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The Extraterritorial Reach of Tribal Court Criminal Jurisdiction

by GRANT CHRISTENSEN*

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Introduction

The jurisdiction of Indian[1] tribal courts is undergoing a substantial expansion in the twenty-first century.[2] Both Congress[3] and the Supreme Court[4] have recently reaffirmed the inherent jurisdiction of Indian tribes, and encouraged the expansion of tribal powers to redress the failure of state and federal law enforcement to keep reservation communities safe.[5] This is a marked reversal of federal policy, which had previously worked to circumvent tribal jurisdiction[6] by handing law enforcement responsibility on Indian lands to the states.[7]

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1. The word "Indian" is a legal term of art and is regularly used in the law and by lawyers to describe many of America's indigenous people. The term is used to codify the definition of 'Indian Country' at 18 USC § 1151 and is used to determine which tribes share in a government-to-government relationship through the Federally Recognized Indian Tribes List Act of 1994, Pub. L. 103–454, 108 Stat. 4791 (1994). But for a discussion of how the term 'Indian' is more problematic in an international context see H.P. GLENN, LEGAL TRADITIONS OF THE WORLD, 60 at n.1 (Oxford University Press, 5th ed., 2014).

2. *See* Matthew L. M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014) [hereinafter Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*]; Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527 (2011); Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Melissa Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2002).

3. Congress expanded tribal court criminal jurisdiction over non-Indians in the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013), and expanded the criminal penalties tribal courts may impose through the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

4. The Supreme Court has expanded tribal court jurisdiction over time. In Duro v. Reina, 495 U.S. 676 (1990), the Court ruled that the inherent criminal jurisdiction of Indian tribes was limited only to their members. However, by 2004, the Court reversed, holding that tribes possess inherent criminal jurisdiction over all Indian persons whether or not they are members of the tribe. United States v. Lara, 541 U.S. 193 (2004). The Court also clarified that tribal court convictions, obtained after proceedings that meet all required tribal court procedures, can be used as predicate offenses for purposes of expanded federal or state criminal jurisdiction. United States v. Bryant, 136 S. Ct. 1954 (2016).

5. For a pertinent example, Justice Ginsburg provides some excellent insight on the problems of domestic violence which have become endemic in Indian Country. "'[C]ompared to all other groups in the United States,' Native American women 'experience the highest rates of domestic violence.'" 151 CONG. REC. 9061 (daily ed. Apr. 5, 2005) (statement of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT (2011).

6. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (An activists Supreme Court determined that tribes lack the inherent criminal jurisdiction to prosecute non-Indian defendants).

7. For a discussion of the largest federally approved state-expansion of jurisdiction in Indian Country, see Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006); Robert Anderson, *Negotiating*

In keeping with these trends, the Sixth Circuit Court of Appeals has responded to signals from Congress and the Supreme Court by affirming even the extraterritorial reach of tribal court criminal jurisdiction over tribal members.[8] In *Kelsey v. Pope*, the Sixth Circuit unanimously recognized the ability of tribal courts to determine the extent of their own criminal jurisdiction even when the asserted criminal authority extended to member conduct outside the reservation.[9] The Sixth Circuit's decision overcame a request for a rehearing *en banc*[10] and a failed petition for certiorari at the Supreme Court.[11] It is now firmly established as the law of the Sixth Circuit and is likely to pave the way as other circuit courts confront similar jurisdictional questions.

This article takes the Sixth Circuit's decision in *Kelsey v. Pope*[12] and argues that the principle of tribal court extraterritorial criminal jurisdiction should extend beyond the limited facts of the case to encompass inherent criminal jurisdiction over all land owned by the tribe regardless of reservation status, and over all conduct of tribal members whenever that conduct has a reasonable connection to the tribe. Moreover, the Sixth Circuit's implied limitation that the assertion of criminal jurisdiction must be necessary to "protect tribal self-government or to control internal relations"[13] should not be retained by future federal courts reviewing the limits of a tribe's inherent *criminal* powers because such limitations are properly applied only to *civil* causes of action.

This article explores the implications of *Kelsey v. Pope*, and its logical legal extensions, to justify a broadening of extraterritorial tribal court criminal authority. Part I puts the case in context by chronicling the development of criminal jurisdiction in a world of competing sovereigns: the tribe, the state, and the United States. Part II examines the *Kelsey* opinion in detail, reviewing both the general proposition that tribal sovereignty includes the inherent authority of tribes to assert their criminal jurisdiction outside of their territory, and the Sixth Circuit's rejection of the defendant's argument that extraterritorial criminal powers have been implicitly divested as inconsistent with a tribe's sovereign status. Part III argues that the principles of tribal court criminal jurisdiction should extend to all land owned or controlled by a tribe, and should not be limited by a nexus to tribal

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Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280, 87 WASH. L. REV. 915 (2012).

8. Kelsey v. Pope, 809 F.3d 849 (6th Cir. 2016).

9. *Id.*

10. *Id.*, *reh'g denied*, No. 14-1537, 2016 U.S. App. LEXIS 3407 (6th Cir., Feb. 8, 2016).

11. *Id.*, *cert. denied,* 137 S. Ct. 183 (2016).

12. 809 F.3d at 849.

13. *Id.* at 861 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

government interests. Finally, the article ends with a few brief concluding remarks on the future implications of the Sixth Circuit's decision.

I. Criminal Jurisdiction Basics

While the question of whether inherent tribal court criminal jurisdiction over tribal members exists on tribal lands outside the reservation was an issue of first impression among federal circuit courts, the Sixth Circuit's decision in *Kelsey v. Pope* was based on almost two centuries of Indigenous history[14] and Supreme Court jurisprudence.[15] The Court in *Kelsey* placed particular emphasis on judicial precedents involving questions of inherent tribal powers in other contexts, like sovereign immunity and civil jurisdiction, in order to conclude that a tribe's inherent power may extend beyond the boundaries of the reservation..[16]

The Supreme Court has confronted questions of criminal jurisdiction in Indian Country from its founding. Early cases focused on the power of state or federal courts to assert criminal jurisdiction over activity occurring on tribal lands. As early as 1832, Chief Justice John Marshall held that the state of Georgia could not enforce its criminal laws upon lands held by the Cherokee Nation because states lacked criminal jurisdiction over Indians in Indian Country.[17] In 1881, the Court clarified the metes of criminal

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14. Neyooxet Greymorning, *The Anglocentric Supremacy of the Marshall Court*, 10 ALB. GOV'T L. REV. 191, 198–99 (2017) ("Where the force of British rule could not be exerted, Indian people were left to govern themselves in accordance to their own laws, as customs dictated. This was classically demonstrated in 1736, when the British colonial government of South Carolina sent a commissioner to arrest Gottlieb Priber, a Jesuit Priest who had been living among the Cherokee and working for French interests. The commissioner, and the military personnel who accompanied him, were forced to return to South Carolina under Cherokee escort. As long as Priber remained within Cherokee territory all the 'lawful' demands of the English were of no consequence.").

15. In the 1830s, the Supreme Court held that Georgia lacked criminal jurisdiction over Indian country, because the tribe had the exclusive power within its borders. Worcester v. Georgia, 31 U.S. 515, 562 (1832). In *Ex Parte* Crow Dog, 109 U.S. 556 (1883), the Court held that the United States lacked criminal jurisdiction over Indians committing crimes on tribal lands.

16. *See* Worcester v. Georgia, 31 U.S. 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."); United States v. Joseph, 94 U.S. 614, 617 (1876) ("The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions."); *Ex Parte Crow Dog*, 109 U.S. at 559 ("If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized Territorial government, it would require an act of Congress to attach it to a judicial district.").

17. *Worcester*, 31 U.S. at 562 (Georgia had enacted a law making unlawful to live within the limits of the Cherokee Nation without a license. Samuel Worcester and Elizur Butler, Vermont missionaries, were prosecuted under the law, convicted, and incarcerated. Their appeal reached the Supreme Court which held that states lack jurisdiction for activities that occur on Indian lands. "It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in

jurisdiction by articulating an exception: States have limited criminal jurisdiction over criminal activity occurring in Indian Country when both the perpetrator and the victim are non-Indian.[18] In 1883, the Court unanimously held that when Crow Dog, a member of the Brule Sioux Band of Sioux Indians, killed fellow tribal member Sin-ta-ge-le-Scka, the United States lacked criminal jurisdiction over the offense because there was no treaty nor act of Congress conferring authority over criminal conduct occurring between tribal members on Indian lands.[19] In response, Congress enacted a federal law granting the United States power to assert criminal jurisdiction over Indians in Indian Country,[20] and the Supreme Court upheld the constitutionality of the congressional action just three years later.[21]

The development of Supreme Court precedent on tribal court jurisdiction took slightly longer, in part because tribes did not traditionally have 'courts' as the common law envisions them.[22] Although in 1896 the Supreme Court held that tribal courts did not have to operate using criminal procedures identical to those used in state courts, in part because tribal courts are not subject to the Constitution nor required to give defendants rights

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the state of Georgia, condemning Samuel A. Worcester to hard labour, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.").

18. United States v. McBratney, 104 U.S. 621, 624 (1881) ("The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.").

19. *Ex Parte Crow Dog*, 105 U.S. at 572 ("To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find.").

20. The Major Crimes Act, 18 U.S.C. § 1153 (2013). *See also* Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173 (2000).

21. United States v. Kagama, 118 U.S. 375, 384 (1886) ("The power of the general government over [Indians] is necessary to their protection, as well as to the safety of those among whom they dwell.").

22. Barbara A. Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 585 (2000) ("Tribal courts, as we know them today, are a modern invention often bearing a greater superficial resemblance to Anglo-American courts operating outside Indian country than to the judicial systems that operated within tribes historically. Although justice systems existed within tribes in pre-colonial times, much of what has been written about such systems is anthropological speculation.").

identical to those enumerated in the Bill of Rights,[23] it was not until 1978 that the Supreme Court addressed tribal court criminal jurisdiction directly. In *Oliphant v. Suquamish Indian Tribe*, the Court determined that tribal courts lacked criminal jurisdiction over all non-Indians.[24] The Court reasoned that, although Congress had never explicitly limited tribal criminal jurisdiction over non-Indians, the power was implicitly divested because it was inconsistent with the status of tribes as sovereign entities 'dependent' upon the United States.[25] Twelve years later, in *Duro v. Reina*,[26] the Court clarified that tribal courts retain criminal jurisdiction only over members of their tribe, and not against any non-member Indian, without an express authorization from Congress.

More recently the Supreme Court has expanded the criminal jurisdiction of tribal courts and manifested its support for their procedures. In *United States v. Lara*,[27] the Court deferred to Congress and essentially reversed the decision in *Duro*—thereby affirming the inherent power of tribal courts to assert criminal jurisdiction over all Indians regardless of their tribe.[28] In *United States v. Bryant*,[29] the Court held that criminal convictions in tribal court, even if uncounseled, could be used as predicate offenses in the context of federal criminal law. While the tribal court's criminal procedures did not need to be identical to those afforded under the

23. Talton v. Mayes, 163 U.S. 376, 384 (1896) ("[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the national government.").

24. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

25. *Id.* at 199. ("[T]ribal criminal jurisdiction over non-Indians, is inter alia, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States.").

26. Duro v. Reina, 495 U.S. 676, 695–96 (1990) ("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. It is a logical consequence of that decision that nonmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status.").

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

28. *Lara,* 541 U.S. at 210 ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute. That being so, the Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign. Consequently, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete *federal* offense.").

29. United States v. Bryant, 136 S. Ct. 1954 (2016).

Constitution, tribal court proceedings must meet all other federal procedural requirements in order to be used as a predicate offense.[30]

Against this background, the Sixth Circuit recently determined whether a tribal court could assert criminal jurisdiction over a member of its tribe when the criminal conduct occurred outside the tribe's reservation lands, but on territory nonetheless owned by the tribe. This case squarely placed the role of both tribal membership and tribal land in the construction of tribal court criminal jurisdiction before the Sixth Circuit Court of Appeals.

II. The Sixth Circuit and *Kelsey v. Pope*

In 2016 the Sixth Circuit answered a question that was essentially a matter of first impression in any federal circuit, but built upon decades of federal jurisprudence regarding the scope and extent of tribal court criminal jurisdiction. In *Kelsey v. Pope* the defendant, Norbert Kelsey, was convicted in the Little River Band of Ottawa Indians Tribal Court of misdemeanor sexual assault occurring at the Band's community center.[31] At the time of the assault Kelsey was an elected member of the Band's nine-person Tribal Council.[32] The victim was a tribal employee, although an enrolled member of a neighboring tribe.[33]

While the community center was owned by the Tribe and was located across the street from land that was part of the Tribe's reservation, the community center itself was not held in trust by the United States and was therefore not "Indian Country."[34] If the community center had been a part of the reservation, no jurisdictional question would have been raised because tribes have the inherent power to criminally prosecute their own members for criminal activity committed on their lands.[35] Kelsey challenged the tribal

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30. *Id.* at 1966 ("Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution.").

31. Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016).

32. *Id.*

33. *Id.* at 853.

34. *Id.* ("The Community Center, located just across the street from the reservation, is constructed on land purchased by the Band in fee simple in 1997 but is not within 'Indian country' as defined by 18 U.S.C. § 1151."). For additional discussion of Indian country *see* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595 (2010); Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73 (1999); Kevin K. Washburn, *American Indians, Crime, and Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003 (2008).

35. *See* United States v. Lara, 541 U.S. 193, 204 (2004) ("[T]he power to prosecute a tribe's own members—a power that this Court has called 'inherent.' In large part it concerns a tribe's authority to control events that occur upon the tribe's own land.") (quoting United States v. Wheeler, 435 U.S. 313, 322–23 (1978)). *See* United States v. Mazurie, 419 U.S. 544, 557 (1975)

court's jurisdiction, arguing that the Band's criminal jurisdiction is co-extensive with its reservation boundaries, and it therefore lacked jurisdiction over any criminal activity that may have occurred at the community center.[36] The tribal court held that its jurisdiction extended over Kelsey's conduct at the community center, and the tribe's appellate court affirmed.[37]

Kelsey filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Michigan, arguing that the Band's inherent criminal jurisdiction did not extend outside of Indian country.[38] The district court granted Kelsey's habeas petition; holding that the inherent power of Indian tribes to assert criminal jurisdiction outside of Indian country, even over their own members, had been implicitly divested by virtue of the tribe's dependent status.[39] The tribe appealed the decision to the Sixth Circuit Court of Appeals.

A. Inherent Criminal Jurisdiction Outside the Reservation

The Sixth Circuit began its opinion by rejecting the district court's conclusion that the inherent criminal jurisdiction, manifest by tribal sovereignty, stops at the reservation's borders. Speaking for the Sixth Circuit Majority, Judge McKeague reasoned that Indian tribes' sovereignty "preexisted the founding; it is neither derived from nor protected by the Constitution."[40] The court recognized the uniqueness of federal Indian law; Indians retain the inherent powers that they have always possessed by virtue of their sovereignty, but those inherent powers are subject to complete defeasance by Congress' plenary power.[41]

The Sixth Circuit took its guidance from the Supreme Court, which has placed a tribe's power to punish its own members among the "inherent"

("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.").

36. *Kelsey*, 809 F.3d at 853.

37. *Id.*

38. *Id.* at 853–54.

39. *Id.* at 854. *See also* Kelsey v. Pope, No. 14-1537, 2014 U.S. Dist. LEXIS 43037 at *5 (W.D. Mich., Mar. 31, 2014) ("The Court's statement that tribes retain sovereignty over 'both their members and their territory,' does not mean that a tribe's jurisdiction over its members is without bounds . . . The statement suggests that tribal membership and territory are connected, and that tribes retain sovereignty where both are present.") (quoting *Wheeler*, 435 U.S. at 323).

40. *Kelsey*, 809 F.3d at 855 (quoting Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 544 (6th Cir. 2015)).

41. *Id.* ("Congress wields power 'consistently described as plenary and exclusive to legislate [with] respect to Indian tribes.'" (citing Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014)). This idea has formed the basis of federal Indian from the beginning. *See* Philip P. Frickey, *Marshalling Past and Present: Colonization, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

powers all tribes possessed since time immemorial.[42] However, the Supreme Court had never encountered a situation where the tribe was asserting its inherent criminal powers over alleged illegal activity occurring outside of Indian Country. While the Tribe argued that its inherent powers extended to the activities of its members wherever that activity would substantially affect the tribe's interest in self-government, Kelsey averred that the tribe's inherent power is coterminous with Indian Country and cannot exist outside the reservation absent congressional direction.[43]

The court was ultimately persuaded by the tribe's argument that a tribe's inherent criminal jurisdiction extends over its members whenever their conduct would substantially affect tribal self-government. It found support for this proposition in a line of Supreme Court precedent that contradistinguishes the power of tribal courts over "their *members* and their *territory*."[44] The Sixth Circuit reasoned that not only has the Supreme Court treated membership and territory as an alternative instead of complementary basis for jurisdiction, but it has also explained that by virtue of their tribal membership, tribal members have consented to the authority of the tribe.[45] While the Sixth Circuit recognized that *Duro* and *Wheeler* emerged from on-reservation disputes, the court expanded their principles to recognize that the

42. *Kelsey,* 809 F.3d at 855 (citing United States v. Lara, 541 U.S. 193, 204 (2004)).

43. The question pertinent to Kelsey's case, however, is whether this inherent authority to prosecute members extends beyond reservation boundaries. The parties advance two competing theories as to how tribal criminal jurisdiction operates. To the Band, the tribes have 'inherent authority to prosecute tribal members for offenses substantially affecting [tribal] self-governance interests,' even when such offenses take place outside of Indian country. Kelsey rejects this membership-based jurisdiction, arguing that sovereign authority (and thus criminal jurisdiction) is defined by the twin factors of tribal membership and territory—when either factor is absent, the tribe's inherent authority, in this case criminal jurisdiction, is greatly diminished or altogether absent. Though our governing precedent has not specifically addressed this question, the Band's theory of membership-based jurisdiction is more persuasive.

Id. at 855–56.

44. *Id.* at 856. ("The two most helpful cases in establishing membership as the driving force behind criminal jurisdiction are *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990). *Wheeler* and *Duro* are grounded in tribal prosecutions for on-reservation conduct, but nonetheless recognize that tribes possess 'attributes of sovereignty over both their *members* and their *territory*.'"). *See Wheeler*, 435 U.S. at 323 (emphasis added).

45. *Kelsey,* 809 F.3d at 856 ("Affirming the inherent authority of tribes to try and prosecute their members, the Court in *Duro* recognized that the tribes' '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.'"). Consent is a complicated concept in Indian Law. For an excellent discussion and critique of the role 'consent' has played in everything from criminal jurisdiction to federal-tribal relations *see* Matthew L. M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012) [hereinafter Fletcher, *Tribal Consent*].

inherent power of a tribe extends to criminal jurisdiction over their members' activity that occurs outside of Indian Country.[46]

B. Extraterritorial Criminal Powers Survive a Divestment Analysis

While the Sixth Circuit recognized that the inherent power of Indian tribes includes jurisdiction over the criminal conduct of their members even outside the reservation, the court did not end its inquiry there. After *Oliphant*, the Supreme Court made clear that a tribe's inherent powers could nonetheless be divested.[47] Justice Rehnquist's majority opinion in *Oliphant* recognized that divestment could be explicit (Congress could expressly take away a tribe's inherent power) or it could be implicit (the tribe could attempt to assert an inherent power inconsistent with a tribe's status).[48]

The Sixth Circuit's opinion quickly dispensed with explicit divestiture.[49] It recognized that Congress has never expressly taken away a tribe's inherent power to criminally prosecute its own members.[50] The question of whether the assertion of a tribe's inherent criminal power outside of Indian Country, and by necessity into and over land controlled by the states, had been implicitly divested was more contentious because it required a return to the first principles of federalism and the relationship between tribal government and the United States.[51]

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46. *Kelsey*, 809 F.3d at 859 ("In sum, Indian tribes possess the inherent sovereign authority to try and punish members on the basis of tribal membership. *Wheeler* and *Duro* may not answer the specific question of whether tribes are permitted to exercise extraterritorial criminal jurisdiction over members, but their core principles strongly support the Band's theory of jurisdiction.").

47. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribe's inherent power to criminally prosecute non-Indians had been implicitly divested, because it was inconsistent with Indian tribes' status as "domestic dependent nations").

48. *Id.* at 210–12.

49. *Kelsey*, 809 F.3d at 859 ("Kelsey has not identified any treaty or statute that explicitly divests the Band of extraterritorial criminal jurisdiction. Nor has the district court . . . Because no statute or treaty expressly divests the Band of its inherent authority to try and punish its members for off-reservation conduct, we turn to the issue of implicit divestiture.").

50. *Id.*

51.
> Our remaining inquiry, then, is whether the tribes have been implicitly divested of their authority to prosecute members for extra-territorial conduct by virtue of their domestic dependent status. We look first to the history and breadth of implicit divestiture, considering whether the Band's purported jurisdiction is consistent with the historical underpinnings of the doctrine. We then consider whether statutes extending federal jurisdiction into Indian Country serve as a basis for implicitly divesting tribes of their jurisdiction over off-reservation offenses.

Kelsey, 809 F.3d at 860

Ultimately, the court determined that a tribe's inherent criminal jurisdiction over its members outside of Indian Country was not implicitly divested. In defining the scope of tribal power that could survive the implicit divestment analysis, the Sixth Circuit looked to the Supreme Court's determination of a tribe's civil regulatory powers over non-Indians in *Montana v. United States*.[52] Citing *Montana*, the court limited the inherent criminal power of tribes to those cases implicating tribal self-government or internal relations.[53] It proceeded to apply that standard and concluded that jurisdiction in this case implicated tribal self-government interests because Kelsey was a member of the Band's legislative council, the victim was a tribal employee 'discharging her official duties' at a meeting of tribal elders, and the crime took place at the tribe's community center which served as the hub of Tribal community activity.[54]

The Sixth Circuit reversed the district court's decision and held that the Little River Band of Ottawa Indians' Tribal Court possessed inherent criminal jurisdiction over the activities of its own members, even outside Indian Country, whenever jurisdiction was necessary to protect tribal self-government or internal relations.[55] The Supreme Court refused to hear Kelsey's appeal, establishing the Sixth Circuit's opinion as the governing law in the circuit and highly persuasive authority in other jurisdictions.[56]

III. The Extension of Inherent Criminal Power

The Sixth Circuit does not hear many Indian law cases.[57] Perhaps that is why its opinion in *Kelsey v. Pope* so easily conflated tribal court *civil*

52. *Id.* at 861 ("Defining the scope of retained inherent sovereignty, *Montana* held that the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'") (quoting Montana v. United States, 450 U.S. 544, 564 (1981)). For a critical discussion of the relationship between tribal government and the United States, see Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014).

53. *Kelsey,* 809 F.3d at 861.

54. *Id.* at 861–62.

55. *Id.* at 863. ("Because prosecuting Kelsey's conduct was 'necessary to protect tribal self-government or control internal relations,' the Band retained authority to assert criminal jurisdiction over his off-reservation conduct.") (quoting *Montana*, 450 U.S. at 564).

56. *Id.*, *cert. denied,* 137 S. Ct. 183 (2016).

57. The Sixth Circuit decided no Indian law opinions in 2017, largely due to the lack of Indian tribes in most of the circuit. (There is no reservation land in Ohio, Kentucky, or Tennessee so virtually all Indian law cases originate from Michigan). For a discussion of the comparative weights of the Circuit's Indian law jurisprudence, see Grant Christensen, *A View From American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805 (2018). Despite the relatively small number of Indian law cases from the Sixth Circuit, the Supreme Court agrees to review a fairly large number of Indian law cases arising from Michigan tribes, although some are appeals from the D.C Circuit. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,

jurisdictional principles to determine the scope of a tribe's inherent *criminal* jurisdiction. The Supreme Court has made clear that the scope of an Indian tribe's inherent criminal and civil jurisdiction are different; "[A]lthough Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians."[58] Professor Matthew Fletcher has perhaps gone furthest in exploring the different basis for criminal and civil jurisdiction.[59] While criminal jurisdiction has largely been shaped by consent,[60] civil jurisdiction has taken on a larger geographical component, giving tribes inherent control over the civil conduct of persons regardless of their Indian status.[61] The *Kelsey* opinion conflates the basis for criminal and civil jurisdiction, which in turn over limits the inherent sovereignty of Indian tribes that the Sixth Circuit otherwise recognizes.

Less defensibly, the Sixth Circuit imputed the reasoning from the Supreme Court's jurisprudence regarding non-members to determine the proper application of its jurisdiction over the conduct of its own members. Not only does the *Kelsey* opinion use the Supreme Court's discussion of tribal civil jurisdiction in *Montana* to establish limits on tribal court criminal jurisdiction, it also limits the inherent power of tribal courts to their membership.[62] Neither limitation has been approved by Congress, nor suggested by the Supreme Court as mandated by a tribe's sovereign status.

The ultimate conclusion that Indian tribes retain inherent criminal jurisdiction over the conduct of their members when that conduct risks tribal self-government and internal relations is supportable by the case law, but such a narrow holding is inconsistent with the inherent power of tribes.[63]

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567 U.S. 209 (2012); Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014); Patchak v. Zinke, 138 S. Ct. 897 (2018).

58. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 854 (1985).

59. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, *supra* note 2, at 800–01.

60. *Id.* Consent here is broadly defined. Professor Fletcher notes that early opinions like *Oliphant* and *Duro* limited criminal jurisdiction only to members, but later decisions like *United States v. Lara* extend criminal jurisdiction to all Indian persons.

61. *Id.* at 802–03.

62. Kelsey v. Pope, 809 F.3d 849, 860 (6th Cir. 2016) ("[W]hile tribes have not been implicitly divested of their right to prosecute *members*, their unique dependent status requires a more nuanced analysis in determining whether they may extend tribal prosecutions to *members*' off-reservation conduct.") (emphasis added).

63. United States v. Wheeler, 435 U.S. 313, 323 (1978) (Tribes possess "attributes of sovereignty over both their members and their territory."). *See also* Christensen, *supra* note 2 (discussing the common law understanding of inherent jurisdictional powers and arguing that tribal courts ought to have exclusive jurisdiction over conduct occurring on their lands regardless of its connection to tribal self-government or internal relations).

The principles of *Kelsey* ought not to be limited to the exceedingly narrow set of facts presented to the Sixth Circuit—but instead expanded to recognize the true extent of a tribe's inherent criminal powers. Tribes retain criminal jurisdiction over their members without any inherent geographical limitations as long as the assertion of that jurisdiction does not impair significant interests of other sovereigns. Tribes also retain inherent criminal jurisdiction over all Indians whenever their activities affect a tribe's member or its territory.

A. A Tribe Retains Inherent Criminal Power Over Its Members Without Regard for Geographical Limits

In *Kelsey*, the Sixth Circuit relied explicitly upon the Supreme Court's *Montana* decision to impute a limitation unto tribes inherent criminal powers.[64] However, *Montana* is the Court's 'pathmaking'[65] case on tribal court *civil* jurisdiction over non-members.[66] The Supreme Court in *Montana* expressly contradistinguished the inherent power of tribes to punish tribal offenders with the limitation that a tribe's actions must relate to its governance; "[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to . . . [the] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . . ."[67] While the *Kelsey* opinion clearly implies that a tribe's inherent criminal power extends only when necessary to promote tribal self-governance or internal relations,[68] the Supreme Court has never placed a similar limit on a tribal court's *criminal* jurisdiction.

The Sixth Circuit should not have required the tribe to demonstrate that the criminal prosecution of Kelsey in tribal court was necessary to protect tribal self-government because the Supreme Court has only placed that

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64. *Kelsey*, 809 F.3d at 862 ("While certain applications of extra-territorial criminal jurisdiction might well be incompatible with the tribes' status as dependent sovereigns—that is, where they tangentially impact tribal self-governance or fail to implicate core internal relations . . . the instant exercise of criminal jurisdiction does not fall within that category.") (citation omitted).

65. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) ("*Montana v. United States*, decided three years later, is the pathmarking case concerning tribal civil authority over nonmembers.").

66. For a discussion of the role *Montana* plays in questions of civil jurisdiction, see Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, *supra* note 2; Fletcher, *Tribal Consent*, *supra* note 45; Douglas Endreson, *Reconciling the Sovereignty of Indian Tribes in Civil Matters with the Montana Line of Cases*, 55 VILL. L. REV. 863 (2010); Judith Royster, *Montana at the Crossroads*, 38 CONN. L. REV. 631 (2006).

67. United States v. Montana, 450 U.S. 544, 564 (1981).

68. *Kelsey*, 809 F.3d at 861 ("[A] free-floating, membership-based jurisdiction over *any criminal conduct* could run headlong into *Montana*'s holding that retained tribal power (i.e. criminal jurisdiction) is only that which is 'necessary to protect tribal self-government or control internal relations.'") (quoting *Montana*, 450 U.S. at 564).

limitation on a tribal court's *civil* jurisdiction involving non-members. In *United States v. Lara*, the Court recognized that Congress had intended that the mere assertion of criminal jurisdiction by a tribal court over other Indians on tribal lands is an exercise of self-government, without requiring the criminal charges to relate to tribal government or a tribe's internal relations.[69] Moreover, the Court expressly endorsed the consent theory of tribal court criminal jurisdiction over their members:

> The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.[70]

Even though the *Duro* Court's holding that tribes lacked inherent criminal jurisdiction over non-member Indians was overturned by Congress[71] and subsequently ratified by the Court,[72] the theory of criminal jurisdiction by consent over tribal members, elucidated by the Supreme Court, has never been expressly overturned.[73] Even after *Lara* an

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69. United States v. Lara, 541 U.S. 193, 198 (2004) ("[I]n permitting a tribe to bring certain tribal prosecutions against nonmember Indians, [it] does not purport to delegate the Federal Government's own federal power. Rather, it enlarges the tribes' own 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians,' including nonmembers.") (quoting 25 U.S.C. § 1301(2) (1990)).

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

71. Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1982 (codified as amended at 25 U.S.C. § 1301(2)(1990) ("'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction *over all Indians*.") (emphasis added).

72. [S]oon after this Court decided *Duro*, Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe. That new statute, in permitting a tribe to bring certain tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own federal power. Rather, it enlarges the tribes' own 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians,' including nonmembers.

Lara, 541 U.S. at 197–98 (2004) (quoting § 1301(2)).

73. Justice Kennedy in his concurring opinion emphasizes the enduring role consent plays in tribal court criminal jurisdiction even after Congress enacted the *Duro* fix. "The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the

overwhelming majority of the Court recognizes that at a minimum tribes retain criminal jurisdiction over the conduct of their members.[74]

Accordingly, while the Sixth Circuit's holding that the Little Band of Ottawa Indians had inherent criminal authority over Kelsey's conduct, the opinion was too limited. The Band's inherent power extends to Kelsey's conduct wherever his conduct is criminalized by the Band precisely because he has consented to tribal jurisdiction by virtue of his membership in the Band.[75] This inherent authority is limited only where the assertion of criminal jurisdiction by the tribe would substantially impede the ability of a sister sovereign (another tribe or a state) to maintain its own independence.[76]

While the scope of inherent tribal powers over tribal members may seem unduly broad, the Court has repeatedly recognized that Indians may be treated differently because of their status as enrolled members in federally-recognized Indian tribes.[77] Moreover, there is little reason to fear that tribes will use this extraterritorial criminal jurisdiction irresponsibly. Indeed, *Kelsey* is among the first cases to reach the federal appellate courts—suggesting that tribal courts generally focus their judicial resources in ways that do not regularly trigger jurisdictional challenges premised on tribal over-reach or threaten the competing sovereignty of other states or tribes.

So after reading *Lara* what is left of the *Duro* decision? The best interpretation of *Duro* asserts that tribal members consent to the inherent criminal powers of their tribe.[78] Normally the tribe will not attempt to extend

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> protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

Id. at 212.

74. *Id.* (The *Lara* opinion was a 7-2 decision with only justices Souter and Scalia dissenting).

75. For an excellent discussion of how the Supreme Court has encouraged the development of consent-based jurisdiction, see Fletcher, *Tribal Consent*, *supra* note 66, and 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 (1993).

76. *Lara*, 541 U.S. at 212 (Kennedy, A., concurring) ("Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both . . . There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.").

77. Morton v. Mancari, 417 U.S. 535 (1974) (the Bureau of Indian Affairs can hire and promote Indians within the federal service without violating the due process or equal protection clauses or triggering strict scrutiny). The Supreme Court in United States v. Antelope, 430 U.S. 641 (1977) found that the Major Crimes Act allows the United States to prosecute certain crimes committed by Indian persons. The Court held that it was not unconstitutional even though a non-Indian would not have been charged with murder had they committed the exact same offense. The Court concluded that Congress has singled out Indians for different treatment and the Major Crimes Act can survive a rational basis review.

78. Duro v. Reina, 495 U.S. 676, 693 (1990) ("The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal

its laws beyond the limits of its territory, regardless of whether that territory is within a reservation. However, because a tribe's sovereign status does not originate from the Constitution[79] but stems instead from its inherent powers as a tribal government, the tribe could decide to extend its criminal laws to the conduct of its members free from any geographic restraint.

B. A Tribe Retains Inherent Criminal Power Over Non-Member Indians Whenever Their Conduct Affects Its Members or Territory

The consent-based theory of tribal criminal jurisdiction does not apply to non-member Indians (i.e., Indians who are not themselves members of the tribe).[80] However, both Congress and the Court have recognized that the inherent power of tribal courts extends to *all Indians* and not just tribal members.[81] The Sixth Circuit in *Kelsey* made no attempt to delineate this power—thus leaving unanswered whether the inherent power of tribal courts extends over non-member Indians for conduct occurring on tribal lands, but not a part of Indian Country. However, it is not difficult to construct an answer from the first principles laid out above. A tribe's inherent criminal power extends over all non-member Indians whenever that activity touches upon the tribe or its members.

This conclusion makes sense. Consider a situation where the Indian status of the perpetrator and victim were the reverse of those found in *Kelsey*; a non-member Indian sexually assaulted a member of the Band at the community center. Since the community center was located on land over which the tribe has control, *United States v. Lara* dictates that the tribe's inherent criminal jurisdiction permits the tribe to prosecute.[82] Clearly, the

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members . . . A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.").

79. United States v. Bryant, 136 S. Ct. 1954, 1962 (2016) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.") (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

80. Obviously non-members have not opted into tribal membership and therefore they are not said to have 'consented' to the criminal jurisdiction of the tribal court. For a discussion of the origins of consent-based jurisdiction, see Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, *supra* note 2 at 800–01; L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 813 (1996) ("As full citizens of the United States, the Court declared, nonmember Indians share the same protections as non-Indians. It then outlined the contours of what has become the doctrine of consent-based sovereignty. 'The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.'") (quoting *Duro,* 495 U.S. at 693).

81. *See Lara*, 541 U.S. at 197–98, 212.

82. *Id.* at 210. ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.").

tribe has a strong interest in the prosecution of this offense; it wants to protect its members from sexual assault by other Indians and it wants to ensure that its community center is a safe place for anyone to visit or conduct business. These interests strongly favor a recognition that a tribe's inherent criminal power also extends extraterritorially when it's necessary to protect a tribe's lands or its membership.

It is equally clear that if it was a non-Indian who assaulted a tribal member at the community center, the inherent criminal power of the tribe would not permit the non-Indian to be prosecuted unless Congress either delegated that power to the tribe or recognized that the tribe's inherent powers extended to the type of assault described.[83] While this seems like a strange result, the combination of *Oliphant* with *Lara* dictate the outcome. *Oliphant* established that a tribe's inherent criminal power does not extend over non-Indians absent congressional action,[84] while *Lara* held that the inherent criminal power of a tribe extends to all Indians regardless of whether they are members.[85] To accord this authority; the inherent criminal powers of a tribal court may extend over all Indian persons, regardless of membership, for criminal activity occurring on tribal lands. This includes lands, like the community center in *Kelsey v. Pope*, that are located outside of Indian Country, but does not automatically extend to non-Indians.

Congress has recognized the inherent powers of tribal governments "to exercise criminal jurisdiction over all Indians,"[86] but such recognition comes with some implied limits related to territoriality. A tribe in California may not exercise its criminal powers over the conduct of members of a Michigan tribe while on its Michigan reservation simply because the California tribe has a tribal court and the members of the Michigan tribe are Indians. Unlike tribal members, non-member Indians did not consent to the jurisdiction of the tribe and so they come within its reach only by interacting with its citizens or threatening the security of its land. The Supreme Court has placed this limit on the inherent power of tribal courts "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members

83. Tribes have had their inherent power to criminally prosecute non-Indians implicitly divested, because the assertion of that criminal power is inconsistent with their sovereign status. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210–12 (1978). However *United States v. Lara* clearly holds that the courts will defer to Congress when it recognizes that the inherent power of tribes is broader than those powers previously articulated by the Court. Congress has recently done so again with the reauthorization of the Violence Against Women Act (VAWA)—permitting tribal criminal jurisdiction over a series of crimes related to domestic violence. *See generally* Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA. L. REV. 1564 (2016). For a discussion about the interaction between VAWA and Indian tribes before its reauthorization, see Tatum, *supra* note 2.

84. *Oliphant*, 435 U.S. at 210–12.

85. *See Lara*, 541 U.S. at 802–03.

86. Kelsey v. Pope, 809 F.3d 849, 861 (6th Cir. 2016).

and their territory."[87] Extending this language from *Mazurie*, as affirmatively applied by the Court in *Lara*, establishes a natural limitation on the extent of a tribe's inherent criminal authority over non-members.

Conclusion

Tribal courts continue to press the limits of a tribe's inherent criminal jurisdiction. Consistent with this movement, the Sixth Circuit was recently the first federal circuit court to be presented with a case about the expansion of tribal court criminal jurisdiction outside of Indian Country. While *Kelsey v. Pope* established the proposition that the inherent criminal power of tribes can extend beyond the reservation borders, the Sixth Circuit also confused the Supreme Court's criminal and civil jurisprudence, and was overly cautious when it placed the *Montana* limits upon a tribal court's inherent criminal jurisdiction.

As questions of off-reservation tribal criminal jurisdiction become more common, *Kelsey v. Pope* will serve as a starting point from which other courts diverge. As jurisprudence in this area develops, federal courts should conclude that there are no artificial limits placed upon the inherent criminal jurisdiction of a tribe over the conduct of its members. As a condition of membership, tribal members generally agree to be bound by the tribe's criminal rules and to be held accountable in tribal court. Limitations on a tribe's criminal powers should be placed upon tribal courts only when: (1) they attempt to prosecute *non-Indians* for crimes when Congress has not recognized the extension of a tribe's inherent powers; or (2) when they seek to prosecute *non-member Indians* for conduct that occurs outside of tribal lands. Only when non-members have not expressly consented to the jurisdiction of the tribal court is it reasonable to require that a tribe justify the assertion of its inherent powers by demonstrating that the non-member's conduct has a significant impact on the tribe's members or territory.

87. *Lara*, 541 U.S. at 204 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).