers to an unreasonable extent, and Indian self-government will suffer.

V. CONCLUSION

Federal Indian policy continues to recognize inherent tribal sovereignty.[114] Tribal criminal jurisdiction is an important aspect of this tribal sovereignty. The tribe's jurisdiction over nonmember Indians has not been expressly limited by Congress and unless clearly limited by treaty, should remain intact. The implied limitations of *Oliphant* also fail as to nonmember Indians; therefore, tribal criminal jurisdiction over nonmember Indians is valid. The exercise of jurisdiction does not unduly restrict the nonmember's rights because the penalties the tribe can impose are minimal, and the tribe's interest in governing the tribe is great.

The Ninth Circuit's recognition of tribal criminal jurisdiction is not limited to a narrow racial classification but is a rational broadening of the definition of who is an Indian. The court's decision is consistent with the existing policy of self-determination. Most importantly, the decision is grounded in notions of tribal sovereignty.

The tribe as a sovereign has the right to maintain its own peaceful existence. Theoretically, this supports the exercise of criminal jurisdiction over nonmember Indians. Practically, it insists on tribal authority in criminal matters. On a reservation, the ethnic lines between Indian groups may become obscured

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112. 424 U.S. 382 (1976).
113. *Id.* at 390-91.
114. *See supra* note 4.

and the notion of who is an Indian may grow broader.[115] The Ninth Circuit court's decision in *Duro v Reina*[116] is a careful recognition of a tribal court's right to exercise criminal jurisdiction according to its own "complex notion of who is an Indian."[117]

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115. The nonmember Indian population is "a result of intertribal marriage, employment by the Bureau of Indian Affairs, or simply the high mobility of the American public." Comment, *supra* note 64, at 727 (citations omitted). Because of the increasing interrelations between Indians of different tribes questions about jurisdiction over nonmember Indians is of great importance.

116. 821 F.2d 1358 (9th Cir. 1987).

117. *Id.* at 1363.