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"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status

Weston Meyring

ARTICLES

"I'M AN INDIAN OUTLAW, HALF CHEROKEE AND CHOCTAW"[1]: CRIMINAL JURISDICTION AND THE QUESTION OF INDIAN STATUS

Weston Meyring[2]

ABSTRACT

This Article provides guidance to federal, state, and tribal courts presented with the question of whether an individual is an Indian for purposes of criminal jurisdiction. Although an understanding of the term "Indian" is "[f]undamental to virtually all analysis of Indian law,"[3] the scholarly literature is devoid of a modern in-depth review and analysis of who is an Indian under the major federal criminal statutes. As a result, judges and their law clerks, most of whom do not specialize in federal Indian law, are left without a comprehensive source for the law, history, and policy needed to formulate a case-by-case analysis of an issue profoundly affecting

1. TIM MCGRAW, *Indian Outlaw*, *on* NOT A MOMENT TOO SOON (Curb Records 1994).

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For her continued love and faith, special thanks to the former Natalie Lehrman, an enrolled member of the Spokane Tribe of Indians and, most significant to me, my wife. This Article is dedicated to my Indian in-laws.

3. CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 38 (Hardy Myers et al. eds., 3d ed. 2004) [hereinafter AMERICAN INDIAN LAW DESKBOOK].

the sovereignty of Indian tribes. This Article explicates the Indian status test and argues it must be construed broadly as intended by Congress. Importantly, the Indian status test connotes an expansive view of tribal membership, and, faithfully applied, helps to avoid potential equal protection problems raised by the legislative response to *Duro v. Reina*.[4]

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4. 495 U.S. 676 (1990) [hereinafter *Duro II*].

I don't see how you can simultaneously be an Indian and not be an Indian.[5]

Leslie R. Weatherhead, Attorney for Duane Garvais

[T]he issue of how one ought to determine Indian status under the federal statutes governing crimes in Indian country is extraordinarily complex and involves a number of competing policy considerations.[6]

Judge Henry, United States Court of Appeals, Tenth Circuit

It is to be expected that in the effort to advance the Indian from his semi-savage condition, and to change his tribal condition into individual citizenship, many anomalous situations will arise, which must be viewed in the light of all the legislation upon the same subject. . . .[7]

Judge Shiras, United States District Court for the District of Nebraska

For nothing in this world today is more complex, difficult, disputed, divisive, or so highly charged with dynamic energies as the question of Indianness.[8]

I. INTRODUCTION

"The case of special agent Duane Garvais has reached Washington's congressional delegation and the highest levels of the troubled Bureau of Indian Affairs," reported Spokane, Washington's newspaper in 2004.[9] Mr. Garvais was employed by the BIA due, in part, to the agency's established preference for hiring enrolled member Indians[10]—a preference mechanism approved by the United States Supreme Court in *Morton v. Mancari*.[11] On his employment application, Garvais claimed he had a documented blood degree of five-eighths and was pending enrollment with the

5. Bill Morlin, *BIA Firing Complicated by Rulings: Former Agent Garvais' Status as an Indian Unclear After Conflicts in Two U.S. Courts*, THE SPOKESMAN-REVIEW, July 14, 2004, at B1. The district court considered whether Garvais was an Indian, even though the BIA had determined he was not an Indian for employment preference purposes. *Id.*

6. United States v. Prentiss, 273 F.3d 1277, 1282 (10th Cir. 2001).

7. United States v. Flournoy Live-Stock & Real Estate Co., 69 F. 886, 891 (Neb. 1895).

8. LOUIS OWENS, MIXEDBLOOD MESSAGES (1998), *quoted in* Alan R. Velie, *Indian Identity in the Nineties*, 23 OKLA. CITY U. L. REV. 189, 189 (1998).

9. Bill Morlin, *BIA Agent Says He's a Victim of Retaliation After Investigating Reports of Police Corruption on Spokane Reservation, He Faces Tribal Charges*, THE SPOKESMAN-REVIEW, Jan. 19, 2004, at A1.

10. 25 U.S.C. § 472 (1934).

11. 417 U.S. 535 (1974); Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002).

Assiniboine tribe.[12] Four years later, however, while being prosecuted by the Spokane Tribe on charges of mishandling undercover drug funds, Garvais professed not to be an Indian under the criminal jurisdiction of the tribe.[13] The BIA then terminated his employment after determining that Special Agent Garvais was simply an Indian descendant and not an enrolled member of any federally recognized tribe.[14] Nevertheless, the Spokane Tribe continued to claim that Garvais was an Indian subject to prosecution in tribal court.

Cases like *In re Garvais* present an opportunity for courts to reexamine the federal common law[15] pertaining to the definition of who is an Indian under the criminal jurisdiction statutes.[16] After more than one hundred years of acquiescing to Congress' plenary power[17] to divest tribes of any remaining sovereignty, courts have been slow to acknowledge recent attempts by Congress to restore tribal sovereignty and encourage self-determination.[18] Indian law scholars often criticize the courts for failing to properly weigh modern policy regarding the federal-tribal relationship.[19]

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12. *In re* Garvais, 402 F. Supp. 2d 1219, 1222 (E.D. Wash. 2004).

13. *Id.*

14. *Id.*

15. "This is really judge-made law as to what an Indian is." —Senior U.S. District Court Judge Justin Quackenbush, *quoted in* Bill Morlin, *Court Ponders Definition of American Indian; Spokane Tribe Wants to Prosecute Former BIA Agent in Tribal Court,* THE SPOKESMAN-REVIEW, Aug. 10, 2004, at B3.

16. QUESTION: There's some ambiguity about what Indian refers to. Is it – must it be someone who is enrolled in an Indian tribe or can it be anyone who is the child of Indian parents?

MR. KNEEDLER: It – generally, it has been understood to require a tribal affiliation. First of all, the definition under – under the Indian Civil Rights Act for tribal power, Congress adopted the same meaning of Indian that is applied under the Federal criminal statutes for the purpose of having the two mesh completely.

QUESTION: Yes, but what is that? What is that definition?

Transcript of Oral Argument at 5, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107).

17. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 217-20 (Rennard Strickland et al. eds., 1982 ed.) [hereinafter STRICKLAND].

18. Bethany R. Berger, United States v. Lara *as a Story of Native Agency,* 40 TULSA L. REV. 5, 19 (2004); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values,* 86 MINN. L. REV. 267, 281 (2001) [hereinafter Getches, *Beyond Indian Law*]; Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions,* 66 S. CAL. L. REV. 767 (1993).

19. *See, e.g.*, Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers,* 109 YALE L.J. 1, 79 (1999) (criticizing Court for Anglocentric analogical reasoning and for abandoning its canons of statutory construction). "It is ironic, as well, that this judicial shift [toward bringing the Constitution to Indian country] has occurred in a time in which the express congressional and executive policy has been to promote, not undercut, tribal sovereignty." *Id. See also*

But in *United States v. Lara,*[20] the United States Supreme Court validated an amendment to the Indian Civil Rights Act[21] affirming the inherent sovereignty of Indian tribes to exercise criminal jurisdiction over *all* Indians.[22] The unanswered question, not before the *Lara* Court, remains whether congressional allowance of tribes to prosecute nonmember Indians, but not non-Indians, violates the equal protection guarantee incorporated within the Fifth Amendment to the United States Constitution.[23]

The equal protection problem,[24] to a great degree, turns upon the legal definition of Indian[25] and its corollaries — member and nonmember Indian.[26] While the profession of lawyers and judges

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Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts Over Non-Member Indians,* 38 FED. B. NEWS & J. 70 (1991) (criticizing "judicial narrowing of the scope and purpose of federal power over Indian affairs to reach only enrolled members of federally recognized Indian tribes . . . ." *Id.* at text following n.41).

20. 541 U.S. 193 (2004).

21. 25 U.S.C. § 1301 (1990).

22. *Lara,* 541 U.S. at 210.

23. *Id.* at 208-09. Justice Breyer wrote for the Court:

> That [due process] argument (if valid) would show that *any* prosecution of a nonmember Indian under the statute is invalid . . . . [W]e need not, and we shall not, consider the merits of Lara's due process claim. Other defendants in tribal proceedings remain free to raise that claim should they wish to do so. *See* 25 U.S.C. § 1303 (vesting district courts with jurisdiction over habeas writs from tribal courts).

Id. See Bolling v. Sharpe, 347 U.S. 497, 498-500 (1954) (incorporating equal protection into Fifth Amendment); *see also* Means v. Navajo Nation, 432 F.3d 924, 931-35 (9th Cir. 2005).

24. QUESTION: Indian tribal members are persons within the United States to whom the Due Process Clause is applicable. Imagine a tribe that does not give you counsel in a criminal trial. That could happen. All right? Now, is there a basis under the Due Process Clause for distinguishing between whether the defendant in such a case is, A, a member of that tribe; B, a non-tribe member but an Indian; C, a non-Indian?

Transcript of Oral Argument, *supra* note 16, at 19. *See also* David Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose,* 39 UCLA L. REV. 191 (1991); Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169 (1991); David Williams, *The Borders of the Equal Protection Clause: Indians as Peoples,* 38 UCLA L. REV. 759 (1991); Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?,* 66 NOTRE DAME L. REV. 1461, 1489-91 (1991); Peter Tasso, Note, Greywater v. Joshua *and Tribal Jurisdiction Over Nonmember Indians,* 75 IOWA L. REV. 685 (1990).

25. *See, e.g.*, United States v. Bruce, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting) (advocating a narrow definition of Indian status to avoid equal protection problems); Clay R. Smith, *"Indian" Status: Let a Thousand Flowers Bloom,* ADVOCATE (Idaho State Bar), Mar. 2003, at 18; Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision,* 55 U. PITT. L. REV. 1, 82-84 (1993); O'Brien, *supra* note 24, at 1481-89.

26. Deloria & Newton, *supra* note 19, at text accompanying n.48:

> Consistently interpreting the term 'Indian' as including both members and nonmembers, federal courts have developed a definition of who is an Indian for pur-

is usually characterized by facility for language, analysis, and communication, in the realm of federal Indian law many briefs and opinions are admittedly schizophrenic and indiscriminate when using terms of Indian status and ethnicity.[27] In general, a person can be an ethnic Indian without being a legal Indian; but, when getting down to specifics, the melding of race and politics plays havoc with most attempts to achieve precision through language. The legal terms "member Indian" and "nonmember Indian" create further confusion.[28] As suggested in this Article, those additional terms of art, from the point of view of a specific tribe, differentiate individuals who are recognized as members of the specific tribe from those who are members of another tribe. Member and nonmember do not necessarily refer to enrollment status in a tribe.[29] The confusion over definitions and terms makes *stare decisis* a minefield, even for federal Indian law practitioners. This Article identifies and attempts to clarify the criminal jurisdiction problem, and shows that equal protection concerns in this context can be avoided in most cases by adhering to a principled determination of Indian status.

Part II of this Article briefly outlines the state of criminal jurisdiction in Indian Country. Part III surveys the case law, including the pre-*Duro v. Reina* (*Duro II*) line of cases endorsed by Congress as the means to defining Indian status with respect to federal criminal jurisdiction and to the inherent power of Indian

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poses of the federal criminal statutes that also requires a sufficient recognition and identification in the community as an Indian to prevent the arbitrary application of the term to someone who has had only a tenuous connection with his or her Indian heritage.

27. Duro v. Reina, 851 F.2d 1136, 1140-41, 1141 n.3 (9th Cir. 1988) [hereinafter *Duro I*]; David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, 12 STAN. L. & POL'Y REV. 223, 224 (2001); Dussias, *supra* note 25, at 80-81; Patricia Owen, Note, *Who is an Indian?* Duro v. Reina's *Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians,* 1988 B.Y.U. L. REV. 161, 178-79 (1988).

28. *See* United States v. Lara, 541 U.S. 193 (2004); *Duro II*, 495 U.S. 676 (1990); Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988); United States v. Antelope, 430 U.S. 641 (1977).

29. Scholars have correctly described "three classes of Indian people" affected by *Duro II*. That classification scheme follows the *Duro II* Court's lexicon in which membership equals enrollment. This Article, however, rejects an enrollment-confined definition of membership as inconsistent with the subsequent *Duro*-fix. *See infra* text accompanying notes 376-77. *See also The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the Comm. on Interior and Insular Affairs on H.R. 972*, 102nd Cong. 159 (1991) (statement of Philip S. Deloria) ("Now when I tried to ask some people. . . [in the Senate] about this, their answer evidently is that they didn't mean enrolled members, they meant members.").

tribes to exercise criminal jurisdiction over *all* Indians. Part III also examines the blood and recognition prongs of the *Rogers* test and discusses the many possible interpretations of that test. Part IV argues that the intent of Congress as expressed in the *Duro*-fix legislation mandates a return to a less cramped view of the *Rogers* test. Before concluding, Part V of this Article discusses the courts' role in averting a constitutional crisis, and provides an additional recommendation to Congress to further address the concerns of both tribes and nonconsensual parties.

II. DETERMINING CRIMINAL JURISDICTION: NON-INDIANS, MEMBER INDIANS AND NONMEMBER INDIANS

Scholars and judges are predicting a constitutional crisis as a result of the conflict between the individual rights of United States citizens and the group rights of American Indian tribes.[30] In 2004, the United States Supreme Court affirmed the inherent sovereignty of tribes to exercise criminal jurisdiction over both nonmember Indians and member Indians, but declined to address the equal protection question.[31]

The equal protection issue has been brewing ever since the Court decided in *Oliphant v. Suquamish Indian Tribe* that Indian tribes, as "domestic dependent nations,"[32] were implicitly divested of all sovereignty over the prosecution of non-Indians.[33] Sixteen days later, the Court in *United States v. Wheeler* reaffirmed a tribe's assertion of criminal jurisdiction over "member"[34] Indians as being necessary for control of internal relations and preservation of the tribe's "unique customs and social order."[35] Subse-

30. Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians,* 80 NOTRE DAME L. REV. 333, 334-37 (2004); Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay,* 5 U. PA. J. CONST. L. 271 (2003); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes,* 101 COLUM. L. REV. 702, 747-48 (2001) [hereinafter Gould, *Mixing Bodies*].

31. *Lara,* 541 U.S. at 209-10; *see also* Means v. Navajo Nation, 432 F.3d 924, 932 (9th Cir. 2005) (acknowledging that, although Means's equal protection argument had "real force," Indian tribes do not have to comply with the United States Constitution).

32. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

33. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). For a chart simplifying the convolutions of criminal jurisdiction in Indian Country, *see* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 168 (3d ed. 1998).

34. In the context of inherent sovereignty, the Court causes confusion by using the moniker "member" as shorthand for "enrolled member."

35. United States v. Wheeler, 435 U.S. 313 (1978). *See also Duro II,* 495 U.S. 676, 685-86 (1990); Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts,* 33 TULSA L.J. 1 (1997).

quently, the circuits split as to whether Indian tribes had been divested of criminal jurisdiction over nonmember Indians along with non-Indians.[36] The Supreme Court in *Duro II* reversed the Ninth Circuit by holding that a nonmember Indian's relations with a tribe are no different than those of a non-Indian.[37] Thus, Indian tribes were prohibited from intruding on the personal liberties of "nonmember" Indians who by definition did not consent to the governance of the tribe.[38]

Accordingly, the Court determined that tribal jurisdiction over crimes involving nonmember Indians – to whom the Bill of Rights would not apply in Indian country[39] – is inconsistent with equal treatment of nonmember Indian citizens and non-Indians.[40] As a result, the *Duro II* decision created a jurisdictional void in the Indian Country Crimes Act (ICCA).[41] While the so-called Indian exception in the ICCA had given exclusive jurisdiction to the tribes over misdemeanor crimes committed by an Indian against the person or property of another Indian, the holding in *Duro II* meant that tribes could no longer prosecute "nonmembers"[42]

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36. *Compare Duro I*, 851 F.2d 1136 (9th Cir. 1988) *with* Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988). *See also* Tasso, *supra* note 24; Owen, *supra* note 27.

37. *Duro II*, 495 U.S. at 688.

38. *Id.* at 694. *See supra* note 34. This Article scrutinizes and challenges the Court's member Indian semantics as unfaithful to federal Indian law's long acceptance of recognized consent.

39. Talton v. Mayes, 163 U.S. 376, 384-85 (1896); Means v. Navajo Nation, 432 F.3d 924, 932 (9th Cir. 2005).

40. *Duro II*, 495 U.S. at 698. Citizenship was granted to all American Indians in 1924. *See* STRICKLAND, *supra* note 17, at 142-43.

41. Eric B. White, Note, *Falling Through the Cracks After* Duro v. Reina*: A Close Look at a Jurisdictional Failure,* 15 U. PUGET SOUND L. REV. 229, 230 (1991). The ICCA, also referred to as the Indian General Crimes Act or Federal Enclaves Act, states:

> 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.

18 U.S.C. § 1152 (2000). "The Supreme Court has interpreted the exception as manifesting a broad congressional respect for tribal sovereignty in matters affecting only Indians." United States v. Bruce, 394 F.3d 1215, 1219 (9th Cir. 2005) (citing United States v. Quiver, 241 U.S. 602 (1916)).

42. *See supra* note 34.

within the Indian exception, and there was no other statute granting federal jurisdiction to fill the gap.[43]

Responding to the outcry of the tribes over *Duro II*, Congress immediately enacted temporary legislation to fix the situation created by the Court.[44] That legislation, made permanent a year later, is referred to as the *Duro*-fix.[45] It amended the definitions section of the Indian Civil Rights Act (ICRA) of 1968 to recognize and affirm the inherent power of Indian tribes "to exercise criminal jurisdiction over all Indians," not just member Indians.[46]

III. *UNITED STATES V. ROGERS* AND ITS PROGENY

Rather than creating a rigid statutory definition of who is an Indian for purposes of tribal criminal jurisdiction,[47] Congress decided in the *Duro*-fix to endorse the definition as then developed by courts interpreting federal jurisdiction under the Major Crimes Act.[48] The test for who is an Indian can be traced at least as far

43. Although nonmembers were shielded from tribal prosecution the same as non-Indians for purposes of *Duro*, they remained Indians and did not fall into the state's jurisdiction over crimes committed against non-Indians. *See, e.g., Means,* 432 F.3d at 933-34:

> If Means was not subject to prosecution in the Navajo courts, he could not be prosecuted in any court. The state of Arizona, like the majority of states, does not have jurisdiction to try Indians for offenses committed on a reservation, and there is no federal court jurisdiction because Means's alleged offenses do not fall within the Major Crimes Act.

44. Dep't of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077, 104 Stat. 1856 (1990) (amending 25 U.S.C. § 1301 (1983)).

45. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2401-41 (Nell J. Newton et al. eds., 2005 ed.) [hereinafter NEWTON]; L. Scott Gould, *The Congressional Response to* Duro v. Reina*: Compromising Sovereignty and the Constitution,* 28 U.C. DAVIS L. REV. 53, 63 (1994) [hereinafter Gould, *The Congressional Response*].

46. 25 U.S.C. § 1301 (2000); *see Means,* 432 F.3d at 930 ("'All Indians' plainly includes Indians who are not enrolled members of the particular tribe exercising jurisdiction" but not "all persons who may be ethnically Indian.").

47. By one count, there are over thirty-three definitions of Indian status contained in federal statutes and regulations. O'Brien, *supra* note 24, at 1481. For an excellent survey of the most common definitions, *see* Margo S. Brownell, Note, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law,* 34 U. MICH. J. L. REFORM 275 (2000-2001).

48. 25 U.S.C. § 1301(4) (2000) states: "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." The Major Crimes Act provides:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who

back as 1846 to the Supreme Court decision of *United States v. Rogers*.[49] In that case, the defendant was William S. Rogers, a white man who established his domicile in Cherokee country and was adopted and recognized by the tribe as an Indian.[50] Although Rogers exercised the same rights and privileges as any other Cherokee citizen, the Court held that the statute at issue, an earlier version of the Major Crimes Act, did not contemplate a white man of mature age being adopted into an Indian tribe.[51] The Court stated that Indian as used in the act "does not speak of members of a tribe, but of the race generally,—of the family of Indians."[52] In addition, the *Rogers* Court determined that Indian "is confined to those who by the usages and customs of the Indians are regarded as belonging to their race."[53]

Over the one-hundred-sixty years since *Rogers*, state and federal courts have formulated a test of Indian status that involves two fundamental prongs: (1) the person has Indian blood; and (2) is recognized as an Indian by the tribe or Indian community.[54] The *Rogers* test has been developed by application in many different state courts and federal circuits, but the Supreme Court has not explicated the test since its decisions from the late nineteenth century.[55] This part of the Article outlines and considers the

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has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

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

18 U.S.C. § 1153 (2000).

49. 45 U.S. 567 (1846).

50. *Id.* at 567-68.

51. *Id.* at 572-73.

52. *Id.* at 573.

53. *Id.*

54. STRICKLAND, *supra* note 17, at 24. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (U.S. Printing Off. 1942, 2d ed., 4th printing 1945) [hereinafter COHEN], *available at* http://madison.law.ou.edu/cohen/ (defining "'Indian' as a person meeting two qualifications: (a) That some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an 'Indian' by the community in which he lives"); *accord* ELMER F. BENNETT, FEDERAL INDIAN LAW 6 (U.S. Printing Off. 1958) [hereinafter BENNETT]; *see also* NEWTON, *supra* note 45, at 171-72 (defining "Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual's tribe or community").

55. *See* United States v. Romero, 136 F.3d 1268, 1274 (10th Cir. 1998) (finding the *Rogers* test to be a "complex legal definition of Indian status").

evolution of the two-pronged test in an attempt to identify common law principles that were assumed by Congress to be established precedent at the time of the *Duro*-fix.

A. *The Blood (or Ancestry) Prong*

The blood element of the Indian status test has been controversial due to its link to race.[56] This requirement has been widely criticized, particularly within the last decade.[57] Yet this part of the test has remained a persistent focus in both state and federal court decisions.

Initially, the federal courts considered a flurry of cases in the latter half of the nineteenth century involving white men with no Indian blood who were adopted by various tribes.[58] In several of those cases, the men were found to be Indian because certain treaties at issue either granted amnesty to Indian citizens or provided specific tribes with jurisdiction over all adopted and naturalized citizens.[59] In *United States v. Ragsdale*, the circuit court in the district of Arkansas noted that *Rogers* expressly allowed that "a white man may incorporate himself with an Indian tribe, be adopted by it, and become a *member* of the tribe."[60] Because the Treaty of Washington pardoned all prior crimes committed by Cherokee citizens, not just by Indians, the court was able to sidestep the *Rogers* holding that a white man could not be an Indian for purposes of avoiding federal criminal jurisdiction under the exceptions in the Indian Trade and Intercourse Act (a precursor to the ICCA).[61] In this fashion, the court declared the white victim in the case, Richard Newland, to be a Cherokee citizen by adoption,

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56. *See* Vialpando v. State, 640 P.2d 77, 81-83 (Wyo. 1982) (Rooney, J., concurring); *see generally* Valencia-Weber, *supra* note 30; Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari, Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, *and Other Recent Cases,* 25 AM. INDIAN L. REV. 275 (2001); Gould, *Mixing Bodies*, *supra* note 30 (noting the unreliability of modern science as a means for quantifying race); John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing,* 80 NEB. L. REV. 171 (2000-2001); Gould, *The Congressional Response*, *supra* note 45. *But see* Kim Benita Furumoto & David Theo Goldberg, *Boundaries of the Racial State: Two Faces of Racist Exclusion in United States Law,* 17 HARV. BLACKLETTER L.J. 85, 101-09 (2001) ("As a racial presumption, colorblindness continues to conjure people of color as a problem in virtue of their being of color, in so far as they are not white.").

57. *See* sources cited *supra* note 56.

58. *See supra* notes 49-52, *infra* notes 60-62, 76-78.

59. *See supra* notes 49-52, *infra* notes 60-62, 76-78.

60. United States v. Ragsdale, 27 F. Cas. 684, 686 (Cir. Ct., D. Ark. 1847) (No. 16,113) (emphasis added).

61. *See* United States v. Rogers, 45 U.S. 567, 573 (1846).

which meant the federal court had no criminal jurisdiction according to the terms of the treaty.[62]

In *Ex parte Mayfield*, the defendant, accused of committing adultery, was stipulated to be one-fourth Indian by blood.[63] Since the crime was victimless, federal court jurisdiction hinged on whether John Mayfield was Indian.[64] Similar to *Ragsdale,* however, the Supreme Court avoided the question by finding Mayfield to be an adopted Cherokee member and thus subject under an 1866 treaty to the exclusive jurisdiction of the Cherokee Nation.[65]

In *Westmoreland v. United States,* the Supreme Court held that an indictment describing the defendant and deceased as white persons, was sufficient for maintaining federal jurisdiction.[66] The Court, citing *Rogers* for support, said the term "Indian" is descriptive of race.[67] Therefore, the description of the defendant and victim as white men was enough to prevent the indictment from being jurisdictionally defective.[68] The indictment further alleged that the defendant and victim were not Indian citizens,[69] thus supporting by implication the holding from *Rogers*, decided almost fifty years earlier, that the citizenship inquiry is not dependent upon race.[70]

In *Alberty v. United States*, the defendant was an undisputed citizen of the Cherokee Nation.[71] The Supreme Court, again citing *Rogers,* cautioned that such citizenship by itself did not make Alberty an Indian under the federal criminal statutes. Absent a preemptive treaty or act of Congress, race remained a key element of jurisdiction.[72]

In *Lucas v. United States*, the Supreme Court began by observing that the description of the murdered man in the indictment as a negro and not an Indian "implied that there were negroes who were, and those who were not, Indians, in a jurisdictional sense" under the Act of 1890,[73] in which the territory of Oklahoma provided "that the judicial tribunals of the Indian Na-

62. *Ragsdale,* 27 F. Cas. at 686.
63. 141 U.S. 107, 113 (1891).
64. *Id.* at 111-12.
65. *Id.* at 112-16.
66. 155 U.S. 545, 548-49 (1895).
67. *Id.*
68. *Id.*
69. *Id.* at 546.
70. *Id.* at 548 (citing United States v. Rogers, 45 U.S. 567 (1846)).
71. 162 U.S. 499, 500 (1896).
72. *Id.* at 500-01; *see infra* note 138.
73. 163 U.S. 612, 615 (1896).

tions shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation, by nativity or by adoption, shall be the only parties. . . ."[74] On account of this unique Oklahoma statute, the racial portion of the *Rogers* test did not apply.[75]

Nofire v. United States involved the same treaty and statutory language that trumped the *Rogers* test in *Alberty*.[76] The murder victim, Fred Rutherford, was alleged to be a white man and not an Indian.[77] But since no quantum of Indian blood was required for Cherokee membership, the Court found Rutherford to be an adopted Cherokee without making further racial inquiry.[78] *Nofire* was the last Supreme Court case to consider whether a person without Indian blood who was adopted as a member of an Indian tribe could be an Indian under the federal law of criminal jurisdiction.[79]

In the twentieth century, most of the cases defining Indian for criminal jurisdiction purposes involved basic measurement of Indian blood as implied by *Rogers*.[80] Treaties were not a frequent consideration, since the federal government ended treaty making with Indian tribes in 1871.[81] In 1912, the Eighth Circuit found one-eighth Indian blood enough for Indian status.[82] In *Ex parte Pero,* one petitioner was a full-blood and the other had a full-blood

74. *Alberty*, 162 U.S. at 502 (quoting Treaty with Cherokee Indians, July 19, 1866, art. 13, 14 Stat. 803). This quoted language of the Treaty was followed in the Act of 1890. *Id.* at 502-03.

75. *Lucas,* 163 U.S. at 616.

76. Nofire v. United States, 164 U.S. 657 (1897).

77. *Id.* at 658.

78. *Id.* at 658, 661-62.

79. The Montana Supreme Court considered the issue of non-racial Indian status in State v. Montana Ninth Jud. Dist. Ct., 257 Mont. 512, 851 P.2d 405 (1993).

80. Shortly after the Indian Rights Act was passed in 1934, the BIA was charged with devising a method:

> to certify individuals who claimed to be half-blood Indian. The Bureau based its determination on five factors: 1) tribal rolls; 2) testimony of the applicant; 3) affidavits from people familiar with the applicant; 4) findings of an anthropologist; and 5) testimony of the applicant that he has retained "a considerable measure of Indian culture and habits of living." As explained in a 1936 memo written by Collier, "Determination of the degree of Indian blood is entirely dependent on circumstantial evidence; there is no known sure or scientific proof. Nor has any legal standard of universal applicability been set up by statute for the determination of who is, and who is not, an Indian."

Brownell, *supra* note 47, at 288.

81. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

82. Sully v. United States, 195 F. 113, 117 (8th Cir. 1912). The Eighth Circuit also held that one-quarter to three-eighths Indian blood was sufficient. Venzina v. United States, 245 F. 411, 420 (1917). *But see* Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) (holding

mother and a half-blood father; a sufficient indication of Indian race in each instance.[83] In 1968, the Washington Supreme Court concluded that "since 1846 – and perhaps earlier" the legal test for Indian status involved a "substantial percentage of Indian blood."[84] In 1974, The Arizona Supreme Court assumed, without deciding, that a defendant had a substantial percentage of Indian blood if his father was half-Indian.[85] The court, however, cited a California Supreme Court opinion cautioning that a significant blood quantum is not dispositive of Indian status because of the possibility that the individual has been emancipated (or assimilated) and thus should be treated like any non-Indian.[86]

In 1976, the Eighth Circuit held that one-fourth Indian by blood is enough to satisfy the first prong of the *Rogers* test.[87] That same year, the Fourth Circuit had no difficulty declaring three-fourths degree of blood to be sufficient.[88] In 1982, the Wyoming Supreme Court, in a parsimonious application of the blood prong, held that one-eighth Indian blood is too little for Indian status.[89] The court supported its conclusion by employing the "substantial amount of Indian blood" terminology from *Ex parte Pero* and resorting to a strict dictionary definition for the meaning of substantial.[90] Justice Brown, writing for the court, praised Professor Robert Clinton's classic article on Indian criminal jurisdiction, but seemingly ignored that scholar's synthesis of the Indian status test and the conclusion that it merely requires "some demonstrable biological identification as an Indian."[91] A few months later, in *Goforth v. State*, the Oklahoma Court of Criminal Appeals held that slightly less than one-quarter Indian blood was a significant percentage.[92]

The Seventh Circuit, in *United States v. Torres,* determined that both 25/64 degree Indian blood and 11/32 degree of Indian blood indicated "some degree of Indian blood" under the *Rogers*

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one-eighth Indian blood is not a "substantial amount of Indian blood" to classify a defendant in a criminal case as Indian).

83. 99 F.2d 28, 31 (7th Cir. 1938).

84. Makah Indian Tribe v. Clallam County, 440 P.2d 442, 444 (Wash. 1968).

85. State v. Attebery, 519 P.2d 53, 54 (Ariz. 1974).

86. *Id.* at 54 (citing People v. Carmen, 273 P.2d 521, 525 (Cal. 1954)).

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

88. United States v. Lossiah, 537 F.2d 1250, 1251 (4th Cir. 1976).

89. Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982).

90. *Id.*

91. *Id.* at 79 (referring to Robert Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 520 (1976)).

92. 644 P.2d 114, 116 (Okla. Crim. App. 1982).

test.[93] In 1988, the Idaho Court of Appeals declined to decide whether 15/64 Indian blood degree was significant, because the defendant did not pass the recognition prong of the two-element test.[94] Four months later, the district court in South Dakota concluded that 15/32 Indian blood was sufficient for the *Rogers* test.[95] This same court held in another case that 7/32 Indian blood meets the *Rogers* criterion of "some Indian blood," notwithstanding one of the defendant's parents being a non-Indian.[96]

In 1990, the Supreme Court of Montana found that 165/512 of Indian blood was significant.[97] Later that year, the Utah Court of Appeals opined "five-sixteenths Indian blood clearly qualifies as a 'significant percentage,' the historical debate treated in the cases focusing on whether *two*-sixteenths is enough."[98] The court further noted that the blood requirement of the Indian status test is more rigid than the recognition requirement.[99] In 1993, the Montana high court heard the case of a defendant, Don Juneau, who had no Indian blood but had an Indian father by adoption.[100] Because the court concluded that Juneau was not recognized by a tribe, it did not think it necessary to address the blood prong of the *Rogers* test, but noted the argument that the prong is inconsistent with the modern notion of being Indian as a political status rather than a racial classification.[101] Similarly, the Eighth Circuit, in 1995, affirmed the South Dakota federal district court's finding, under the recognition prong, that defendant was a non-Indian, and affirmed without review that 11/128 Indian blood would satisfy the *Rogers* inquiry.[102] And, in 1996, the Ninth Circuit agreed that one-quarter Indian blood is a degree of blood that satisfies the *Rogers* test.[103]

In a notable early decision of the twenty-first century regarding Indian status for criminal jurisdiction, the Washington Court of Appeals held that a defendant conceded to be a descendant and member of the Sturgeon Lake First Nation, a Canadian Indian

93. 733 F.2d 449, 456 (7th Cir. 1984).
94. State v. Bonaparte, 759 P.2d 83, 85 (Idaho Ct. App. 1988).
95. St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988).
96. United States v. Driver, 755 F. Supp. 885, 888 (D.S.D. 1991).
97. State v. LaPier, 242 Mont. 335, 341-42, 790 P.2d 983 (1990) [hereinafter *LaPier I*].
98. State v. Hagen, 802 P.2d 745, 748 n.2 (Utah Ct. App. 1990).
99. *Id.*
100. State v. Montana Ninth Jud. Dist. Ct., 257 Mont. 512, 515, 851 P.2d 405, 407 (1993).
101. *Id.* at 516-17, 851 P.2d at 407-08.
102. United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995).
103. United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996).

tribe, was clearly established as an Indian under the first *Rogers* prong.[104] Also in 2001, the Tenth Circuit held that evidence of Indian membership by itself is not evidence of blood sufficient to meet the first prong of *Rogers*.[105] The following year, in a case before the Idaho Court of Appeals, the parties agreed that a significant percentage of blood was present in a defendant whose mother was a full-blooded Indian and whose father was an African-American.[106]

Judge Quackenbush, in a 2004 memorandum opinion for the Federal District Court of the Eastern District of Washington, found that "The maximum Indian blood possessed by Duane Garvais in any federally recognized Indian Tribe is 1/16th Kootenai and 1/16th Colville,"[107] seemingly implying that blood is fortified by maximizing the blood quantum from a particular tribe.[108] Garvais' blood degree in other recognized tribes was 1/32 Yankton Sioux and 1/32 Santee Sioux, for a total blood quantum of 3/16, much less than the "documented blood degree of 5/8" he had claimed on his application for BIA employment.[109] Moreover, the court took the position that a limited blood quantum weighed heavily against a determination of Indian status when the recognition prong of the *Rogers* test was tenuous.[110]

In *United States v. Bruce*, a Montana district court joined the Eighth Circuit in concluding that one-eighth blood is enough to satisfy the first prong.[111] On appeal, the Ninth Circuit held that "[b]ecause the general requirement is only of 'some' blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong."[112] Judge Rymer, in dissent, argued that the *Rogers* test requirement of "some" blood is not enough.[113] According to Judge Rymer, the quantum of blood must be at the level required by each tribe for enrollment.[114] Under this theory, the dissent implied that

104. State v. Daniels, 16 P.3d 650, 654 (Wash. Ct. App. 2001).
105. United States v. Prentiss, 273 F.3d 1277, 1283 (10th Cir. 2001).
106. Lewis v. State, 55 P.3d 875, 876, 878 (Idaho Ct. App. 2002).
107. *In re* Garvais, 402 F. Supp. 2d 1219, 1223 (E.D. Wash. 2004).
108. *Id.*
109. *Id.* at 1221-22.
110. *Id.* at 1225.
111. 394 F.3d 1215, 1223-26 (9th Cir. 2005).
112. *Id.* at 1223.
113. *Id.* at 1235 (Rymer, J., dissenting).
114. *Id.* at 1235 n.6 ("Whether or not one-eighth blood is sufficient in some cases, there is no evidence in this case that it would suffice for purposes of membership in, or identification with, any relevant tribe.").

an individual must share the same bloodline as the recognizing tribe.[115]

B. The Recognition Prong

A significant quantum of scholarly ink has been spilled criticizing the "vampire" prong of the *Rogers* test.[116] Yet only cursory review has been given to the recognition prong.[117] This section of the Article identifies many overlapping types of fact patterns, showcases factors that courts have considered when assessing the second prong of the *Rogers* test, and illuminates various methods adopted by courts in construing the meaning of recognition. Then, in Part IV, this Article analyzes the original meaning of the recognition prong and the implication of the *Duro*-fix policy as a return to a culturally relevant,[118] socio-political method of recognition.

1. Formal[119] Recognition by an Indian Tribe or the Federal Government

a) Membership *in Tribe Asserting Jurisdiction*

As mentioned in Part III.A., many cases heard by the Supreme Court in the late nineteenth century involved individuals who were ancestrally non-Indian, yet considered to be members of Indian tribes by adoption.[120] The Court made clear that those individuals, though not "racially" Indian as required for criminal jurisdiction under the *Rogers* test, were recognized, nonetheless, as

115. *Id.*

116. *See supra* note 56.

117. COHEN, *supra* note 54, at 2-5; Clinton, *supra* note 91, at 513-20 (analyzing recognition prong); *see generally* Bethany R. Berger, *"Power over this Unfortunate Race": Race, Politics, and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction,* 36 ARIZ. ST. L.J. 77, 111-16 (2004); Christine Metteer, *The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian,* 5 RUTGERS RACE & L. REV. 53 (2003); Snowden et al., *supra* note 56; Brownell, *supra* note 47; Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity,* 4 RACE & ETHNIC ANC. L.J. 7 (1998); Gould, *The Congressional Response*, *supra* note 45; Dussias, *supra* note 25.

118. William C. Wantland, *An Essay: The Ignorance of Ignorance: Cultural Barriers Between Indians and Non-Indians,* 3 AM. INDIAN L. REV. 1, 1 (1975) ("Indians who live in a dominant non-Indian society find it necessary to live in two cultures, that is, we have to be bicultural.").

119. The terms "formal" and "informal" are subjective. The placement of the following cases is therefore meant to facilitate fact pattern comparisons and further analysis.

120. *See supra* notes 49-53, 71-78.

Indian citizens.[121] It was further suggested by the *Rogers* court that Indian status is regarded from the Indian race viewpoint.[122] Recognition as an Indian depended on the usages and customs of all Indians.[123] In other words, pan-Indian culture was the standard by which Indian recognition was to be measured. Once recognized, an Indian would be governed by the usages and customs of their own tribe and other tribes.[124]

i) Recognized as an Indian

Chief Justice Taney noted that William S. Rogers had, in fact, become a formally recognized member of the Cherokee tribe.[125] He had voluntarily moved to Cherokee country with the intent of making it his permanent home and had "incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian."[126] But for Roger's lack of Indian blood, he would have been deemed Indian.

Similarly, in *Ragsdale,* Judge Johnson stated that, under Cherokee laws and usages, Richard Newland was recognized as a citizen of the tribe.[127] Moreover, by his marriage to a Cherokee woman, he was "entitled to all the rights and privileges, civil and political, which belonged to any other citizen of the [Cherokee] Nation."[128] Nearly fifty years later, however, the Supreme Court found that marriage to a freed African-American woman who was a Cherokee citizen did not confer the right to vote or other privileges of Cherokee citizenship on Phil Duncan.[129] Apparently, a Cherokee woman by blood could confer citizenship by marriage, but a non-Indian Cherokee citizen could not.[130] The district court next noted indications that the United States government also

121. *See supra* notes 49-53, 71-78.
122. United States v. Rogers, 45 U.S. 567, 573 (1846).
123. *Id.*
124. *Id.*
125. *Id.* at 572.
126. *Id.* at 571.
127. United States v. Ragsdale, 27 F. Cas. 684, 685 (C.C.D. Ark. 1847) (No. 16,113).
128. *Id.*
129. Alberty v. United States, 162 U.S. 499, 501 (1896).
130. *See also* Nofire v. United States, 164 U.S. 657, 658, 662 (1897); Boff v. Burney, 168 U.S. 218, 223 (1897); Red Bird v. United States, 203 U.S. 76, 78-79, 95 (1906) (holding that marrying a Cherokee Indian by blood prior to 1875 resulted in entitlement to similar citizenship per capita rights as Cherokee Indians by blood, but with other limitations).

recognized Newland's Indian status.[131] Based on his Cherokee membership, Newland had received "transportation money, rations, and a year's subsistence" from the United States government three years after his marriage when the Cherokees were removed to west of the Mississippi.[132]

The Minnesota Supreme Court, in the 1893 *State v. Campbell* case, considered an act of adultery committed within the exterior boundaries of the White Earth Reservation.[133] One defendant, John Belonge, was determined by the court to be an Indian because he lived on the reservation, retained his tribal relations, received annuities from the United States government, and was under the supervision of a government agent.[134] Justice Mitchell noted that the tribe "still retained [its] tribal organization, and w[as] under the care and supervision of the federal government."[135]

In *Nofire,* Justice Brewer explained that white men who were married to Cherokee women were adopted citizens while living in Cherokee country, according to Cherokee law.[136] The Court found that Fred Rutherford not only fit those criteria, but also identified himself as a citizen, voted in a Cherokee election, continued to hold himself out as a Cherokee citizen and was recognized as a citizen by the tribe.[137] Although, under treaties and acts involving the Cherokee Nation,[138] Rutherford was held to be within the jurisdiction of Cherokee Nation courts, his lack of Indian ancestry prevented him from being an Indian under the *Rogers* test.[139]

In 1933, the Montana Attorney General argued that Bud Phelps, convicted of stealing cattle on the Crow Indian Reservation, was not an Indian under the "two elements in the test by which it is determined that an accused is within the exclusive jurisdiction of the courts of the United States; (1) He must be an Indian, that is, of some degree of Indian blood, and (2) he must not

131. *Ragsdale*, 27 F. Cas. at 685.

132. *Id.*

133. 55 N.W. 553, 553 (Minn. 1893).

134. *Id.* at 553-54.

135. *Id.* at 553.

136. 164 U.S. 657, 658 (1897).

137. *Id.* at 660-62.

138. *See* Alberty v. United States, 162 U.S. 499, 502 (citing Cherokee treaty of 1866 and the Act of May 2, 1890, which affirmed Cherokee court jurisdiction in all cases involving only "members of the Nation, by nativity or by adoption").

139. *Compare Nofire*, 164 U.S. at 662, *with Alberty*, 162 U.S. at 500-01 (Because Alberty had no Indian blood, the 1866 treaty with the Cherokee Nation could not prevent his non-Indian status resulting from the *Rogers* holding.).

have been emancipated."[140] The court, however, held that Mr. Phelps was by law an Indian because he was listed on a Crow Indian tribe membership roll approved by the Secretary of the Interior, and he had received annuities and a trust patent of a thousand acres of allotted land. Therefore, Justice Matthews determined that the defendant continued to be "recognized by the tribe and by the government authorities as of the Indian race."[141]

Ex parte Pero[142] is a frequently cited case from the Seventh Circuit decided nearly one hundred years after *Rogers*. In analyzing the question of who is an Indian for purposes of federal criminal jurisdiction, Judge Treanor cited *Rogers* for the proposition that Indian usages and customs define Indian status.[143] As to petitioner, Jerry Pero, a full-blooded Indian, the court found his receipt of allotted lands was not in fee-simple, but was either by means of a trust patent or a patent in fee with restrictions.[144] The court thus held that Pero remained under federal guardianship as an Indian ward of the United States and, contrary to the contention of the warden of the Wisconsin State Prison, had not been emancipated from his tribal bonds.[145]

In 1959, the Washington Supreme Court granted a writ of *habeas corpus* to Agnes Monroe, an enrolled member of the Blackfoot-Cree tribe who pled guilty to being an accomplice in the commission of grand larceny on the Yakama Indian Reservation.[146] In support of Monroe's Indian status, Justice Weaver noted that she had maintained her tribal relations.[147]

The Fourth Circuit, in *United States v. Lossiah,* held that there was sufficient evidence to prove Indian status for purposes of federal jurisdiction when the defendant had three-quarters Eastern Cherokee blood and there was a "certificate of the Tribal Enrollment Officer of the Eastern band of Cherokee Indians that defendant is on Revised Roll No. 3902."[148]

In *United States v. Antelope,* the United States Supreme Court noted that defendants were "enrolled members of the Coeur

140. Brief for Appellant, State v. Phelps, 93 Mont. 277, 19 P.2d 319 (1933) (No. 7,037).
141. *Phelps*, 93 Mont. at 288, 19 P.2d at 321.
142. 99 F.2d 28 (1938).
143. *Id.* at 30.
144. *Id.* at 35.
145. *Id.*
146. *In re* Monroe, 346 P.2d 667, 667 (Wash. 1959).
147. *Id.*
148. 537 F.2d 1250, 1251 (4th Cir. 1976).

d'Alene Tribe and thus not emancipated from tribal relations."[149] Chief Justice Burger, writing for a unanimous court, declined to say whether nonenrolled Indians have Indian status under the Major Crimes Act, but did note *Ex parte Pero*'s holding that enrollment in a recognized tribe is not a *sine qua non* for federal jurisdiction, "at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'"[150] In *United States v. Broncheau,* the Ninth Circuit held that the Major Crimes Act does not require an indictment alleging the Indian to be enrolled.[151] Judge Blaine Anderson cited *Ex parte Pero* and Cohen's 1942 Handbook, among other sources, to support an understanding that "[e]nrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."[152]

In a matter involving two enrolled members of the Menominee Indian Tribe, the Wisconsin Court of Appeals remanded the case to the lower court with instructions for deciding whether Bernard Smith, the party who lived off of the reservation, was a non-Indian.[153] First, the court stated that status as a citizen of a state does not preclude status as an Indian.[154] Next, the court followed the totality of circumstances approach from *State v. Allan,* and mentioned several factors – habits, racial status, and lifestyle – noting that "place of residence could be important evidence of whether Smith has adopted a non-Indian lifestyle."[155] Finally, Judge Cane observed that "the federal policy of promoting Indian self-government is clearest when all components of a transaction are reservation-based."[156]

In *Torres,* the Seventh Circuit held that certificates of tribal enrollment and evidence of dividend payments from the Menominee Tribal Enterprises exclusively to the enrolled members of the Tribe were sufficient, along with evidence of some blood, to support a jury finding of Indian status.[157] The court also approved the following jury instruction:

149. 430 U.S. 641, 647 n.7 (1977).

150. *Id.* (citing *Ex parte* Pero, 99 F.2d 28, 30 (7th Cir. 1938)).

151. 597 F.2d 1260, 1262-63 (9th Cir. 1979).

152. *Id.* ("[E]nrollment has not yet been held to be an absolute requirement of federal jurisdiction. . . . Nor should it be.").

153. Sanapaw v. Smith, 335 N.W.2d 425, 426 (Wis. Ct. App. 1983).

154. *Id.* at 429.

155. *Id.* at 430, *see infra* notes 166-71.

156. *Id.* at 431.

157. 733 F.2d 449, 455-56 (7th Cir. 1984).

> To be considered an Indian, a person must have some degree of Indian blood, and must be recognized as an Indian. In considering whether a person is recognized as an Indian, you may consider such factors, whether a person is recognized as an Indian by an Indian tribe, or society of Indians. Whether a person is recognized as an Indian by the federal government, whether a person resides on an Indian reservation, and whether a person holds himself out as an Indian. It is not necessary that all of these factors be present, rather you as jurors must consider the totality of the circumstances in determining as a factual matter whether each defendant is an Indian.[158]

ii) Not Recognized as an Indian

In 1921, the Ninth Circuit, in *Louie v. United States*, determined that a member of the Coeur d'Alene Tribe of Indians, who had received funds disbursed to tribal members, was a non-Indian because he held a patent in fee to land within the reservation and had been declared competent by an agent of the Department of Indian Affairs.[159] Judge Hunt, writing for the majority, reasoned that Congress, by expressly making fee-simple patent allottees subject to state law, "in a sense, abandoned its guardianship of Louie and has left him subject to all the privileges and burdens of one sui juris."[160] The court indicated that the General Allotment Act was a "radical departure" from prevailing Indian policy, but decided that such intent was made clear by the language of the statute.[161]

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158. *Id.* at 456.

159. 274 F. 47, 48, 51 (9th Cir. 1921).

160. *Id.* at 51.

161. *Id.* The United States Supreme Court, in examining the General Allotment Act (Dawes Act), opined that "[c]itizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection," but held that "the dissolution of the tribal relation was in contemplation" after the title to the land was no longer held by the United States in trust. United States v. Nice, 241 U.S. 591, 598-99 (1916). *See also* State v. Columbia George, 65 P. 604, 609-10 (Or. 1901):

> The intendment of the latter clause is not so clear, but if it be conceded that the purpose therefor[e] is to extend citizenship by the mere act of allotment, without requiring of the allottees the adoption of the habits of civilized life, — about which there is some doubt, — the federal courts seem to have considered that such citizenship is not inconsistent with the continuation of tribal existence, relations, and affiliations. * * * It would seem, therefore, that citizenship, such as extends within the purview of the Daws [sic] act to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes. . . .

In 1929, the Montana Supreme Court considered the case of Louis Monroe, who had been born a member of the Blackfeet tribe and had been a police officer on the Blackfeet Indian Reservation for ten or fifteen years.[162] The court held that Monroe was a citizen of Montana, however, and accountable to its laws because he had been allotted patent in fee land under the 1877 Dawes Act.[163] Chief Justice Callaway wrote that Monroe had lost his Indian status and now "stood in the shoes of a white man" – the "color line ha[ving] faded out."[164] And, in 1954, the California Supreme Court decided that Indian status is lost, for example, if an ethnic Indian takes on "civilized habits" and severs tribal relations or if the individual receives "a conveyance of allotted lands by patent in fee from the federal government."[165]

b) Nonmembership *in Tribe Asserting Jurisdiction*

i) Recognized as an Indian

In *Allan,* the Idaho Supreme Court held that an enrolled member of one tribe is not emancipated merely by virtue of residing on the reservation of a different tribe.[166] Ralph Joseph Allan was an enrolled member of the federally recognized Quinault Tribe of Indians.[167] He had a share of an allotment on the Quinault Reservation, but was living on the Coeur d'Alene Indian Reservation when he allegedly bribed a deputy sheriff of Kootenai County.[168] Chief Justice Donaldson, writing for a unanimous court, applied the totality of the circumstances approach to the recognition prong, as synthesized from case law by Professor Clinton, and decided that "Allan ha[d] not severed his relations with the Quinault Tribe."[169] In a detailed concurring opinion, Justice McFadden noted that "[t]he cases uniformly regard this factual issue [i.e. living off of the reservation, and taking up a non-Indian lifestyle] as pertinent, despite the fact that the reservation system itself imposed a non-Indian lifestyle on many tribes."[170] But where a person maintained tribal relations with any federally recognized

162. State v. Monroe, 83 Mont. 556, 274 P. 840, 841 (1929).
163. *Id.*, 274 P. at 843.
164. *Id.*, 274 P. at 843.
165. People v. Carmen, 273 P.2d 521, 525 (Cal. 1954).
166. State v. Allan, 607 P.2d 426, 429 (Idaho 1980).
167. *Id.* at 428.
168. *Id.* at 427-28.
169. *Id.* at 428-29.
170. *Id.* at 433 n.2 (McFadden, J., specially concurring).

Indian tribe, Justice McFadden found a multitude of cases holding the individual to be an Indian for purposes of criminal jurisdiction as a nonmember Indian guest on another reservation.[171]

ii) Not Recognized as an Indian

Mary Campbell, a defendant in *Campbell* before the Minnesota Supreme Court, was raised on a farm outside the reservation by her white father and an Indian mother "who did not sustain any tribal relations."[172] Campbell married a white man and continued to live in Pine County up until a short time before she committed adultery.[173] The court said without a doubt she was a not a "tribal Indian," even though she had collected one annuity payment as an Indian after moving to the White Earth Reservation.[174]

In *United States v. Heath,* the Ninth Circuit considered whether the federal court had jurisdiction under the Major Crimes Act over a defendant who was stipulated to be an Indian member of the terminated Klamath Tribe of Indians.[175] The language of the Klamath Termination Act related specifically to membership in the tribe and provided that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe."[176] The court decided that terminated Klamath Indians were obviously anthropologically Indian but were no longer afforded Indian status.[177] Judge Jameson, writing for the court, did not address whether the defendant, Betty Jean Heath, might have regained Indian status by becoming an informal member of another tribe – perhaps the Warm Springs Indian Tribe where the act of voluntary manslaughter was committed.[178]

171. *Id.* at 432-33. *See also* United States v. Dodge, 538 F.2d 770, 785-87 (8th Cir. 1976) (recognizing Williams as enrolled nonmember Indian); Means v. Navajo Nation, 432 F.3d 924, 935 (9th Cir. 2005).

172. State v. Campbell, 55 N.W. 553, 554 (Minn. 1893).

173. *Id.*

174. *Id.*

175. 509 F.2d 16, 18 (9th Cir. 1974).

176. *Id.* at 19.

177. *Id.*; *see also* Means v. Navajo Nation, 432 F.3d 924, 934 (9th Cir. 2005) ("*Antelope* suggests that Indians 'emancipated from tribal relations' or whose tribes have been terminated are not subject to the Major Crimes Act even if they are 'racially to be classified as 'Indians.'").

178. *Heath*, 509 F.2d at 17; Clinton, *supra* note 91, at 518 n.75. *Cf. Means*, 432 F.3d at 934 (deciding not to consider whether *Mancari* political status would apply if defendant "had been expelled from or had voluntarily and formally withdrawn from his tribe").

In *Lapier v. McCormick* (*LaPier II*), a Ninth Circuit panel consisting of Judges Wright, Fletcher, and Canby, affirmed a non-Indian status determination of a lower court, but embraced a different analytical framework.[179] The court introduced a "threshold question" that must be answered "yes" to proceed to the recognition prong: is the Indian tribe with which an individual claims an affiliation acknowledged by the federal government?[180] LaPier did not pass the threshold because he only alleged an affiliation with the Little Shell Band of Landless Chippewa Indians of Montana, a tribe not federally recognized.[181] However, the court did not foreclose the argument that LaPier might have claimed an affiliation with the Blackfeet Tribe – on whose reservation the crime occurred – even though he did not have any ancestors from that tribe.[182] Such an approach would treat the *Rogers* prongs as independent; in other words, blood need not be from the recognizing tribe.

2. *Informal Recognition via Significant Contacts*

a) Informal Membership *in Tribe Asserting Jurisdiction*

i) Recognized as an Indian

In *Famous Smith*, the victim, James Gentry, was found by the Supreme Court to be an Indian.[183] First, Justice Brown noted that Gentry had held himself out to be a Cherokee Indian and was so recognized in general.[184] The Court further noted Gentry moved to the Cherokee Nation after living in the Choctaw Nation.[185] Although it is apparent that Gentry was not an enrolled member of the tribe, the Court considered that his father "was recognized as an Indian, and appears to have been enrolled and participated in the payment of 'bread money' to the Cherokees."[186] The evidence cited in opposition to the Indian claim was that Gentry had not been permitted to vote in a Cherokee Nation election and he had

179. 986 F.2d 303, 304 (9th Cir. 1992) [hereinafter *LaPier II*].

180. *Id.* at 304-05. *See* State v. Sebastian, 701 A.2d 13, 24 n.28 (Conn. 1997) (noting list of "Indian tribal entities that have a government-to-government relationship with the United States" was first published by the BIA in 1979).

181. *LaPier II*, 986 F.2d at 306.

182. *Id.* at 306 n.5.

183. Smith v. United States, 141 U.S. 50, 56 (1894) [hereinafter *Famous Smith*].

184. *Id.* at 54.

185. *Id.*

186. *Id.*

lived for an unspecified amount of time outside of Indian country.[187] Any negative inferences based on the voting eligibility, however, were dismissed by the Court because Gentry had not yet fulfilled the six-month residency requirement for voting privileges.[188] Moreover, one of the election judges had expressed confidence that Gentry was a [Cherokee] Indian; the implication being that he was also a citizen of the Nation, since only citizens were allowed to vote.[189] Finally, the Court discussed the effect of Gentry having lived for some time as a resident of the state of Arkansas.[190] There was no evidence of "how he came to live there, under what circumstances, or how long he lived there;" factors the Court said had the tendency of pointing to non-Indian status—either of one who was always a non-Indian or one who had severed his ties to any tribe.[191] The Court held that a person who is an Indian does not lose that status due to temporary residence outside of Indian country when there is no indication of intent to sever the tribal affiliation and the tribe still exists and is recognized by the federal government.[192]

Moore, the other petitioner in *Ex parte Pero*, had his domicile on the Bad River Indian Reservation and actively associated with the reservation Indians, but "had not been enrolled with *any* Indian tribe or on *any* reservation."[193] In Moore's case, the court held that non-enrollment did not bar Indian status.[194] Judge Treanor cited two Eighth Circuit cases and an Indiana case in support of this holding.[195] In dicta, the court stated that enrollment does serve as evidence of Indian status.[196] The court concluded that Moore was an Indian because he was recognized as an Indian and his full-blood mother, half-blood father, and relatives resided on the reservation and were recognized as Indians by other Indians.[197]

187. *Id.* at 54-55.

188. *Id.* at 54.

189. *Famous Smith*, 141 U.S. at 55.

190. *Id.*

191. *Id.*

192. *Id.* (citing Elk v. Wilkins, 112 U.S. 94 (1884)); *see* United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974) (regarding termination of Indian tribe).

193. *Ex parte* Pero, 99 F.2d 28, 30 (1938) (emphasis added).

194. *Id.* at 31.

195. Vezina v. United States, 245 F. 411 (8th Cir. 1917); Sully v. United States, 195 F. 113 (C.C.S.D.S.D. 1912); Doe *ex dem.* LaFontaine v. Avalina, 8 Ind. 6 (1856).

196. *Ex parte Pero,* 99 F.2d at 32.

197. *Id.* at 30-31.

More than one-hundred-forty years after *Rogers*, a federal district court in South Dakota redefined the *Rogers* test by submitting what are now referred to as the *St. Cloud* factors.[198] While the *St. Cloud* factors have been cited on a relatively frequent basis since being published in 1988,[199] only one other court mentioned the factors prior to the enactment of the *Duro*-fix.[200] According to Chief Judge Donald J. Porter:

> In declining order of importance, these factors are:
>
> 1) enrollment in a tribe;
>
> 2) government recognition formally and informally through providing the person assistance reserved only to Indians;
>
> 3) enjoying benefits of tribal affiliation; and
>
> 4) social recognition as an Indian through living on a reservation and participating in Indian social life.
>
> These factors do not establish a precise formula for determining who is an Indian. Rather, they merely guide the analysis of whether a person is recognized as an Indian.[201]

Richard St. Cloud was an enrolled member of a terminated tribe[202] – the Ponca Indian Tribe.[203] St. Cloud moved to the Lower Brule Sioux Indian Reservation, married an enrolled member of that tribe, and had children who were tribal members.[204] After living on the reservation for ten years, he applied for enrollment, but was denied because the Yankton Sioux Tribe's constitution prohibited "[p]ersons who are enrolled with another Tribe of Indians and who have shared as members in allotments of land/or payments, excluding inherited interests, from any other tribe."[205] Because he was not an enrolled member of the Yankton Sioux

198. St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

199. *See, e.g.*, *LaPier I*, 242 Mont. 335, 340-41, 790 P.2d 983, 986 (1990); State v. Hagen, 802 P.2d 745, 748 n.2 (Utah Ct. App. 1990); United States v. Driver, 755 F. Supp. 885, 888-89 (D.S.D. 1991); State v. Perank, 858 P.2d 927, 933 (Utah 1992); United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995); People v. Bowen, Nos. 185415, 189441, 1996 WL 33357554, at *1 (Mich. App. Ct. 1996); State v. Sebastian, 701 A.2d 13, 24 (Conn. 1997) ("The four factors enumerated in *St. Cloud* have emerged as a widely accepted test for Indian status in the federal courts."); State v. Daniels, 16 P.3d 650, 653-54 (Wash. Ct. App. 2001); *see also* United States v. Drewry, 365 F.3d 957, 961 (10th Cir. 2004); United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005).

200. *LaPier I*, 242 Mont. at 340-41, 790 P.2d at 986.

201. *St. Cloud*, 702 F. Supp. at 1461.

202. AMERICAN INDIAN LAW DESKBOOK, *supra* note 3, at 52 (discussing termination); STRICKLAND, *supra* note 17, at 811 (discussing termination).

203. *St. Cloud*, 702 F. Supp. at 1458.

204. *Id.*

205. *Id.* at 1458 n.6.

Tribe, St. Cloud could not vote in tribal elections and was not given a higher priority in tribal employment programs.[206]

Applying its recognition prong factor analysis, the court first stated that enrollment in this case was not determinative of Indian status.[207] The effect of termination was not explicitly included in the factor analysis, rather it was intended to be a separate inquiry.[208] Under the government recognition factor, the court noted that St. Cloud, as a terminated Indian, did not receive general assistance benefits.[209] Moreover, the court discounted benefits, such as federal housing assistance, that St. Cloud had received as a non-Indian living on the reservation while married to an Indian.[210] Next, the court determined that St. Cloud had enjoyed the benefits of tribal affiliation through some job assistance, tribal counseling and alcohol treatment programs.[211] Social recognition as an Indian was the final factor considered by the court.[212] Here, Judge Porter found St. Cloud to be "a member of the Indian community;" a "participa[nt] in Indian social life;" and a self-identified Indian. The fact that St. Cloud was "not at all integrated into non-Indian society" seems to have been viewed as a positive attribute of Indian status for purposes of criminal jurisdiction.[213]

Based on its factor analysis, the *St. Cloud* court concluded that the defendant had a "sufficient non-racial link" to the tribe – presumably the Yankton Sioux Indian Tribe.[214] However, due to the termination of the Ponca Tribe and the fact that St. Cloud's name was listed on the roll of that tribe, the court surmised that the trust relationship between the federal government and St. Cloud had been terminated.[215] In support of that proposition, Judge Porter cited *Heath*, the only court at that time to have considered the issue, and dicta from *Antelope*.[216] The court did not consider the possibility of Indian status resulting from St. Cloud's informal membership in the Yankton Sioux tribe, and the tribe did not intervene on his behalf.

206. *Id.* at 1458.
207. *Id.* at 1461.
208. *Id.* at 1461 n.10.
209. *St. Cloud,* 702 F. Supp. at 1461.
210. *Id.* at 1462.
211. *Id.*
212. *Id.*
213. *Id.*; *see also* Wantland, *supra* note 118, at 4-5.
214. *St. Cloud,* 702 F. Supp. at 1461-62.
215. *Id.* at 1464-65.
216. *Id.* at 1464.

In *Duro v. Reina* (*Duro I*), the Ninth Circuit Court of Appeals did not cite *St. Cloud.* Instead, the court applied the totality of the circumstances approach to the recognition prong.[217] Albert Duro was an enrolled member of the Torrez-Martinez band of Mission Indians and had lived one year on that tribe's reservation.[218] For three-and-one-half months, Duro lived on the Salt River Indian Reservation, during which time he was alleged to have discharged a firearm – a misdemeanor.[219] The shot killed an enrolled member Indian of the Gila River Indian Tribe.[220] The Ninth Circuit held that "extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification."[221] In *Duro I*, the relevant contacts were that "[h]e was closely associated with the [Salt River Pima-Maricopa Indian] Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the [Tribe's] PiCopa Construction Company."[222]

In *United States v. Drewry,* the Tenth Circuit adopted the *St. Cloud* factors in reviewing the sufficiency of evidence supporting a jury finding of guilt on four counts of child abuse.[223] The court found that the United States had proven beyond a reasonable doubt that the tribe recognized the children as Indians.[224] As to the first factor, tribal enrollment, Judge Seymour noticed that the children were officially enrolled in the Comanche Tribe, but that two of the alleged acts had occurred prior to enrollment.[225] Instead of relying on the enrollment factor, the court found evidence sufficient to satisfy a finding of Indian status under the other *St. Cloud* factors.[226] The supporting evidence was as follows: Indian Medical Services provided health care to the children based on an Indian classification; the Comanche tribal chairman had directed that the children be admitted to a summer camp for Comanche children only and had vouched for their status as Comanches; the children attended pow-wows; and, the Tribe's Indian Child Wel-

217. *Duro I*, 851 F.2d 1136, 1144 (9th Cir. 1988).
218. *Id.* at 1138.
219. *Id.*
220. *Id.*
221. *Id.* at 1145.
222. *Id.* at 1144. The PiCopa Construction Company was not restricted to members of the Community. *Id.* at 1138.
223. 365 F.3d 957, 961 (10th Cir. 2004), *vacated on other grounds,* 543 U.S. 1103 (2005).
224. *Id.*
225. *Id.*
226. *Id.*

fare Office had taken custody of the children on the basis of their eligibility as Comanches.[227]

In *Bruce*, a three judge panel of the Ninth Circuit reversed the United States District Court for the District of Montana which had relied on both the lack of enrollment and federal government recognition in determining that Violet Bruce had not met her burden of producing sufficient evidence of her Indian status.[228] Judge Bybee, writing for the majority, held that the second prong of the *Rogers* test does not mandate federal recognition.[229] Citing *United States v. Keys*, *Lewis v. State*, and *Ex parte Pero* for support, the majority affirmed the possibility of informal membership in a tribe.[230] The court found "strong evidence of tribal recognition" in that Bruce was born and resided on the Fort Peck Indian Reservation; she had participated in Indian ceremonies – for example, a sweat lodge ritual; she had received medical care at Poplar Indian Health Services and at the Spotted Bull Treatment Center on several occasions; two of her children were enrolled tribal members; and, most significantly, according to the majority, she had been arrested numerous times and treated as an Indian by tribal authorities.[231]

Judge Rymer dissented in *Bruce* "because until now, no one has ever held that an adult may be an Indian (for purposes of legal status, not for purposes of ethnicity) when she is neither enrolled as a member of a tribe nor eligible for membership, nor entitled to tribal or government benefits to which only Indians are entitled."[232] The dissent described enrollment as the "common thread" of Indian status.[233] Judge Rymer did not think that Bruce's con-

227. *Id.*; *cf.* United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995).

228. 394 F.3d 1215, 1224 (2005).

229. *Id.* at 1225.

230. *Id.* at 1224-25 (citing State v. Keys, 103 F.3d 758, 761 (9th Cir. 1996); Lewis v. State, 55 P.3d 875, 878 (Idaho Ct. App. 2002); *Ex parte* Pero, 99 F.2d 28, 31 (1938)). "The lack of enrollment . . . is not determinative of status . . . . [T]he refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian." *Id.* at 1224 (quoting *Ex parte Pero*, 99 F.2d at 31).

231. *Id.* at 1226-27. Additional facts were that Ms. Bruce "associate[d] with Indian persons," "was married for a time to an Indian," and her mother was an enrolled member of the Turtle Mountain Tribe of Oklahoma. *Id.* at 1231, 1235. According to the dissent, there was no evidence that Ms. Bruce held herself out as an Indian. *Id.* at 1232 (Rymer, J., dissenting).

232. *Id.* at 1231. The effect of the test proposed by the dissent would render moot the first prong of the Rogers test. *See id.* at 1225 (majority opinion).

233. *Bruce*, 394 F.3d at 1232-33 (Rymer, J., dissenting).

tacts with the tribe were significant.[234] Rather, ignoring the spirit of the *Duro*-fix entirely, the dissent noted that Bruce's blood was not the same as the tribe exercising criminal jurisdiction and found her ties to be typical of many non-Indians.[235]

ii) Not Recognized as an Indian

In 1900, a federal circuit court in Washington outlined the prongs of the *Rogers* test, and then narrowed the recognition inquiry to the circumstances of the individual's birth.[236] Judge Hanford, writing for the majority, declared it was common knowledge that some "half-breed[237] children of unmarried Indian mothers never do have the recognition, support, or care from their fathers . . . . They grow up among Indians, and live as Indians, and are as much the subject of governmental concern as Indians full blood."[238] However, in this particular case, the defendant was born off the reservation to a white man and Indian woman married in accordance with the laws of the Washington territory.[239] Although he had lived on the *then* Yakima Reservation for almost twenty years, the court found that his class status was fixed at birth. Thus, the defendant was distinguished as a non-Indian, "as any other civilized people are distinct from savages."[240]

234. *Id.* at 1231-32, 1235.

235. *Id.* at 1235.

236. United States v. Hadley, 99 F. 437, 438 (C.C.N.D. Wash. 1900).

237. A variant of the "half-breed classification" test utilized by the Hadley court was followed by the Montana district court in evaluating a taxation case where the petitioner was born in Indian country to a Canadian Frenchman father and a Piegan Indian mother. United States v. Higgins, 103 F. 348, 349 (C.C.D. Mont. 1900) [hereinafter *Higgins I*]. His mother was adopted into the Flathead Indian Tribe with the consent of the head chief and chiefs of the tribe, and her children were also recognized as members. *Id.* The petitioner, Alexander Matt, thereafter lived on the Flathead Indian Reservation for twenty-six years. Nonetheless, the tax collector of Missoula County claimed that Matt's status must follow that of his father, a white man, since a white man, even if adopted by a tribe, "cannot escape his responsibilities as a white man." *Id.* Judge Knowles, after conducting an extensive review of the recognition of half-breeds by the federal government, held that Matt was an Indian because he was born in Indian country; neither he nor his parents ever severed their tribal relations; he was treated by the government as an Indian, and his father was not shown to be a United States citizen. *Id.* at 349-52; *see also* United States v. Higgins, 110 F. 609, 611 (C.C.D. Mont. 1901) [hereinafter *Higgins II*]. For further discussion of various mixedblood status tests utilized by courts in the nineteenth and earlier twentieth centuries, *see generally* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

238. *Hadley*, 99 F. at 438.

239. *Id.*

240. *Id.*

Similarly, in *United States v. Higgins* (*Higgins II*), Judge Knowles adopted the citizenship by birthplace test for mixed-bloods,[241] and was able to distinguish his *United States v. Higgins* (*Higgins I*) holding in what appears to be a rather absurd result from today's vantage point.[242] Oliver Gibeau, the petitioner, was born in Missoula County to a white father and a Spokane Indian mother.[243] When he was seventeen years old, Gibeau's mother (and later his father) moved with him to the Flathead Indian Reservation, where his mother applied and was admitted as a member of the Nation.[244] Gibeau grew up on the reservation and became chief of the Indian police.[245] The court asked, "[d]id the fact of his going upon the reservation with his mother, and adopting the habits of the Indians, change his status?"[246] The court answered, "By Indian polity he might, by them, be classed as an Indian, but not by the constitution and laws of the United States."[247]

In *Vialpando v. State*, before the Wyoming Supreme Court in 1982, Dennis Vialpando lived on the Wind River Indian Reservation of the Shoshone Tribe for many years, and it was stipulated that he "has been recognized as an Indian by the Shoshone Indian Tribe and others."[248] Vialpando held a non-enrolled Indian fishing permit for the reservation rather than the permit given to non-Indians. In the appendix of stipulated facts attached to the court's opinion and summarized therein, the State conceded: "Dennis Vialpando takes great pride in his Indian ancestry and heritage and in fact this criminal action arose out of his efforts to enforce tribal game and fish regulations against three whites who were fishing on the Wind River Indian Reservation without non-Indian fishing permits."[249] Moreover, his father and paternal grandmother were enrolled members of the Shoshone Indian Tribe; he frequently visited his Indian relatives; he had used his free medical benefits at a BIA health clinic; he attended pow-wows and other Indian cultural events, and brought his children along to help instill an appreciation for Indian heritage.[250]

241. *See supra* note 237.
242. *Higgins II*, 110 F. at 611.
243. *Id.* at 610.
244. *Id.*
245. *Id.*; *cf. In re* Garvais, 402 F. Supp. 2d 1219, 1222 (E.D. Wash. 2004).
246. *Id.*
247. *Id.* at 611.
248. 640 P.2d 77, 81 (Wyo. 1982).
249. *Id.*
250. *Id.*

After reviewing *Ex parte Pero* and subsequent cases, the *Vialpando* court decided to adopt the test of "substantial amount of Indian blood plus a racial status in fact as an Indian;" racial status encompassing recognition by the Indian tribe, society in general, or the federal government. The court reversed the logic of *Ex parte Pero* so as to imply that non-enrollment is evidence of non-Indian status, yet appeared to agree with other courts that no one factor is dispositive.[251] The factors considered by the court were enrollment (and eligibility for enrollment), lifestyle, residence, and employment.[252] Because Vialpando was not enrolled in any tribe nor eligible for Shoshone enrollment and was "employed by drilling companies which 'work all over the eastern and western United States'" (supposedly indicating a non-Indian lifestyle), the court found he was not recognized as an Indian.[253] The court conceded Vialpando did have an Indian lifestyle with respect to recreation and visitation, but dismissed other cultural affiliations, such as those provided by pow-wows, for not being restricted to Indians.[254] In concurring, Justice Rooney stressed that lack of enrollment here was the proper basis for the finding of non-Indian status, and argued that the blood prong should be discarded as racist.[255]

The Montana Supreme Court was the only court to adopt the *St. Cloud* factors prior to the *Duro*-fix legislation.[256] In *LaPier v. State* (*LaPier I*), the court stated that LaPier was affiliated with the Little Shell Band of Landless Chippewa Indians of Montana and the Turtle Mountain Band of Chippewas – with a blood quantum combined from those tribes.[257] Although the crime occurred on the Blackfeet Indian Reservation, the court did not indicate a possible affiliation with the Blackfeet Tribe.[258] Justice Weber, writing for the court, agreed that LaPier's lack of formal enrollment was not dispositive, but also implied it was a significant negative indicator.[259] Moving on to the second *St. Cloud* factor, the

251. *Id.* at 79-80.

252. *Id.* at 80.

253. *Id.* The court equates "racial status in fact as an Indian" with the recognition prong from *Rogers.*

254. *Vialpando*, 640 P.2d at 81.

255. *Id.* at 81-83 (Rooney, J., concurring).

256. *LaPier I,* 242 Mont. 335, 341, 790 P.2d 983, 986 (1990).

257. *Id.*, 790 P.2d at 986.

258. *Cf. LaPier II,* 986 F.2d 303, 306 n.5 (9th Cir. 1992) (observing that LaPier had "abandoned on appeal any argument that he is affiliated with. . . the Blackfeet Tribe of the Blackfeet Reservation of Montana").

259. *LaPier I,* 242 Mont. at 342, 790 P.2d at 987.

court noted that the Indian health service benefits received by LaPier "were not reserved solely for Indians."[260] The court, however, did give weight to the fact that he received educational assistance and attended a college sponsored by the Bureau of Indian Affairs (BIA).[261] The court did not mention anything under the third *St. Cloud* factor ("enjoying benefits of tribal affiliation"), although LaPier's multiple prosecutions in tribal court may be a benefit for those like him who claim Indian status.[262] Facts considered by the court to be relevant to the fourth *St. Cloud* factor were that LaPier lived all of his life off the reservation except for a few summers and one year of high school; he was "employed on an all-Indian fire fighting crew;" he "occasionally played basketball on all-Indian basketball teams;" and he "occasionally attended Browning Indian Days" and Indian "give aways."[263] In conclusion, the court determined that "the record reveals an integration into non-Indian society, and an absence of cultural identity as an Indian."[264]

State ex rel. Poll v. Montana Ninth Judicial District Court is another case arising from the Blackfeet Reservation.[265] The defendant, Don Juneau, had no Indian blood but was adopted by an Indian and spent his entire life on the reservation.[266]

> Don Juneau testified that he is not enrolled as a member of any federally recognized Indian tribe; he does not vote in Indian elections; he does not receive any per capita federal benefits as an Indian; and, he has never held a Tribal office. * * *
> Defendants contend that although Don Juneau is not a tribal member and he has no Indian blood, everything else about his life is Indian; he was adopted by an Indian; attended Indian schools; practiced the Indian religion; participated in tribal customs; married an Indian; has Indian friends; and, has Indian children.[267]

The court nevertheless concluded that the recognition prong was not satisfied due to non-enrollment and ineligibility for federal benefits.[268]

In 1995, a divided Eighth Circuit panel decided *United States v. Lawrence*.[269] The question was whether the alleged victim of

260. *Id.* at 343, 790 P.2d at 988.
261. *Id.*, 790 P.2d at 987-88.
262. *Id.* at 342, 790 P.2d at 987; *see* United States v. Bruce, 394 F.3d 1215, 1226-27 (2005) ("arrested Indian").
263. *Lapier I*, 242 Mont. at 342, 790 P.2d at 987.
264. *Id.* at 343, 790 P.2d at 988.
265. 257 Mont. 512, 513, 851 P.2d 405, 405 (1993).
266. *Id.* at 515, 851 P.2d at 406.
267. *Id.*, 851 P.2d at 407.
268. *Id.*
269. 51 F.3d 150 (8th Cir. 1995).

sexual child abuse was an Indian.[270] The critical facts were that seven months prior to the alleged incident,

> the Oglala Sioux, acting through the tribal court, affirmatively intervened to assume responsibility for the care and protection of this girl. The child had been abandoned in Las Vegas and had subsequently been relegated to a shelter there. Acting at the request of the child's grandmother, who was unable to act herself on behalf of the child, the tribe asserted its right of intervention under 25 U.S.C. § 1911 and acquired jurisdiction over the custody proceedings. The Oglala Sioux tribal court exercised its authority to make the girl a ward of the court and she was moved from Nevada to the Oglala Sioux reservation. The tribal court then placed her in the care of her grandmother.[271]

The majority categorized the tribal court's involvement under the third *St. Cloud* factor: "enjoyment of the benefits of tribal affiliation."[272] In this situation, however, the court did not think the tribe's actions rose to the level of recognition.[273] The dissenting opinion chastised the lower court for "trivializ[ing]" the tribal court's choice "to cloak this girl in the security of a wardship."[274] The dissent also took issue with the *St. Cloud* factors' narrow designation of tribal enrollment as the sole means of official tribal recognition.[275] Judge McKay opined: "The majority, although attributing some importance to the actions of the tribal court, minimizes their significance by relegating its consideration of those actions to the third (and third least important) prong of the framework suggested in *St. Cloud v. United States*."[276]

In the *In re Garvais* case, mentioned at the beginning of this Article, Senior United States District Judge Quackenbush concluded that Duane Garvais was not subject to the criminal jurisdiction of the Spokane Tribal Court;[277] finding that:

> Garvais' connections to Indian life were for a limited duration. He was never regarded by members of either the Spokane or Colville Tribes as being an enrolled member of any Tribe. He was only regarded as one who had Indian blood by reason of being a descendant of an Indian.[278]

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270. *Id.* at 152.

271. *Id.* at 154-55 (McKay, J., dissenting).

272. *Id.* at 153 (majority opinion).

273. *Id.*

274. *Id.* at 155 n.2 (McKay, J., dissenting).

275. *Lawrence*, 51 F.3d at 155 n.1.

276. *Id.* at 155; *cf.* United States v. Drewry, 365 F.3d 957 (10th Cir. 2004) (finding tribal recognition of children under lesser *St. Cloud* factors).

277. *In re* Garvais, 402 F. Supp. 2d 1219, 1226 (E.D. Wash. 2004).

278. *Id.*

In re Garvais illustrates the ambiguities of the *Rogers* test, and it illuminates the clash between narrow notions of political consent and cultural forms of group identity. As a non-enrolled individual, Garvais was not eligible to vote in Spokane tribal elections or receive tribal per capita payments.[279] He did not have Spokane tribal rights to hunt or fish, but, as a descendant of an enrolled Colville member, he occasionally received medical care at the Colville Tribal Health Service.[280] Garvais' ex-wife testified that he had participated in Indian activities such as Indian basketball games and pow-wows.[281] His connections to Indian spirituality included sweathouse use and "possession of a sacred Indian feather in his truck."[282] Garvais lived on the Spokane Indian Reservation for nineteen months while employed as a BIA police officer.[283] And, on his BIA employment application, Garvais stated: "I am pending enrollment with the Assiniboine tribe in the near future with a documented blood degree of 5/8."[284] Importantly, although the Spokane Tribe knew that Garvais was not an enrolled or recognized member of any other tribe, it allegedly recognized him to be an informal member Indian within the criminal jurisdiction of the Spokane Tribe.[285] Nonetheless, according to the United States District Court for the Eastern District of Washington, Garvais was not an Indian.[286]

b) Nonmembership *in Tribe Asserting Jurisdiction*

In *State v. Hagen*, Robert P. Hagen was convicted of selling marijuana within the exterior boundaries of the Uintah and Ouray Indian Reservation.[287] Hagen was not an enrolled member of any tribe, but he testified to being "a *member* of the Little Shell Tribe of Chippewa Indians."[288] Hagen further testified "that he has lived on Indian reservations all his life, that he has attended reservation school and been treated at reservation hospitals, . . . [and] that he had received proceeds from a judgment entered in favor of various bands of the Chippewas pursuant to a distribution

279. *Id.* at 1222.
280. *Id.*
281. *Id.* at 1223.
282. *Id.*
283. *In re* Garvais, 402 F. Supp. 2d at 1222.
284. *Id.*
285. *Id.* at 1222, 1226.
286. *Id.* at 1226.
287. 802 P.2d 745, 746 (Utah Ct. App. 1990) (reversed on other grounds).
288. *Id.* at 747 (emphasis added).

made by the Bureau of Indian Affairs. . . ."[289] Judge Orme, writing for a unanimous court, concluded there was "simply no way" that Hagen was recognized as a non-Indian.[290]

3. *Informal Recognition in Absence of Significant Contacts*

a) *Recognized as an Indian*

In *United States v. Dodge,* the Eighth Circuit employed the *Rogers* test in determining both appellants to be Indian under the Major Crimes Act with respect to crimes committed on the Pine Ridge Indian Reservation during the occupation of Wounded Knee.[291] One appellant, Manuel M. Alvarado, applied three-and-a-half years earlier to be entered on the judgment rolls of California as a member of the Yurok Tribe, and claimed to know the number of his previous entry on a judgment roll in 1950.[292] The court implied that recognition by the federal government was possible because Alvarado had held himself out as an Indian eligible for enrollment. (Another appellant, Terry Gene Williams, was an enrolled member of the Pawnee Tribe.)[293] The *Dodge* court was the first court after the passage of the 1924 Citizenship Act[294] to expressly include federal government recognition in the second prong of the *Rogers* test, in addition to tribal recognition.[295] For support, Judge Heaney cited the now controversial 1958 version of Felix S. Cohen's Handbook of Federal Indian Law which had been revised to present a viewpoint more favorable to the federal government.[296] The 1982 and 2005 editions agree, in line with *Ex parte Pero* and modern opinions, that the *Rogers* test recognition

289. *Id.*

290. *Id.*

291. 538 F.2d 770, 785-87 (8th Cir. 1976).

292. *Id.*

293. *Id.*; *cf.* State v. Allan, 607 P.2d 426 (Idaho 1980) (similarly involving formally recognized nonmember Indian); *supra* notes 166-71.

294. *Dodge*, 538 F.2d at 785-87; United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979) (citing *Dodge*, 538 F.2d at 786) was the first Ninth Circuit opinion to add governmental recognition to the *Rogers* test.

295. 8 U.S.C. § 1401(b) (2000).

296. *See* Joseph F. Rarick, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition,* 11 AM. INDIAN L. REV. 85, 85 (1986) (book review) ("The 1958 book is a self-confessed product of the switch of congressional policy from tolerance to termination. . ."). The so-called "Bennett Handbook" of 1958, named after another Solicitor for the Department of Interior, was meant to "foreclos[e], if possible, further uncritical use of the earlier edition by judges, lawyers, and laymen." BENNETT, *supra* note 54, at 1. *See also* STRICKLAND, *supra* note 17, at ix ("The 1958 edition did not reflect Felix Cohen's work. Many of Cohen's carefully considered conclusions were discarded.").

prong does not require federal recognition. The original Handbook published in 1942, however, does cite a pre-1924 Act case for the proposition that "[w]ithin the meaning of those various statutes which though applicable to Indians do not define them . . . courts have heeded both recognition by the tribe or society of Indians and recognition by the Federal Government as expressed in treaty and statute."[297]

The locus of the crime in *United States v. Pemberton* was the Red Lake Indian Reservation, where Arnold Pemberton was born, attended primary and secondary school, and continued to live.[298] Although Pemberton "was not an enrolled member of any tribe," he testified to being an Indian.[299] Judge Bye's unanimous opinion found sufficient evidence of Indian status because Pemberton held himself out to be Indian (and was of Indian blood).[300]

b) Not Recognized as an Indian

In 1887, the California Supreme Court, in *People v. Ketchum*, adjudged that Ketchum, a full blooded Indian, was not legally an Indian.[301] There the defendant did not appear to be recognized as a member of any Indian tribe, and the tribe of his ancestors was not recognized by the government.[302] Moreover, "it appeared that he had lived among the whites for several years. Ketchum had his own cabin, and about three acres of land around it, which he cultivated, and on which he raised vegetables."[303]

In 1901, the Washington Supreme Court considered the case of *State v. Howard,* involving a conviction for manslaughter occurring on the Puyallup Indian Reservation.[304] The evidence did not show that Howard had ever lived on the reservation, but he did appear to have attended the Puyallup Indian school.[305] There was also no evidence that Howard had ties to his parents' tribes.[306] For

297. COHEN, *supra* note 54, at 3.
298. 405 F.3d 656, 658-59 (8th Cir. 2005).
299. *Id.* at 658.
300. *Id.* at 660. The rendition of the *Rogers* rule in *Pemberton* is problematic because the Court, perhaps unintentionally, implies that enrollment equals recognition and that the Court must go beyond the recognition prong for other indicia of recognition and self-identification.
301. 15 P. 353 (Cal. 1887).
302. *Id.*
303. *Id.*
304. 74 P. 382, 383 (Wash. 1903).
305. *Id.*
306. *Id.*

several years prior to the criminal act, Howard lived with his family apart from any tribe, and worked for the Gentry Bros.' show.[307] The court held that the defendant had not demonstrated sustained tribal relations and thus the state court had jurisdiction over him as a non-Indian.[308] Judge Hadley, writing for the majority, further analyzed whether the Major Crimes Act applied to all Indians by ancestry or only to tribal Indians.[309] First, it was noted that the language from *United States v. Kagama* inferred "that the offending Indian shall belong to that or some other tribe."[310] Next, the court acknowledged it had not found any cases wherein an Indian by blood with no tribal relations had been tried under the Act.[311] The court concluded that "an Indian who is not allied with any tribe" is no longer a subject of federal guardianship.[312]

In *People ex rel. Schuyler v. Livingstone*, in which an Oneida descendant committed a crime on the Onondaga Reservation, a lower court of New York cited a rule that "the status of an Indian may be proved by general reputation or his residence upon a reservation."[313] The court then proceeded to find the defendant, who had lived on and off the Onondaga Reservation for thirty-three years, to be treated as a non-Indian for the purpose of state jurisdiction.[314] Judge Cheney labeled Rosanna Schuyler a "sojourning Indian" who was not a member of the Onondaga tribe.[315]

In *State v. Attebery,* the defendant was a Cherokee Indian by ancestry but his only association with an Indian tribe was when, many years earlier, he lived for three months on the Apache Reservation.[316] The Arizona Supreme Court noted that the defendant's father resided on a Cherokee reservation; however, this was weighed against the fact that the father had never lived on the Gila River Indian Reservation where the crime occurred.[317] The

307. *Id.* at 383-84.

308. *Id.* at 384.

309. *Id.* at 384-85.

310. *Howard*, 74 P. at 384 (quoting United States v. Kagama, 118 U.S. 375, 383 (1886)).

311. *Id.* at 385.

312. *Id.*

313. 205 N.Y.S. 888, 889-90 (N.Y. Sup. Ct. 1924) (citing Charbonneau v. DeLorimier, 8 Que. Pr. 115).

314. *Id.* The Onondagas are one of the Six Nations in New York State. *Id.* at 891.

315. *Id.* at 894. *But cf.* State v. Allan, 607 P.2d 426, 433 (Idaho 1980) (McFadden, J., concurring) (distinguishing *Schulyer* on basis of the "very unusual relationship between the state of New York and the Odondagas and Oneidas").

316. 519 P.2d 53, 54 (Ariz. 1974).

317. *Id.*

court held that the defendant was a non-Indian under the second prong of the *Rogers* test.[318]

In *State v. Bonaparte,* the Idaho Court of Appeals focused on recognition of Indian status by the federal government because there was no evidence supporting tribal recognition.[319] Incidentally, the court noted that under the Idaho Supreme Court's holding in *Allan,* "Bonaparte would have been entitled to recognition as an Indian had he been a member of any tribe, regardless of the reservation on which he resided."[320] As to the claim of federal government recognition, the court evaluated eligibility for social programs and the treatment of descendants of enrolled tribal members under the Indian Reorganization Act (IRA) of 1934.[321] Judge Burnett opined:

> [T]he criteria governing social program eligibility do not embody the objectives of criminal jurisdiction. Neither do we construe the IRA to place the imprimatur of Indian status, for criminal jurisdiction purposes, upon all present-day "descendants" residing on reservations, irrespective of their degree of Indian blood or their lack of tribal recognition.[322]

Since Douglas Bonaparte was not an enrolled member of any tribe, was not eligible for enrollment in the Nez Perce Tribe with which he alleged an affiliation, and there was no "substantial indicia of federal recognition," the court determined he was non-Indian.[323] Judge Burnett, in dicta, concluded that the frequent federal court refrain – that non-enrollment is not a factor dispositive of Indian status for criminal jurisdiction – suggests "a mistaken enrollment does not confer federal jurisdiction."[324] Moreover, he posited that an unreasonable denial of recognition by a tribe, as opposed to the simple lack of recognition in the instant case, would not bar federal jurisdiction.[325]

In *United States v. Driver,* Judge Porter had another opportunity to employ his *St. Cloud* factors.[326] As to the first factor, the court stated that the defendant's eligibility for enrollment was not a consideration.[327] The only corroborated evidence of government

318. *Id.*
319. 759 P.2d 83, 85 (Idaho Ct. App. 1988).
320. *Id.* at 85 n.1 (citing *Allan*, 607 P.2d at 426).
321. *Id.* at 85.
322. *Id.*
323. *Id.* at 85-86.
324. *Id.* at 86.
325. *Bonaparte*, 759 P.2d at 86.
326. 755 F. Supp. 885, 888 (D.S.D. 1991).
327. *Id.*

assistance was that Driver once received medical treatment available to enrolled members, such as his father, and Driver's children.[328] Finally, in regard to the third and fourth factors, the court decided that Driver's "sporadic visits" to the reservation "did not rise to the level of enjoying 'the benefits of tribal affiliation' or 'living on the reservation and participating in Indian social life.'"[329]

In *Lewis*, the Idaho Court of Appeals alluded to the *St. Cloud* factors as requiring "significant affiliation" rather than "minor contacts with the reservation and tribes."[330] Lewis was not enrolled in any tribe.[331] His contacts with the Fort Hall Indian Reservation (where the crime occurred) entailed living on the reservation when he was a young child; having a brother and sister who were enrolled members; co-owning some property on the reservation; and once attending the Shoshone-Bannock Indian festival as a child.[332] Judge Lansing determined that the defendant was a non-Indian on account of the absence of any significant contacts: Lewis did not apply for tribal enrollment nor express an interest in doing so prior to his criminal conviction; he maintained no tribal relations nor significant contact with his relatives; he did not participate in tribal activities other than the one-time festival visit; he had no record of reservation employment; he did not seek any federal benefits available for Indians; and he had no personal contact with Indian religions.[333]

C. *Various Interpretations of the* Rogers *Test*

It is evident from a chronological view of twentieth century cases exhibited above that the pendulum has swung from an emphasis on social recognition to political recognition[334] of Indian

328. *Id.* at 888-89, 889 n.9.

329. *Id.* at 889.

330. 55 P.3d 875, 878 (Idaho Ct. App. 2002). The Idaho Court of Appeals applied a clear-error standard of review. *Id. But see* United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005) (applying de novo standard of review).

331. *Lewis*, 55 P.3d at 878.

332. *Id.*

333. *Id.*

334. *See Means*'s characterization of Indian status as requiring political recognition: "Taken together, the 1990 Amendments, the Major Crimes Act, and *Antelope* mean that the criminal jurisdiction of tribes over 'all Indians' recognized by the 1990 Amendments means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." Means v. Navajo Nation, 432 F.3d 924, 930 (9th Cir. 2005) (referring to United States v. Antelope, 430 U.S. 641 (1977)).

status.[335] This shift in common law stems from congressional policies of assimilation and termination, the notion of dual allegiances resulting from *United States v. Nice*[336] and the Citizenship Act of 1924, and courts' growing sensitivity to perceived racism[337] and equal protection concerns.[338] Although there has always been a quasi-political element to the *Rogers* test, status prior to 1916 was generally made plain by the rigid constraints of single citizenship.[339] The path for an Indian to become a citizen of the United States involved the severing of tribal relations, and the steps taken were not to be lightly inferred. Thus, until the Citizenship Act, Indian status often precluded the possibility of United States citizenship.

Felix Cohen described the courts' pre-1924 analysis of the Indian status recognition prong as "heed[ing] both recognition by the tribe or society of Indians and recognition by the Federal Government as expressed in treaty and statute."[340] The treaties and statutes referred to were those recognizing mixed-blood individuals as Indians, since courts were reluctant to hold that a person was deprived by birth of the privileges and benefits of United States citizenship.[341]

The role of the federal courts in the aftermath of the Dawes Act can be characterized as protecting Indian status from states eager to assert state sovereignty over patent-in-fee Indians. Hence, recognition by the federal government was construed by federal courts to affirm Indian status. All inferences were to be drawn to the benefit of finding continued federal guardianship over the individual.[342]

With the Congressional policy change toward fostering tribal government, signaled by the Indian Reorganization Act of 1934,[343] and the concept of tribal rolls carried over from the Dawes Act,[344] the stage was set for using formal enrollment as the courts' pri-

335. *See supra* Part III.B.

336. 241 U.S. 591 (1916).

337. *See, e.g.*, Vialpando v. State, 640 P.2d 77, 81 (Wyo. 1982) (Rooney, J., concurring).

338. *See, e.g.*, United States v. Bruce, 394 F.3d 1215, 1234 (9th Cir. 2005) (Rymer, J., dissenting).

339. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 3, at 26-27, 30-31.

340. COHEN, *supra* note 54, at 3.

341. *Id.* at 3 n.14.

342. *See supra* text accompanying notes 143-44.

343. DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 187-88 (5th ed. 2005) [hereinafter GETCHES ET AL., CASES AND MATERIALS].

344. *Id.* at 141.

mary tool under the *Rogers* recognition prong. In his 1976 article on criminal jurisdiction, Professor Clinton may have been reacting to the "enrollment as recognition" trend[345] by restating the *Rogers* test with an emphasis on social recognition.[346] The *Dodge* Court, two years later, dropped the reference to recognition by treaty and statute,[347] and simply phrased the recognition prong as "recognition by a tribe or society of Indians or by the federal government."[348] With courts favoring brevity, *Dodge* became an oft-cited rule. Both the Strickland version of Cohen's *Indian Law Handbook* and the Canby *Nutshell* sought to restore the *Rogers* second prong to "an Indian must be regarded as an Indian by his or her community,"[349] but those efforts do not appear to have corrected the not-so-innocent detour from the well-established path of the *Rogers* test. The unintended consequence of *Dodge* is a judicial focus on tribal rolls, which embody the politics of conquest, not necessarily the politics of Indian tribes.

The Supreme Court catalyzed an even greater emphasis on the political aspects of recognition with its *Mancari* and *Antelope* opinions. As Professor Clinton's *Jurisdictional Maze* article went to press, the editors noted:

> Part 3 of the Court's opinion [in *Antelope*], in suggesting that the jurisdictional term "Indian" is not a racial classification, seems to approve in dicta a definition which is not solely based on racial ancestry and social recognition, as suggested herein, but which also requires some political and legal recognition of the tribe of the defendant by the federal government.[350]

Responding to footnote seven of *Antelope*,[351] the Eighth and Ninth circuits in *St. Cloud*[352] and *LaPier II*,[353] respectively, incorporated federal recognition of the tribe as an addition to the *Rogers* test.

Counsel for Duane Garvais sought to further embellish the *Rogers* test by inserting the federally-recognized tribe require-

345. Enrollment or eligibility for enrollment is advocated by Judge Rymer as the bright line test for avoiding equal protection concerns arising from the blood prong. United States v. Bruce, 394 F.3d 1215, 1233-34 (9th Cir. 2005) (Rymer, J., dissenting).

346. Professor Clinton further wrote: "Recognition might be by society as a whole." But there is little support for that proposition. *See* Clinton, *supra* note 91, at 516 (citing People *ex rel.* Schuyler v. Livingstone, 205 N.Y.S. 888 (Sup. Ct. 1924)).

347. *See supra* text accompanying notes 340-42.

348. United States v. Dodge, 538 F.2d 770, 786 (1976) (citing BENNETT, *supra* note 54, at 8); *see supra* note 296 for discussion of this edition, the "Bennett Handbook."

349. CANBY, *supra* note 33, at 7; STRICKLAND, *supra* note 17, at 20.

350. Clinton, *supra* note 91, at 576 (editors' note).

351. 430 U.S. 641, 646 n.7 (1977).

352. 702 F. Supp. 1456, 1464 (D.S.D. 1988).

353. 986 F.2d 303, 306 (9th Cir. 1993).

ment into each of the *Rogers* prongs.[354] In other words, to achieve Indian status, an individual must have blood from a federally recognized tribe and be recognized as a member of a federally recognized tribe.[355] The Spokane Tribe argued in reply that no case has mandated full incorporation for equal protection purposes.[356] "A full incorporation would have the effect of diluting the ability of tribal courts to establish jurisdiction over persons who have clearly consented to tribal laws, simply because the tribe has not endeavored to classify the person as a member of a particular tribe."[357] The Spokane Tribe offered that federal recognition of the tribe should be incorporated either as a threshold question relative to the individual's claimed affiliation or by partially incorporating it into the blood prong of the *Rogers* test.[358]

A universe of eight possible combinations may exist within the *Rogers* framework, assuming that the tribe asserting jurisdiction is federally recognized:

	Blood Prong	+	Recognition Prong
1)	Indian Blood in General (IBG)	+	Recognized as an Indian in General (RIG);
2)	IBG	+	Member of Tribe Asserting Jurisdiction (MTAJ);
3)	IBG	+	Member of Specific Other Federally Recognized Tribe (MSOFRT);[359]
4)	IBG	+	Member of Specific Other Tribe Not Federally Recognized (MSOTNFR)
5)	Federally Recognized Indian Blood (FRIB)	+	RIG;
6)	FRIB	+	MTAJ;

354. Petitioner's Response to Spokane Tribe's Position Paper Pursuant to Court Order of September 8, 2004 at 9-10, *In re* Garvais, 402 F. Supp. 2d 1219 (E.D. Wash. 2004) (No. CS-03-0291-JLQ).

355. A list of tribes that are not federally recognized is available at http://www.kstrom.net/isk/maps/tribesnonrec.html (last visited Apr. 26, 2006). For federally recognized tribes, *see* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs Notice, 70 Fed. Reg. 17,193 (Nov. 25, 2005), *available at* http://factfinder.census.gov/home/aian/indian_entities_11-25.pdf.

356. Spokane Tribe's Reply Pursuant to Court Order of September 8, 2004 at 12, *In re* Garvais, 402 F. Supp. 2d 1219 (E.D. Wash. 2004) (No. CS-03-0291-JLQ).

357. *Id.*

358. *Id.* at 11-12.

359. Note that this interpretation has the same effect as the *Lapier II* threshold inquiry of federal recognition of the tribe of claimed affiliation.

7) FRIB + MSOFRT;
8) FRIB + MSOTNFR.

Combinations 1 and 5 were espoused by the Spokane Tribe. Only combinations 5, 6 and 7 would be acceptable according to attorneys for Garvais. The Washington Court of Appeals has expressly endorsed adding the federally recognized tribe requirement to the second prong – encompassing combinations 2 and 3.[360] Judge Rymer's dissent in *Bruce* argued that only combinations 6 and 7 are satisfactory, and would further require that the blood quantum be at the level necessary for enrollment in a federally recognized tribe.[361] *Means v. Navajo Nation* suggests disapproval of combinations 1, 4, and 8.[362]

To further complicate matters, it is not clear whether the blood and recognition prongs are dependent or independent variables. Some courts have implied that the less Indian blood in an individual, the greater the presumption he or she is not recognized as an Indian.[363] Finally, in *State v. Daniels,* where the state conceded defendant's Canadian Indian status, Judge Brown held that defendant's "Canadian nationality does not divest him of his racial identity."[364] Does this suggest that ancestry may be traced to any tribe existing in the Americas prior to the period of discovery by Europeans?[365] What if the non-Indian Peruvian in *Lewis*[366] had had South American Indian blood?

IV. CONGRESSIONAL CALIBRATION OF THE *ROGERS* TEST

The Rehnquist Court has been described by one scholar as attempting to harmonize federal Indian law and the general law via a "dormant plenary power impulse."[367] The most recent legislative response to counter and restrain the Court's impulse was the

360. State v. Daniels, 16 P.3d 650, 654 (Wash. Ct. App. 2001).

361. United States v. Bruce, 394 F.3d 1215, 1234-36 (9th Cir. 2005) (Rymer, J., dissenting).

362. 432 F.3d 924, 934 (9th Cir. 2005).

363. *See supra* text accompanying note 110.

364. *Daniels*, 16 P.3d at 654. Mr. Daniels claimed that his "father's people followed Sitting Bull into Canada." *Id.* at 651.

365. *Compare* COHEN, *supra* note 54, at 2 ("[t]hat some of his ancestors lived in America before its discovery by the white race") *with* NEWTON, *supra* note 45, at 171-72 ("that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans").

366. Lewis v. State, 55 P.3d 875, 877 (Idaho Ct. App. 2002).

367. Frickey, *supra* note 19, at 79; *see generally* Getches, *Beyond Indian Law*, *supra* note 18.

Duro-fix.[368] The conference committee report reads, in pertinent part:

> Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members. Instead, the Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally-administered programs and services are provided to Indian people because of their status as Indians without regard to whether their tribal membership is the same as their reservation residence. *The issue of Who is an Indian for purposes of Federal law is well-settled as a function of two hundred years of Constitutional and case law and Federal statutes.*[369]

Yet no court, in deciding who is Indian for purposes of criminal jurisdiction, has considered the effect of the *Duro*-fix.[370] Instead, the judiciary has moved far afield from the general principles established over the last two hundred years. Some courts have readily accepted *St. Cloud's* narrowing of the Indian status inquiry, even though *St. Cloud* compromises the *Rogers* test by emphasizing enrollment[371] and introducing a hierarchy that was not well-settled when Congress used its plenary powers to rewrite the Court's narrow view of Indian history and government in *Duro II*.[372]

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368. *See supra* notes 44-46 and accompanying text.

369. H.R. REP. NO. 102-61, at 5 (1991) (Conf. Rep.) (citing H.R. REP. NO. 101-938, at 132 (Conf. Rep)) (emphasis added).

370. The only observation by the *Bruce* Court was that the definition of "Indian" in the ICRA seems to beg the question. 394 F.3d 1215, 1223 n.4 (9th Cir. 2005). The court failed to consider the legislative context of the *Duro*-fix and its objectives. Judge Rymer, dissenting, relied on the Supreme Court's dismissal of the contacts test without examining the implications of the *Duro*-fix. *Id.* at 1234-35 (Rymer, J., dissenting).

371. If federal definitions referencing tribal membership are interpreted to require formal enrollment, they may exclude some non-enrolled individuals who are acknowledged participants in their tribal communities. For example, an individual may speak the language, participate in religious ceremonies, and be the child of an enrolled member. But if that particular tribe reckons membership through a person's mother, and the parent who is an enrolled member is the person's father, that individual may not be eligible for formal enrollment. In fact, the concept of formal enrollment has no counterpart in traditional tribal views of membership. NEWTON, *supra* note 45, at 179.

372. The field of Indian law has an historical, as well as a contemporary, dimension. In the two centuries of our national existence, Indians and Indian tribes have undergone profound changes in living habits, institutions, needs, and aspirations. Those changes are perhaps more pronounced than the differences that separate Anglo-American society from the ages for which Hammurabi, Moses, Lycurgus, or Justin-

Now that the *Lara* Court has validated the inherent tribal sovereignty over all Indians as expressed in the *Duro*-fix,[373] lower courts should be mindful of Congressional intent and wary of precedent that does not consider Congress' restoration of significant contacts within the second prong of the *Rogers* test. In particular, when addressing the *Rogers* prongs in light of the *Duro*-fix, courts should not deviate from the canon of statutory construction that resolves all ambiguities in favor of Indian sovereignty.[374] In doing so, courts will be better equipped to avoid repeating past misinterpretations of the federal-tribal relationship.[375] Furthermore, courts should apply the *Duro*-fix policy in the form of significant contacts[376] so as to broaden the conception of membership to include *de facto* membership and thus help avoid unconstitutional applications of the ICRA amendment.[377] Finally, state and federal courts should be aware of tribal court interpretations of Indian status and consider the doctrine of comity now that the *Duro*-fix has imposed the *Rogers* framework on both tribal and non-tribal courts.

A. The Prongs

It is well-settled that the *Rogers* test contains an ancestry or blood prong.[378] One scholar cites *Nofire*[379] for the proposition that blood need not be a consideration,[380] but the *Rogers* line of cases does not support that interpretation, and the legislative history of the *Duro*-fix clearly contemplates that the blood prong would be the primary "racial" separator of Indians and non-Indians. Self-described Indian-fighter Senator Slade Gorton's[381] main concern

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ian legislated. Telescoped into a century and a half, therefore, one may find changes in Indian social, political, and property relations that are at least as great as the evolution of thirty centuries of European civilization.

STRICKLAND, *supra* note 17, at 2.

373. 25 U.S.C. § 1301 (2006).

374. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 608-19 (1975), *reprinted in* GETCHES ET AL., CASES AND MATERIALS, *supra* note 343, at 127-29.

375. *See, e.g.*, *Duro II*, 495 U.S. 676 (1990).

376. The Supreme Court dismissed the Ninth Circuit's contacts analysis; Congress, by implication, rehabilitated it in the *Duro*-fix, 25 U.S.C. § 1301 (2000). *See infra* Part IV.B.

377. *See, e.g.*, United States v. Keys, 103 F.3d 758 (9th Cir. 1996).

378. *See* United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005).

379. Nofire v. United States, 164 U.S. 657 (1897).

380. *See* Clinton, *supra* note 91, at 516 n.60.

381. Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 17 (2004) (citing Lewis Kamb, *Tribes Flex Growing Muscle at Ballot Box: 'Great*

was to prevent the *Duro*-fix from subjecting no-bloods to tribal courts by blurring the legal boundary between Indians and non-Indians.[382] While the *Duro*-fix may be racist – its constitutional Achilles' heel – there is no doubt that the ancestry element presents a bright-line way to exempt from tribal criminal jurisdiction all but those who have Indian ancestors.

The majority rule from the case law discussed in Part III shows that the prongs are not intended to be weighted. And the blood prong is either satisfied or not. Given the high rate of intermarriage in Indian culture,[383] blood quanta of less than one-eighth should not be viewed as unusual by the courts. Moreover, an individual's blood need not share the "blood-type" of the recognizing tribe.[384] *Rogers* expressly referred to the "family of Indians" and "the race generally."[385] By intending to affirm Indian tribal power over all Indians, the *Duro*-fix is in accord. After *Mancari*, however, it is unclear whether blood must be from a federally recognized tribe;[386] arguably, given the absence of such judicial law-making prior to the *Duro*-fix, the intent of Congress was that it does not.

Next, the recognition prong is not the proper place for the federal recognition threshold question establishing the special relationship and responsibility of the federal government to the tribe.[387] The recognition is of the Indian, not the Indian tribe. The tribe exercising jurisdiction, however, must be federally recognized. Thus, if an individual is not affiliated with another federally recognized tribe, the tribe exercising criminal jurisdiction may prove that it recognizes the individual as an informal member.[388] Otherwise, the inherent sovereignty to prosecute a non-member Indian might violate equal protection in the absence of substantial indicia of federal recognition.

Victory' over Gorton in 2000 Points the Way, SEATTLE POST-INTELLIGENCER, Mar. 9, 2004, at A1).

382. *Id.*

383. *See* Gould, *Mixing Bodies*, *supra* note 30, at 757-59.

384. STRICKLAND, *supra* note 17, at 23 n.27.

385. United States v. Rogers, 45 U.S. 567, 573 (1846).

386. *See* United States v. Bruce, 394 F.3d 1215, 1234 (9th Cir. 2005) (Rymer, J., dissenting).

387. *Id.* at 1224-25 (majority opinion) ("Nor have we required evidence of federal recognition. Rather, we have emphasized that there must be some evidence of government or *tribal* recognition.").

388. "Informal member" may also be referred to as a "de facto member." United States v. Keys, 103 F.3d 758, 760 (9th Cir. 1996).

The term "member" itself does not mean that the individual is enrolled or eligible for enrollment.[389] As the Ninth Circuit acknowledges, "Enrollment is not the only means to establish membership in a tribal political entity."[390] Thus, in theory, an Indian could be a member of several tribes just as Indians possess multiple citizenships as federal, state, and tribal citizens today. For example, an Indian could be an enrolled member of one tribe, and enjoy per capita payments and other privileges of that tribe, while residing as a non-dividend member on another tribe's reservation. The term "member" should be viewed merely as identifying which tribe has recognized the individual as an Indian. In other words, primary legal significance follows the "Indian" status determination; the secondary member/nonmember label with respect to Indian status is simply descriptive.

B. The Recognition Factors

The Supreme Court in *Duro II* dismissed the Ninth Circuit's "significant contacts" test[391] because "the rationale of the test would apply to non-Indians on the reservation as readily as to Indian nonmembers."[392] The Court, however, failed to consider that the second *Rogers* prong is fundamentally based on socio-political contacts. As demonstrated by the cases in Part III.B., the recognition prong can apply just as readily to individuals with no Indian ancestry.[393] Only the blood prong prevents someone like Rogers from having Indian status. All in all, the objective of the *Rogers* test is to enable a more culturally sensitive means of political classification than the enrollment-driven one used in *Mancari* to circumvent the equal protection guarantee. Thus, if the Court cannot accept this rationale for some form of a contacts test, then it must

389. *Bruce*, 394 F.3d at 1224.

390. *Keys*, 103 F.3d at 761.

391. *Duro I*, 851 F.2d 1136, 1145 (9th Cir. 1988).

392. *Duro II*, 495 U.S. 676, 695 (1990).

393. This Article uses the phrase "Indian by ancestry" as a broad category to include some who may not have the legal status of an Indian. Other commentators have used the descriptors "ethnologically Indian," "biologically Indian," or "racially Indian." COHEN, *supra* note 54, at 2 (biological and ethnological); BENNETT, *supra* note 54, at 5 (biological and ethnological); STRICKLAND, *supra* note 17, at 19 (ethnological); Clinton, *supra* note 91, at 514, 520 (biological and ethnological); Dussias, *supra* note 25, at 80 (ethnological). However, the word ethnological requires an analysis of culture, thus creating a confusing overlap with the second prong of the *Rogers* test. Scientists have yet to find biologic or genetic markers of Indianness. Race continues to be a controversial classification on account of its indefinite, arbitrary nature.

discard two hundred years of "well-settled"[394] law embodied in the *Rogers* test.

Fortunately, it appears that the Court might approve a contacts test for a tribe's descendants.[395] Justice Kennedy for the *Duro II* majority wrote:

> The contacts approach is little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him. We have rejected this approach for non-Indians [in *Oliphant*]. It is a logical consequence of that decision that nonmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status.[396]

While that characterization of the contacts approach may seem logical as applied to the high degree of assimilation in *Oliphant*, it is less relevant in the majority of Indian status cases, nor does it do justice to the *Duro* facts. As evidenced by *Duro I*, there is an order of magnitude difference between implied consent and significant contacts. And, after the *Duro*-fix, the Court must apply that contacts approach to descendants of all tribes.

Although significant contacts do not go as far as the expressed consent paradigm preferred by the Court,[397] they are a well-settled basis of the *Rogers* test. The *Duro*-fix thus overrides the Court's aversion to contacts by restoring inherent sovereignty circumscribed by significant contacts. By endorsing the *Rogers* case law, which rejects enrollment as the standard for political consent, the *Duro*-fix does more than affirm the inherent sovereignty of Indian tribes to exercise criminal jurisdiction over all Indians – it resuscitates the meaning of Indian membership-based sovereignty to include non-enrolled members. Accordingly, it matters little whether such *de facto* or informal members share relevant jurisdictional characteristics of non-Indians. What counts now is that Congress' *Rogers*-based view of membership finds special relevance in ancestry as part of a unique legal status.

Significant contacts in a criminal context, as suggested by this Article, are those socio-political contacts that rise above the

394. *See supra* text accompanying note 369.

395. In essence, the *Duro II* Court suggests that the relevant jurisdictional characteristics of member Indians are driven by what nonmember and non-Indians do not possess: namely, descent from the federally recognized tribe exercising jurisdiction.

396. *Duro II*, 495 U.S. at 695-96.

397. *Id.* at 694 ("Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.").

minimum contacts approach of the *International Shoe*[398] line of civil cases. Courts should view significant contacts as an approach that restores the Indian status test and thereby helps non-Indian judges avoid quick conclusions stemming from perceived differences between culture and politics. Moreover, the significant contacts approach helps to ensure a broad definition of member Indian under the *Rogers* test, thus minimizing potential for unconstitutional applications of the *Duro*-fix.

In the recognition prong approach used by courts today, no one factor is dispositive, yet courts are lulled into mainly relying on the questionable objectivity of BIA rolls. Modern enrollment policy aims to protect scarce resources and create behavioral type incentives necessary for the internal strength and cohesion of a tribe. Enrollment is strong evidence of Indianness, but the negative is not necessarily true.[399] That is, a lack of enrollment or eligibility for enrollment should not weigh in the balance.[400] Furthermore, nineteenth century views of civilized versus non-civilized, Anglo-American culture versus Indian culture, or integrated versus separated should not be allowed to function as relevant dichotomies. The recognition factors, to be fair and to avoid cultural misconceptions, must be viewed as additive, just like contacts. In short, the absence of any one factor should not offset the presence of another.

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398. Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). The original holding in *International Shoe* used the term "sufficient contacts or ties" – not "significant" – to describe a "quality and nature" of activities that "were neither irregular nor casual" but were "systematic and continuous."

399. Charles Park, *Enrollment: Procedures and Consequences*, 3 AM. INDIAN L. REV. 109, 110 (1975):

> Although enrollment is the most obvious evidence of tribal membership, care must be used in ascertaining the specific purpose for which a roll is made. Payment of money to tribal members under statutes and treaties depends upon enrollment, as do voting rights in tribal elections and the capacity to be an elected official of the tribe. Probably most important, however, is the connection between tribal property and enrollment, because allotments of land can be made only to enrolled members.

See also Deloria & Newton, *supra* note 19, at text accompanying n.29:

> In some cases, not enrolling may be a protest against Indian Reorganization Act governments seen as federally imposed or may be an expression of religious or cultural conviction. In other cases, the tribe itself may be lax about keeping its rolls up to date, allowing benefits and political participation to many who are not enrolled (and in some cases not even technically eligible for enrollment under the tribe's own constitution). Indians do not have to enroll formally to obtain tribal benefits in many tribes; some even have a separate roll for internal purposes or an informal "census roll."

400. *See supra* notes 371, 399.

In particular, *St. Cloud*'s hierarchical factors should be disordered and unweighted. The "well-settled" *Rogers* test allows tribes, as social and political quasi-sovereigns, the power to determine their membership. A fundamental aspect of sovereignty is, of course, the ability to determine membership in the sovereign.[401] "Social" factors should not be relegated to the bottom of the court's consideration list. Similarly, Anglo-American concepts of the political (e.g. democratic voting) must not predominate over what is rightfully the group's view of its own identity and membership.[402]

For example, one can have a political effect without being able to vote. State and federal courts should accord comity to tribal courts in this regard. In *Means v. District Court of the Chinle Judicial District,* Chief Justice Yazzie of the Navajo Nation Supreme Court observed that Means, a member of the Oglala Sioux Nation, claimed he was not allowed to vote or attain any political office within the Navajo Nation, but was able to attend chapter meetings and "led a march to the court house for a demonstration to make a 'broad statement' about political activities of the Navajo Nation."[403] Nevertheless, conflating enrollment with membership and without even addressing the *Rogers* test, the Ninth Circuit held that "[a]s an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home."[404]

Lastly, it seems settled that the federal government might recognize someone as an Indian even though no tribe intervenes to testify and there is no other evidence of tribal recognition.[405] In that situation it might be helpful for the court to appoint a *guardian ad litem* to help assess the significance of the more subjective cultural contacts.[406]

401. United States v. Bruce, 394 F.3d 1215, 1225 (9th Cir. 2005) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978)).

402. *See* Deloria & Newton, *supra* note 19, at text accompanying n.63 (questioning imposition of Lockean social contract theory on Indian tribes).

403. Means v. Dist. Ct. of the Chinle Jud. Dist., 26 Indian Law Rptr. 6083, 6085 (Navajo Nation Sup. Ct. 1999).

404. Means v. Navajo Nation, 432 F.3d 924, 932 (9th Cir. 2005).

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

406. Ideally, each tribe would appoint a representative to act in the best interests of tribal sovereignty. In the alternative, a federally appointed *guardian ad litem* would be consonant with the wardship relationship and responsibility.

V. POST-*LARA* OBSERVATIONS

It is now apparent that the judiciary created a constitutional crisis by choosing a myopic view of Indian membership, resulting in the tremendous number of Indians categorized as nonmembers. Had it not been for the relatively recent erosion of broadly defined Indian member status under federal common law, the *Duro* decision would have had little impact on tribal sovereignty and there would have been little political impetus for a "fix." By returning to the pre-1990 reality of Indian status, more Indians would be deemed non-enrolled members rather than as nonmembers or non-Indians. With the *Duro*-fix as statutory guide, it is time for the courts to restore the concept of membership espoused by the *Rogers* Court and Felix Cohen, which includes recognition of an individual as an Indian by his or her tribe or community.[407] Thus, the constitutional crisis may be averted to a great extent by harmonizing the *Duro II* decision and the *Duro*-fix legislation through a definition of Indian status based on significant contacts. The interpretation of the Indian status test suggested by this Article, as compared to other interpretations, has the advantage of alignment with the congressional intent of the *Duro*-fix. In addition, a similar notion of significant contacts between ethnic Indians and the federal government solves the problem of nonmember Indians, who by the definition recommended in this Article are recognized by another tribe and have insignificant contacts with the tribe exercising criminal jurisdiction.

Congress also could nullify the racial attack by acknowledging that tribal criminal jurisdiction is a function of membership[408] or recognized consent, and need not be linked to race. This would entail dropping the first prong from the *Rogers* test and would respect the wishes of some tribes to decide that a specific blood quantum is not a requirement of membership. To this aim, courts over the last century have proven able to distinguish the *Rogers*

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407. *See supra* note 54 and accompanying text.

408. Citizenship is the preferred term because membership connotes a club rather than a semi-sovereign nation. *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 437, 437 n.3 (2002). Professor Goldberg

> came to believe that the term "membership" is used in tribal constitutions rather than "citizenship" because the Bureau of Indian Affairs did not treat these constitutions as charters for governments. Rather, they viewed them as some variation on private associations or student councils, designed to instruct Indian people in self-government rather than to facilitate genuine self-determination.

Id.

recognition prong from the general legal norms of territorial sovereignty and implied consent. Accordingly, the concerns represented by former Senator and Washington Attorney General Slade Gorton[409] can be given adequate deference because membership is not based on geography. Tribal criminal jurisdiction could be easily avoided, for example, by reservation residents who eschew sustained socio-political contact with the tribe.

VI. CONCLUSION

The question of who is an Indian for purposes of criminal jurisdiction is considered by Congress to be a well-settled area of law as a result of two hundred years of common law and federal legislation. This Article demonstrates, however, that the judicial branches of state and federal government do not often agree with that congressional assessment. The challenges of federal Indian law are only growing more complicated due to tribal demographic trends.[410] Like the Israelites in the diaspora, Indians today are confronted with the problem of maintaining a sense of identity in the face of a dominant culture that views society through the lens of integration and separation. This Article exhorts the judiciary to focus less on formal enrollment[411] and to restore the second prong of the *Rogers* test to its proper role as a measurement of Indian tribal identification in the socio-political sense. Courts must meet the challenge of sifting the grain of Indian status from the chaff within recent lower court decisions. Only by so doing will the congressional intent of the *Duro*-fix be honored and the pressure of equal protection concerns be relieved.

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409. *See* Brief for Amicus Curiae Attorney General, State of Washington, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729). *See supra* text accompanying notes 381-82.

410. *See generally* Gould, *Mixing Bodies*, *supra* note 30.

411. Motivated in part by Equal Protection concerns, the dissent proposes a new test for determining Indian status; one that would conflate our two-pronged *Rogers* inquiry and multifaceted "recognition" guidelines into a single question: whether the individual is enrolled or eligible for enrollment in a federally recognized tribe. From a purely conceptual standpoint, we agree that eligibility for enrollment provides a simpler framework within which we might judge Indian status as a political affiliation with a formerly sovereign people. Nonetheless, it is not the test that we have adopted, and until either Congress acts or the Supreme Court or an *en banc* panel of our court revises the "recognition" prong of the *Rogers* test, we are bound by our prior jurisprudence. In particular, we are bound by the body of case law which holds that enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status. In sum, we are not permitted to hold that these cases do not mean what they say.

Bruce, 394 F.3d at 1225 (citations omitted).