HALTING THE "SLIDE DOWN THE SOVEREIGNTY SLOPE"[1]: CREATIVE REMEDIES FOR TRIBES EXTENDING CIVIL INFRACTION SYSTEMS OVER NON-INDIANS

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Introduction

A slot machine player at the Four Winds Casino in Hartford, Michigan, took a payout ticket from another slot machine as he sat down to play.[2] In situations like this, casino security and law enforcement take every opportunity to ensure the player returns the property to the rightful owner. As a last resort, after sitting before a judge and entering a plea, the ticket taker was fined $280 and required to pay $139 in restitution.[3] What makes this story unique is that the ticket taker, a non-Indian, was brought to justice in the Pokagon Band of Potawatomi's Tribal Court for a violation of the tribe's civil infraction code.[4] Entering the courtroom, he saw a judge wearing beaded robes, an eagle feather behind the bench, and a turtle shell drum on counsel's table;[5] but, he was also treated to many of the safeguards, protection, notice, and fair hearing requirements common in a state or federal court.[6]

In an effort to regain control over their reservations and assert their sovereignty, tribal courts have begun to exercise jurisdiction over non-Indians through the use of civil infraction systems.[7] These civil infraction systems allow tribes to exercise jurisdiction over non-Indian offenders for actions that are more criminal than civil in nature.[8] The Supreme Court, in *Oliphant v.*

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[1] Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 117 (2003).

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[2] Lou Mumford, *Civil Misbehavior Can Land Even Non-Indians in Pokagon's Tribal Court*, SOUTH BEND TRIBUNE (May 25, 2013), http://articles.southbendtribune.com/2013-05-25/news/39527326_1_casino-patron-pokagons-tribal-court.

[3] *Id.*

[4] *Id.*

[5] *Id.* (describing the Pokagon courtroom in the article text and featuring a photograph of the courtroom).

[6] *See* discussion *infra* Sections I.B, III.A.

[7] *See infra* Part III.

[8] *See, e.g.*, Tulalip Tribes v. 2008 White Ford Econoline Van, No. Tul-CV-AP-2012-0404 (Tulalip Tribal Ct. May 31, 2013) (detailing the civil forfeiture of a vehicle after a

Suquamish Indian Tribe, expressly excluded tribes from exercising criminal jurisdiction over non-Indians,[9] and in *Montana v. United States*, the Court allowed for the exercise of civil jurisdiction over non-Indians only in very limited instances.[10] Tribes are currently working in a grey area between Supreme Court rulings, congressional limitations, and inherent tribal sovereignty to enforce a rule of law that allows tribes to retain and express their inherent sovereignty, ensure safety and security for members of the reservation, and attract businesses and investors to the reservation.[11] Due to the unclear legal posture of these civil infraction codes, a Supreme Court ruling on the subject would be detrimental to tribal sovereignty at this time.[12]

The best option for tribes is to work towards building open communications with non-Indians residing on reservations, non-Indians visiting reservations, and state and local governments surrounding reservations.[13] These communications can help to build trust between all parties and a base of empirical evidence showing the effectiveness of tribal civil infraction systems.[14] It is imperative that tribal jurisdiction over non-Indians not be reduced any more than it currently is to ensure the continuing success and viability of tribal nations themselves.[15] A tribal nation that does not have the ability to protect itself from harmful outside influences via its tribal courts has little ability to ensure the safety and security of its citizens, a priority

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non-Indian was caught attempting to sell marijuana within tribal lands after being prosecuted under the tribe's civil infraction system); *see also infra* Part III.

[9] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); s*ee infra* Part I.

[10] *See* Montana v. U.S., 450 U.S. 544, 566 (1981); s*ee infra* Part I.

[11] *See infra* Part IV.

[12] *See* Matthew L.M. Fletcher, *Factbound and Spitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935 (2009) (showing empirical evidence of discrimination against tribal interests during the certiorari process in the Supreme Court) [hereinafter Fletcher, *Factbound and Spitless*]; *see also* Marcia Coyle, *Indians Try to Keep Cases Away From High Court*, NAT'L L.J. (Mar. 30, 2010), http://www.nationallawjournal.com/id=1202447162222?slreturn=20140014214913 (explaining the abysmal record of the Indian tribes in front of the Supreme Court in recent years).

[13] *See infra* Part V.

[14] *See infra* Part V.

[15] Samuel E. Ennis, Note, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 575-76 (2009) (stressing the importance of jurisdiction over non-Indians because it can reduce reservation crime rates, ensure the safety of tribal citizens, and promote tribal sovereignty and self-governance).

of all sovereign nations.[16]

Part I of this Comment explores the history of tribal jurisdiction over non-Indians on reservations. Part II discusses the constraints that tribal governments must work within to exercise their civil jurisdiction over non-Indians. Part III analyzes numerous civil infraction codes and tribal judicial systems, examining what they include and what problems have arisen, or are likely to arise, because of the exercise of jurisdiction over non-Indians. Part IV addresses the importance of tribes retaining jurisdiction over non-Indians and the resistance these codes may receive from non-Indians subject to tribal authority. Finally, Part V offers suggestions for tribes in the creation and implementation of these tribal codes so their jurisdiction survives well into the future.

I. History of Tribal Jurisdiction Over Non-Indians

The history of tribal jurisdiction over non-Indians is multifaceted and varied due to the constantly evolving nature of federal Indian law.[17] One popular federal Indian law casebook has noted that 80% of the most prominent and important cases in Indian law today did not exist just forty years ago.[18] For the purposes of this

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[16] The police power is considered a cornerstone of sovereignty; this power includes the power of the State to keep its citizens safe, promote public health and welfare, and ensure comfort within the nation*; see* State v. Old Tavern Farm, Inc., 180 A. 473, 474 (Me. 1935) (noting key expressions of police power); Goldman v. Crowther, 128 A. 50, 54 (Md. 1925) (describing the fundamental attributes of the police power); MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT, at xi (2005) (explaining the essential nature of the police power to the state).

[17] *See* Richard L. Barnes, *From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction*, 57 LOY. L. REV. 435, 437, 455 (2011) (noting the continual modifications made in federal Indian law and the widespread manipulations of federal Indian law doctrines).

[18] GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW, at v (6th ed. 2011); *see also* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2557 (2013) (holding a non-Indian family may adopt an Indian child, regardless of a tribe's placement preferences, if no other individuals have come forward to adopt the child); *see also* United States v. Lara, 541 U.S. 193, 196 (2004) (affirming that tribal courts have criminal jurisdiction over non-member Indians); *see also* Alaska v. Native Vill.of Venetie Tribal Gov't, 522 U.S. 520, 523 (1998) (stating that Alaskan Native lands held within tribal corporations do not fall within the description of Indian country); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (affirming a tribe's inherent right to run gambling facilities preempts state and local laws to the contrary); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)

Comment, there are four important pieces to tribal jurisdiction over non-Indians. First, longstanding notions of inherent tribal sovereignty and jurisdiction are essential to an understanding of this issue.[19] Second, this inherent sovereignty is limited by pieces of congressional legislation.[20] Third, case law itself has evolved and changed through time regarding the extent of tribal jurisdiction over non-Indians on reservations.[21] Finally, in recent years, Congress has begun to expand the previous limitations on tribal jurisdiction with new pieces of legislation.[22]

A. Traditional Tribal Sovereignty and Jurisdiction

It is a basic tenet of federal Indian law that tribes are not bestowed sovereignty or jurisdiction from an overarching power—they have the inherent powers of a sovereign nation by their very existence, powers that were present well before the "discovery" of America.[23] These sovereign powers include, among many others, the right to self-government, determine membership, enforce laws, tax, and regulate property.[24] As sovereign nations, tribes can take actions using *de facto* sovereignty, or "sovereignty in practice."[25] However,

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(explaining that tribes have the inherent authority to tax non-Indian companies working on the reservation); *see also* Montana v. United States, 450 U.S. 544 (1981) (allowing for tribal court civil jurisdiction over non-Indians in only two limited instances); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (removing tribal court criminal jurisdiction over non-Indians). *See infra* Section I.C. for a discussion of many of these cases.

[19] *See infra* Section I.A.

[20] *See infra* Section I.B.

[21] *See infra* Section I.C. These cases illustrate the Supreme Court's shift in policy towards Indian tribes and are necessary in order to properly situate civil infraction codes within federal Indian law jurisprudence.

[22] *See infra* Section I.D.

[23] *See* United States v. Wheeler, 435 U.S. 313, 324 (1978) (explaining that tribal governments have always had the inherent powers to exercise jurisdiction over their own members); s*ee also* HANDBOOK OF FED. INDIAN LAW §4.02(1) (F. Cohen 2012) (noting that all federal Indian law is centered around the fundamental principle that "an Indian tribe possess, in the first instance, all the inherent powers of any sovereign state").

[24] Jamelle King, Note, *Tribal Court General Civil Jurisdiction over Actions Between Non-Indian Plaintiffs and Defendants:* Strate v. A-1 Contractors, 22 AM. INDIAN L. REV. 191, 198 (1997).

[25] JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE 5 (2004), *available at*

much of the field of Indian law is devoted to studying *de jure* sovereignty, the decisions a tribal government makes only after a "legal decree or legislative act" from an outside sovereign affirms tribal sovereignty.[26] *De facto* sovereignty is a much more powerful form of sovereignty and fully expresses inherent tribal sovereignty because it allows tribes the powers to make the decisions that will most affect their nations.[27]

On several occasions, the Supreme Court has worked to affirm inherent tribal jurisdiction.[28] One of the foundational cases of tribal jurisdiction is *Worcester v. Georgia*, where the Supreme Court held that the laws of Georgia did not have any application within Indian country.[29] Just one year later, the Court affirmed the idea that tribes have the authority to control what happens within their reservations.[30] In *Ex parte Crow Dog*, the Court held that the Sioux tribe had the inherent jurisdiction to prosecute a murder committed by one Indian against another, where the crime occurred within Indian country, on the Rosebud Sioux Reservation.[31]

Jumping more than one hundred years forward, *Williams v. Lee*, the first major affirmation of tribal sovereignty in the modern era, confirmed that the state of Arizona did not have jurisdiction over a dispute between a non-Indian shop owner and an Indian debtor, and that the case should instead be settled in tribal court.[32] In this case, the Court noted that throughout the history of federal Indian affairs, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by

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http://nni.arizona.edu/resources/inpp/2004_kalt.singer_JOPNA_myths.realities.pdf .

[26] *Id.*

[27] *See id.*; Marren Sanders, *De Recto, De Jure, or De Facto: Another Look at the History of U.S./Tribal Relations*, 43 SW. L. REV. 171, 186-87 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2135064.

[28] *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 811 (1996) (summarizing the doctrine of inherent tribal sovereignty and its beginnings in the Supreme Court).

[29] Worcester v. Georgia, 31 U.S. 515, 595 (1832).

[30] *Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883).

[31] *Id.* at 558, 572 (noting that neither an 1868 treaty with the Sioux, nor an Act of Congress expressly repealed the U.S. Code in effect at the time, which excepted "crimes committed by one Indian against the person or property of another Indian" from federal jurisdiction).

[32] *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that tribal court is the proper forum for a dispute involving tribal members living on the reservation).

them."[33] This principle of ensuring that the rights of Indians to govern themselves are not infringed has not always remained consistent,[34] but it is regaining widespread recognition.[35]

B. Legislation Limiting Inherent Tribal Sovereignty

One way that tribes can be divested of their inherent sovereignty is through congressional legislation.[36] Passed in 1885, the Major Crimes Act gave the federal government concurrent jurisdiction over seven major crimes occurring within Indian country; tribes retained their inherent jurisdiction for these crimes.[37] This legislation, which applied to crimes that were committed between Indians on tribal lands, was passed in direct response to *Ex parte Crow Dog*.[38] The authority of Congress to pass this type of criminal legislation regarding tribes was confirmed in *United States v. Kagama*.[39]

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[33] *Id.* at 220.

[34] The federal government has gone through major policy shifts regarding the rights of Indian tribes to exist as independent, sovereign nations; *see* Gould, *supra* note 28, at 811-12. The periods of allotment, termination, and relocation are examples of the federal government severely restricting the ability of tribes to exist as sovereign nations. *Id.*

[35] The articulation of this policy has early beginnings. In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985), which held that non-Indian plaintiffs must exhaust their remedies in tribal courts before petitioning for federal relief, the Court excerpted and affirmed statements of the 1855 Attorney General, Caleb Cushing. *Id.* Cushing stated that Congress had "omitt[ed] to take jurisdiction in civil matters," and "jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation." *Id.* (quoting 7 Op. Atty. Gen. 175, 180-81 (1855) (emphasis removed)).

[36] COHEN, *supra* note 23, at §4.02(1); Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 469 (2003).

[37] Major Crimes Act, 18 U.S.C. § 1153 (2012) (removing exclusive jurisdiction over seven major crimes from tribal courts and placing it concurrently within federal courts). The seven original crimes were "murder, manslaughter, rape, assault with intent to commit murder, arson, burglary, and larceny." *Id.* The act has been amended many times and now includes kidnapping, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a minor, and robbery. *Id.*

[38] *See* 109 U.S. 556, 571-72 (1883) (allowing tribal criminal jurisdiction for a crime committed within Indian country between two enrolled Indians). The Major Crimes Act was passed by Congress just two years after *Ex parte Crow Dog* and reverses its holding that tribes have exclusive jurisdiction over criminal matters between members; *see* Major Crimes Act, *supra* note 37.

[39] 118 U.S. 375 (1886) (holding that plenary power gave Congress the ability to give the federal government concurrent jurisdiction with tribes in the instance of the Major Crimes Act). At the time of *Kagama*, Congress already had the ability to pass

Although the Major Crimes Act applied to only those crimes involving Indians, it began a long string of legislation intended to chip away at the inherent sovereignty of tribes.[40] While in theory tribes still had concurrent jurisdiction with the federal government, the lack of funding and support for tribal courts during this time created functionally exclusive jurisdiction for the federal government.[41]

Passed in 1953, Public Law 280-83 (PL-280) exacerbated the problem of enforcement and prosecution of laws within Indian country.[42] The law mandated six states take criminal and civil jurisdiction over tribal members into state control, where the federal government previously had jurisdiction.[43] While delegating all criminal jurisdiction to states,[44] the statute distinguished between civil regulatory and civil adjudicatory jurisdiction.[45] Through a series of cases, it was established that states had control over civil adjudicatory matters within Indian country, but not over civil regulatory matters, like taxes.[46] Although Congress added a tribal consent provision in

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other type of legislation regarding Indians; *see* Indian Trade and Intercourse Act, Pub. L. No. 1-33, § 4, 1 Stat. 137 (1790) (requiring a license to trade with Indian tribes); U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "To regulate Commerce . . . with the Indian tribes").

[40] *See, e.g.*, General Allotment Act, 24 Stat. 388 (1887), *repealed by* Indian Reorganization Act, 48 Stat. 984 (1934) (current version at 25 U.S.C. § 461 (2006)) (breaking up Indian reservations into individually owned 160 acre parcels); Public Law 83-280, ch. 505, § 2, 67 Stat. 588 (1953) (codified as amended in 18 U.S.C. § 1162 (2012), 28 U.S.C. § 1360 (2012)) (granting state concurrent jurisdiction over all criminal, and some civil, acts occurring in Indian country).

[41] Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 147 (1995). For example, Congress had appropriated no funds for judges within Indian country until 1888, when $5,000 was appropriated. *Id.*

[42] Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (1953) (codified as amended in 18 U.S.C. § 1162 (2012), 28 U.S.C. § 1360 (2012)).

[43] *Id.* (creating mandatory state control over tribal civil and criminal jurisdiction in California, Minnesota, Oregon, Wisconsin, Nebraska, and Alaska). At the time of PL-280's enactment, other, non-mandatory states had the ability to take jurisdiction. *Id.* Several tribes were exempted from the original mandatory states, such as Red Lake in Minnesota, Warm Springs in Oregon, and the Annette Islands in Alaska. *Id.*; *see generally* ANTON S. TREUER, OJIBWE IN MINNESOTA 46 (2010) (detailing how Red Lake obtained an exception from PL-280).

[44] 18 U.S.C.S. § 1162.

[45] 28 U.S.C.S. § 1360(a).

[46] Bryan v. Itasca Cnty., 426 U.S. 373, 390 (1976) (holding that Itasca County did not have the power to levy a personal property tax on the mobile home of Bryan, who was an enrolled member of the Leech Lake Band of Chippewa Indians, living on the Leech Lake Reservation); *see* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that state laws that regulated gaming in the state, but allowed for

1968, by that time all of the mandatory states had assumed jurisdiction.[47] By its very nature, PL-280 created jurisdictional problems within Indian country due to a lack of funding.[48] Congress did not appropriate any additional funding for the mandatory states that were required to assume jurisdiction over Indian country and states do not have the general ability to tax, and thus raise additional revenues, within Indian country.[49] Lack of enforcement of laws where neither federal nor state governments are able to properly prosecute criminal or civil matters is a continuing problem within Indian country today.[50] This enforcement gap is just one of many reasons why tribes have worked towards creating comprehensive codes that can guarantee that there is proper access to justice across reservations.[51]

The Indian Civil Rights Act of 1968 was passed to ensure that tribal courts did not violate specific portions of the Bill of Rights when adjudicating claims over Indians.[52] In order to conform to the

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certain exceptions, showed that gambling was not against the public policy of the state, which meant it was a civil regulatory law and thus not applicable to the tribe within their reservation); Doe v. Mann, 415 F.3d 1038, 1059-61 (9th Cir. 2005) (holding that the state of California properly had civil adjudicatory jurisdiction over a child protection hearing between two private parties, one of whom was an enrolled tribal member).

[47] 25 U.S.C. § 1322(a). The mandatory states were required to assume jurisdiction upon the effective date of the law, so the tribal consent provision did nothing to help tribes in these mandatory states; *see* Rosebud Sioux Tribe v. South Dakota, 709 F. Supp. 1502, 1507 (D.S.D. 1989) (explaining the tribal consent provision did not apply retroactively), *vacated on other grounds*, 900 F.2d 1164 (8th Cir. 1990).

[48] *See infra* note 49 and accompanying text.

[49] Daniel Twetten, Note, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1327 (2000) (detailing the financial motivations behind PL-280 and the resulting complications).

[50] *See* Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 1-4 (2009) (discussing the impact of the jurisdictional gap on Native American women and sexual violence). This specific jurisdictional problem is beginning to work itself out with the reauthorization of the Violence Against Women Act of 2013; *see infra* Section I.D.

[51] *See* Janine Robben, *Life In Indian Country: How the Knot of Criminal Jurisdiction Is Strangling Community Safety*, 72 OR. ST. B. BULL. 28, 29, 32-33 (2012) (describing the still-existing jurisdictional gap on reservations).

[52] 25 U.S.C. § 1301-04 (1968) (including provisions that the accused in a tribal court has the ability to file a writ of habeas corpus, a guarantee of due process, and a prohibition against double jeopardy). Notably missing for the purpose of this Comment is the right to a jury trial in civil cases and the right to free counsel for indigent persons in civil cases; *see* Robert D. Probasco, *Indian Tribes, Civil Rights, and*

requirements of the Indian Civil Rights Act, tribal courts often deploy similar protections as state and federal courts, although there is space for tribal courts to retain unique customs and practices.[53] Because of this, many of the concerns and counter arguments to civil jurisdiction over non-Indians are unfounded; "Tribal courts appear to be no less protective—and much more accessible—than federal courts have been in protecting civil rights on Indian reservations."[54] That tribal courts are more accessible to individuals living on the reservation may refer both to the physical accessibility to tribal courts, as compared to the remote locations of many reservations to the nearest federal or state courts,[55] as well as the spiritual and cultural accessibility that many tribal members feel within tribal courts.[56]

C. Cases Limiting Tribal Sovereignty

In sharp contrast with Congress's and the Executive Branch's push towards self-determination for tribes,[57] the Supreme Court has

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Federal Courts, 7 TEX. WESLEYAN L. REV. 119, 127 n.56 (2001) (explaining that these provisions were left out of the Indian Civil Rights Act in an attempt to make the Act more applicable to a wide range of tribes, who could not have afforded the extra expense accompanying these rights).

[53] Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 489 (1998) (describing the evolution of tribal courts since the Indian Civil Rights Act and their similar protections to federal and state courts, besides anecdotal evidence to the contrary).

[54] *Id.* at 490; *see infra* Section IV.D. (describing the pushback against tribal court jurisdiction over fairness concerns). Although tribes are not required to provide these safeguards, many do. *See* POARCH BAND OF CREEK INDIANS TRIBAL CODE § 6-1-1 (allowing a jury trial in civil cases with more than a $500 claim); *see also* TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS TRIBAL CODE § 2.0901(1) (allowing a jury trial in all civil cases with more than a $200 claim).

[55] Irina Zhorov, *Showing Up to Federal Court Can Be a Hardship for Wind River Residents*, WYO. PUB. MEDIA (Feb. 3, 2014), http://wyomingpublicmedia.org/post/showing-federal-court-can-be-hardship-wind-river-residents.

[56] *See* Matt Buxton, *Alaska Tribal Courts Fight to Establish Authority*, FAIRBANKS DAILY NEWS (Aug. 11, 2013), http://www.newsminer.com/news/local_news/alaska-tribal-courts-fight-to-establish-authority/article_76c6a87e-025f-11e3-a051-0019bb30f31a.html; Join Together Staff, *Tribal "Wellness Court" Uses Native American Culture to Assist Addition Recovery*, PARTNERSHIP FOR DRUG-FREE KIDS (Aug. 13, 2012), http://www.drugfree.org/join-together/addiction/tribal-wellness-court-uses-native-american-culture-to-assist-addiction-recovery.

[57] *See* Aaron F.W. Meek, Note, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 141-46 (2010-2011) (describing Congress' promotion of Indian self-determination

acted to limit tribal sovereign jurisdiction over Indian country, particularly over non-Indians.[58] The Supreme Court began to limit tribal jurisdiction in the modern era by restricting criminal jurisdiction over non-Indians.[59] This was exemplified in *Oliphant v. Suquamish Indian Tribe*, which was a devastating blow to the authority of tribal courts.[60] In a sweeping decision, the Supreme Court uniformly, and without exception, took criminal jurisdiction away from tribal courts over non-Indians.[61] The Court held that "Indian tribes . . . [gave] up their power to try non-Indian citizens of the United States" when they submitted to the protection of the United States.[62] The effects of *Oliphant* have caused continued issues in the enforcement of criminal codes on reservations due to the "jurisdictional maze" that resulted from the competing precedents of the Major Crimes Act, PL-280, and now *Oliphant*.[63]

Duro v. Reina was an extension of *Oliphant*; as the Court in *Duro* held that not only did tribes not have criminal jurisdiction over non-Indians, but they also did not have criminal jurisdiction over non-member Indians.[64] As it is common for Indians to live, work, and marry on reservations other than their own, this created a

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through various policy initiatives, such as the reversal of termination, the Indian Self-Determination Education and Assistance Act, and the Indian Civil Rights Act); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 151-54 (2006) (detailing presidential contributions to federal Indian policy, including President Richard Nixon's 1970 speech to Congress regarding Indian self-determination) [hereinafter Fletcher, *The Supreme Court and Federal Indian Policy*].

[58] John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 732 (2006) (comparing Congress's and the Executive Branch's commitment to inherent tribal sovereignty with the Supreme Court's limitations, or divestitures, of tribal sovereignty).

[59] *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Non-members in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1048 (2005).

[60] 435 U.S. 191, 212 (1978).

[61] *Id.* at 195.

[62] *Id.* at 210.

[63] A complex grid system of determining jurisdiction has resulted, requiring an arresting officer to determine the membership of the victim, membership of the perpetrator, type of crime, and location of crime before the officer can bring the accused to jail. UNITED STATES ATTORNEYS' MANUAL Tit. 9, § 689 (2013), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm . Recently, Congress has restored a limited amount of criminal jurisdiction to tribes with the 2013 reauthorization of the Violence Against Women Act; *see infra* Section I.D.

[64] *See* 495 U.S. 676 (1990).

jurisdictional gap on many reservations.[65] Congress very quickly enacted legislation to fix this issue, colloquially known as the "*Duro*-fix."[66] This amendment to the 1968 Indian Civil Rights Act served to extend tribal jurisdiction over all Indians, not just member Indians.[67] The Supreme Court affirmed Congress's power to overturn its previous ruling in *Duro* in *United States v. Lara*.[68] This case confirmed that Congress has the ability to "lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians."[69] The Court noted that Congress's power to legislate over Indian affairs comes from the Indian Commerce Clause and the Treaty Clauses of the Constitution,[70] and that Congress has a long history of changing the "metes and bounds of tribal sovereignty,"[71] so there was no reason Congress could not overturn the Court's previous ruling.[72]

Not long after the controversial decision in *Oliphant*, the Supreme Court released a decision that severely limited tribal jurisdiction over non-Indians in civil cases.[73] In *Montana v. United States*, the Court stated a general rule that tribes do not have civil jurisdiction over non-Indians.[74] Within this general rule, the Court included two exceptions. First, a tribe can assert civil jurisdiction over a non-Indian if the non-Indian has a "consensual relationship[ ] with the tribe or its members through commercial dealing, contracts,

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[65] *See* S. REP. NO. 102-153, Appendix E, at 58 (1991); *see also* Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After* Duro v. Reina, 41 CONN. L. REV. 265, 281-82 (2008) (succinctly summarizing current statistics on Indians residing on reservations other than which they are enrolled).

[66] 25 U.S.C. § 1301(2) (confirming a tribe's right "to exercise criminal jurisdiction over all Indians").

[67] *Id.*

[68] *See* 541 U.S. 193 (2004).

[69] *Id.* at 200.

[70] *See Id.*

[71] *Id.* at 203. In affirming this point, the Court noted the major shifts in congressional policy towards Indian tribes had necessarily involved changing tribal sovereignty, including the removal, assimilation, termination, and tribal autonomy policies. *Id* at 202. This case could be interpreted as allowing Congress to have too much power over tribes, if the power is not used in conjunction with the trust responsibility; *see generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (explaining the trust responsibility owed by the federal government to Indian tribes).

[72] *See Lara*, 541 U.S. at 196.

[73] *See* Montana v. United States, 450 U.S. 544, 565 (1981).

[74] *Id.*

leases, or other arrangements."[75] Second, a tribe may assert civil jurisdiction over a non-Indian if the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[76] However, *Montana* was not simply a civil blanket statement of jurisdiction in the way that *Oliphant* was for criminal law.[77] While this case was an extreme restriction of tribal jurisdiction over non-Indians, it was not as far reaching in the civil context as *Oliphant* was in the criminal context.[78]

Early in the aftermath of *Montana*, it seemed that the Court may have only intended the decision and its exceptions to apply on non-Indian owned land, but not reservation land.[79] As more case law has developed, however, the *Montana* test has been used on tribal trust lands within the boundaries of the reservation.[80] It is still unclear whether the application of *Montana* to tribal trust lands is a general principle to be used moving forward, or only a narrow holding found in one case.[81] The Supreme Court has not expressly answered this question and lower courts have ruled in conflicting ways.[82]

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[75] *Id.*

[76] *Id.* at 566.

[77] *See* Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1207 (2010) (discussing the idea that while *Montana* is broadly reaching, it is not quite as broad as *Oliphant v. Suquamish Indian Tribe* and does leave space for tribes to exercise civil jurisdiction over non-Indians).

[78] *Id. Oliphant* contained no exceptions; tribes cannot exercise criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 195 (1978). Conversely, *Montana* has two exceptions written in to the general rule. *Montana*, 450 U.S. at 565-66.

[79] *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987). Although passed just a year after *Montana*, the Supreme Court did not use the *Montana* test and exceptions in this case, likely because the incident took place on reservation lands. *See id.* at 11. The Court specifically noted that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and . . . [c]ivil jurisdiction over such activities presumptively lies in tribal courts." *Id.* at 18.

[80] *See* Nevada v. Hicks, 533 U.S. 353, (2001) (holding that for the purposes of state officials responding to off-reservation violations on tribal trust lands, the tribal court does not have jurisdiction under *Montana*).

[81] *See* Blair M. Rinne, *In* Water Wheel, *The Ninth Circuit Corrects a Limitation on Tribal Court Jurisdiction*, 32 B.C. J.L. & SOC. JUST. E. SUPP. 47, 57 (2012) ("*Hicks* has limited applicability and should not be extended to conduct of non-Indians on tribal land unless there exists a competing state interest."); *see also Nevada*, 553 U.S. at 360 ("The ownership status of land, in other words, is only one factor to consider. . . . It may sometimes be a dispositive factor.").

[82] *Compare* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 812-14 (9th Cir. 2011) (declining to apply *Montana* and holding the tribal court did have jurisdiction over a non-Indian who failed to pay rent for an extended period of time

In *Strate v. A-1 Contractors*, the Court focused on and limited *Montana*'s second exception, suggesting that tribal jurisdiction relying on the second exception involving the health, welfare, political integrity, or economic security of the tribe would be found only in cases where the non-Indian conduct had some impact on tribal government or internal tribal affairs.[83] A personal injury action by a non-Indian resulting from a traffic accident caused by a non-Indian on a public highway within the reservation was determined not to fall under *Montana*'s second exception.[84] The Court also held that until Congress chose to increase a tribe's civil jurisdiction, its "adjudicative jurisdiction does not exceed its legislative jurisdiction,"[85] meaning that if a tribe was found not to have jurisdiction to assess taxes and other regulations on a non-Indian, it also could have pull that non-Indian into tribal court. The Court re-affirmed that the rule set out in *Montana* was intended to be a rule; the exceptions could not be expanded to become larger than the rule itself.[86] It can be interpreted from this decision that any tribal court claiming jurisdiction under one of the *Montana* exceptions needs to have a narrow and specific rationale for the claim of jurisdiction.[87] The *Strate* Court also narrowed *Montana*'s first exception implicitly when it determined that its ruling did not apply to this case, even though the owners of the vehicle that struck the non-member were engaged in subcontracting work with the tribe.[88]

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on tribal land), *with* Ford Motor Co. v. Todecheene, 394 F.3d 1170 (9th Cir. 2005) (applying *Montana* to a products liability claim arising on tribal lands and holding the tribal court lacked jurisdiction over a non-Indian). The Ninth Circuit reversed itself two years later in *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216 (9th Cir. 2007), and determined that the tribal court did have jurisdiction, but the court determined jurisdiction existed within the confines of the *Montana* test and exceptions.

[83] *See* 520 U.S. 438, 459 (1997).

[84] *See id.*

[85] *Id.* at 453.

[86] *See id.* ("[T]he civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'" (quoting Montana v. United States, 450 U.S. 544, 565 (1981)); *see also* Braveman, *supra* note 1 at 113 ("Moreover, *Strate* demonstrates that the Court reads very narrowly the second exception, concerning conduct that threatens the political integrity, economic security, or welfare of the tribe, to apply only where the tribal interest relates directly to self-government.").

[87] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (noting that while the sale of a tribal member's land once owned in fee is disappointing, it "cannot be called 'catastrophic' for tribal self-government" for the purposes of the second *Montana* exception).

[88] *See Strate*, 520 U.S. at 457.

Aligned with its pattern of not allowing any case to fit under the second *Montana* exception, the Court further limited tribal jurisdiction over non-Indians in *Atkinson Trading Co., Inc. v. Shirley*.[89] This case involved the Navajo Nation's attempt to levy a tax on the non-Indian guests of a hotel located on non-Indian land within the Navajo Reservation.[90] The Court again affirmed that *Montana*'s exceptions may not be read broadly, finding that just because hotel guests are benefiting from tribal police, fire, and medical services it does not mean that they have entered into a consensual relationship with the tribe under *Montana*'s first exception.[91] The Court admitted that the hotel had an "overwhelming Indian character"[92] due to its large employment of Navajo members, location on the reservation, and lodging of tourists, but found that it did not meet *Montana*'s second exception because its activities had no direct effect on the tribe. This holding seems illogical when compared with the Court's holding in *Merrion v. Jicarilla Apache Tribe*, where it decided that the Jicarilla Apache Tribe could exercise its inherent taxing power to impose a severance tax on a non-Indian company working on the reservation.[93] In *Merrion*, however, the taxation was occurring on tribal trust property,[94] whereas in *Atkinson Trading*, the hotel was located on non-Indian land.[95]

Less than a month after the Court decided *Atkinson Trading*, it further reduced the scope of tribal jurisdiction over non-Indians in *Nevada v. Hicks*.[96] In a marked change from its previous *Montana* decisions, this case was the first time that the *Montana* reasoning had been applied to non-Indian actions on tribal lands,[97] and extended the

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[89] *See* 532 U.S. 645 (2001).

[90] *See id.* at 647-649.

[91] *See id.* at 655. It is interesting to note that the paternalism and protectionist arguments from *Oliphant* do not extend to non-Indians on the reservation receiving tribal government support in the *Montana* cases. *Id.*

[92] *Id.* at 657 (quoting Brief for Respondents at 13-14).

[93] *See* 455 U.S. 130, 159 (1982).

[94] *Id.* at 137. This distinction between Indian and non-Indian land is important for the application of *Montana*; *see infra* notes 97-98 and accompanying text.

[95] *Atkinson*, 532 U.S. at 648.

[96] 533 U.S. 353, 364 (2001) (holding that it is not essential to a tribe's right to self-government or the creation of laws to have the power to regulate state officers pursuing an off-reservation violation).

[97] Rinne, *supra* note 81, at 53-54. *Montana*, *Strate*, *Merrion*, and *Atkinson* had all involved application of the *Montana* rule on non-Indian land, or a refusal to apply *Montana* because the land was tribally owned. *Id.*; *see supra* notes 79-82 and accompanying text.

reach of *Montana* beyond non-Indian owned fee lands.[98] The Court revisited its question from *Strate* regarding whether a tribe's adjudicatory jurisdiction may exceed its regulatory jurisdiction.[99] Answered in the negative in *Strate*,[100] the Court here noted that a tribe's regulatory and adjudicatory jurisdiction may be "coextensive," but "it surely deserves more considered analysis."[101] *Hicks* demonstrates one area where the Supreme Court may choose to take up a more detailed analysis of this question—tribal civil jurisdiction over non-Indians resulting from a civil infraction code, as this combines a tribe's adjudicatory and regulatory jurisdiction.[102] In a negative tone, the Court wrote that the tribe's proposed solution in this case "would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court."[103] It is unclear why a non-Indian appearing in tribal court needs to hold a negative connotation.[104] Tribal courts are becoming fundamentally fair and safe places for non-Indians to be tried.[105] One author has suggested that the very reason why tribal courts are forums of effective justice is because of the presence of non-Indians.[106]

The Court again reduced tribal court jurisdiction over non-Indians in *Plains Commerce Bank v. Long Family Land & Cattle Co.*[107] The Court held that a tribal court did not have jurisdiction over a non-Indian bank, even though the bank had been dealing with the Indian-owned company for many years; the land dispute at issue had recently been owned by the Indian company on the Reservation; the bank had availed itself of tribal court resources before; and the Indian company alleged outright racial discrimination by the bank.[108] In this case, the Court's discussion of the *Montana* exceptions became even more

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[98] *Nevada*, 533 U.S. at 355. This case involved state game wardens executing a search warrant for crimes that occurred off reservation. *Id.* at 356. The facts of this case raised unique state interests not present in the previous *Montana* cases; *see* Rinne, *supra* note 81, at 56-57.

[99] *See supra* note 85 and accompanying text.

[100] *See supra* note 85 and accompanying text.

[101] *Nevada*, 533 U.S. at 374.

[102] *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 171-72, 179 (2d ed. 2010).

[103] *Id.*

[104] *See infra* Part IV.

[105] Berger, *supra* note 59, at 1115 (surveying the appellate court decisions in the Navajo Nation involving outsiders); *see supra* notes 53-54 and accompanying text.

[106] *See* Berger, *supra* note 59, at 1115.

[107] *See* 554 U.S. 316, 320 (2008).

[108] *Id.* at 320-21.

restricted.[109] Instead of writing about the two *Montana* exceptions as encompassing many possible instances of tribal court jurisdiction, the Court wrote of the two *Montana* exceptions as the only two narrow instances where a tribal court could have jurisdiction over a non-Indian.[110] The Court affirmed that a potential catastrophe was needed before non-Indian conduct would be covered under tribal jurisdiction within *Montana*'s second exception.[111]

For hundreds of years, the Supreme Court has ruled on issues involving Indian tribes, creating a large body of common law for tribes to navigate when they attempt to exercise sovereign powers the tribe has never used.[112] As the case law of the Supreme Court currently exists, tribes do not have jurisdiction over the criminal actions of non-Indians under the doctrine of *Oliphant*,[113] regardless of where they occur, with only a few, extremely limited, exceptions.[114] The Supreme Court has drastically narrowed the circumstances that allow tribes to take civil jurisdiction over non-Indians,[115] but there are still avenues for tribes to pursue, including the open question of whether *Montana* applies on tribal trust land when there are limited competing state interests.[116] These open avenues in the case law, when combined with tribes' inherent sovereign authority and Congress' recent restoration of some aspects of tribal sovereignty,[117] offer tribes the ability to be creative with its extensions of jurisdiction.

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[109] *See generally* Paul A. Banker & Christopher Grgurich, *The Plains Commerce Bank Decision and Its Further Narrowing of the Montana Exceptions as Applied to Tribal Court Jurisdiction Over Non-Member Defendants*, 36 WM. MITCHELL L. REV. 565, 589 (2010) (explaining how the *Plains Commerce Bank* case strengthened *Montana*'s general rule and limited its exceptions).

[110] *Plains Commerce*, 554 U.S. at 332-34.

[111] *See id.* at 341 (quoting F. COHEN, *supra* note 23, § 4.02(3)(c)); *see also supra* note 87.

[112] Although it is a large body of law, the complexity of Indian law is often overstated, especially to those unfamiliar with the field. Matthew L.M. Fletcher, *Commentary on "Confusion" and "Complexity" in Indian Law*, TURTLE TALK (May 2, 2011), http://turtletalk.wordpress.com/2011/05/02/commentary-on-confusion-and-complexity-in-indian-law/. According to many commentators, Indian law is no more complicated than federal sentencing guidelines or the Erie Doctrine, but the "complexity" of the law is often used as a rationale by the Supreme Court to further restrict tribal sovereignty. *Id.*

[113] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

[114] *See infra* Section I.D.

[115] *See supra* notes 74-76 and accompanying text.

[116] *See supra* note 98 and accompanying text.

[117] *See supra* Section I.A; *see infra* Section I.D.

D. Legislation Restoring Tribal Sovereignty

The Tribal Law and Order Act of 2010 once again changed the jurisdictional makeup of reservations.[118] One of the motivations for the passage of the Act was to have a record of the declinations of prosecutions causing many of the law and order problems on reservations.[119] The Act increased both the resources of federal prosecutors and tribal courts and increased the ability of tribal courts to grant longer incarceration sentences and assess higher fines.[120] Although dealing with crimes, and thus only member-Indian convictions, the Act allows tribal courts to expand their jurisdiction if they meet certain requirements.[121] As part of this expansion, tribal courts are eligible to receive additional federal funding.[122] While this funding is earmarked for the criminal trials of member-Indians,[123] optimistically there will be a spillover effect of the funding, resources, knowledge, and confidence of tribal courts to expand their civil jurisdiction over non-Indians through civil infraction systems.

In 2013, Congress expanded the Violence Against Women Act to extend jurisdiction to certain tribes to prosecute non-Indian offenders for sexual assault and battery crimes against tribal women.[124] Although this Act deals only with the most heinous crimes against enrolled members,[125] it may point to the fact that Congress is not completely opposed to the idea of expanding tribal jurisdiction over non-Indians in some cases. It also may lend credibility to the idea

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[118] Tribal Law and Order Act of 2010, 25 U.S.C. 2802 (codified in scattered sections of the U.S. Code); *see Tribal Law and Order Act*, U.S. DEP'T OF JUST., http://www.justice.gov/tribal/tloa.html (last visited Feb. 19, 2014).

[119] *See Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the Comm. on Indian Affairs*, 110th Cong. 40-43 (2008) (statement of M. Brent Leonhard, Deputy Att'y Gen. of the Umatilla Indian Reservation); Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U.L. REV. 139, 148 (2011) (noting that while the rate of domestic violence, rapes, and sexual assaults are double for Native Americans, the prosecution for these crimes is much lower than the national average); Tribal Law and Order Act of 2010 § 212.

[120] *See* Tribal Law and Order Act of 2010 §§ 213, 234, 242; *see generally* Hart, *supra* note 119.

[121] *See* Tribal Law and Order Act of 2010 § 234.

[122] *Id.*

[123] *Id.*

[124] *See* Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, tit. IX (2013). The Act authorizes jurisdiction over crimes of domestic violence, dating violence, sexual assault or stalking, and sex trafficking. *Id.* § 901.

[125] *Id.*

that if a tribe can show that there are consistent, dangerous, and nearly catastrophic safety issues on reservations,[126] Congress is open to solving them. After tackling violence against tribal women, the next step by Congress might be an act to extend tribal jurisdiction over drug and alcohol users and distributors, as the rampant abuse of controlled substances is nearing catastrophic levels for many tribes.[127]

The pendulum continues to swing between inherent tribal authority and divestment of inherent tribal sovereignty.[128] Although both the Tribal Law and Order Act of 2010 and the Violence Against Women Reauthorization Act of 2013 are a step in the right direction for tribal sovereignty, both of these Acts serve very limited purposes,[129] and the process of exercising jurisdiction over non-Indians is still fraught with problems.[130]

II. Constraints in Exercising Tribal Civil Jurisdiction Over Non-Indians

The acts of Congress and Supreme Court cases described above have created major problems for tribal governments attempting to ensure that their reservations are safe places for members to live, corporations to invest, and non-Indians to visit.[131] Tribal governments have begun to get creative in extending jurisdiction over non-Indians

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[126] *See supra* note 111.

[127] *See* Fred Beauvais, *Comparison of Drug Use Rates for Reservation Indian, Non-Reservation Indian and Anglo Youth*, 5 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 13 (1992); A STUDY OF THE ALCOHOL AND DRUG HEALTH OF WISCONSIN AMERICAN INDIAN ADULTS LIVING ON OR NEAR RESERVATIONS, WIS. DEP'T HUMAN SERVS. (2011), *available at* http://www.dhs.wisconsin.gov/substabuse/docs/reports/NAREPORTweb.pdf; Allie Hostler & Jacob Simas, *Fixin' Up Hoopa: A Community's Struggle with Addiction—Part 1*, TWO RIVERS TRIB. (May 29, 2012) http://www.tworiverstribune.com/2012/05/fixin-up-hoopa-a-communitys-struggle-with-addiction-part-1/; Theodore W. McDonald & Mary E. Pritchard, *Mental Health and Substance Abuse Issues Among Native Americans Living on a Remote Reservation: Result from a Community Survey*, E13 J. OF RURAL CMTY. PSYCHOLOGY, no. 1, 2010, at 1; *White Earth Reservation Seeing High Drug Use*, VALLEY NEWS LIVE (Jan. 7, 2013), http://www.valleynewslive.com/story/20526891/white-earth-reservation-seeing-high-drug-use.

[128] *See supra* Sections I.A-C.

[129] *See supra* note 124, and text accompanying notes 119-120.

[130] *See supra* Sections I.B-C.

[131] *See supra* Part I.

while working around *Oliphant* and *Montana*.[132] Tribes are using monetary penalties, community service, restitution, shame, injunctions, forfeiture, exclusion and banishment, peace bonds, civil commitments, mandatory treatments, civil arrests, civil regulatory powers,[133] and civil infraction systems—the focus of this Comment—to accomplish this goal. A prediction made just after the *Oliphant* decision that "civil penalties and even forfeitures may be imposed through regulation of such areas previously defined as criminal, e.g., trespass, traffic violations, illegal hunting and fishing, littering, and the like"[134] is currently coming to pass on reservations across the country.[135]

There are concerns with how tribal courts are attempting to expand their jurisdiction over non-Indians. One author maintains that the only way around the strict *Montana* test and exceptions will be "congressional authorization for tribal action, or delegation of authority."[136] The concern about how the Supreme Court will react to a tribe extending its jurisdiction over non-Indians comes because of the Court's extremely restrictive history regarding jurisdiction over non-Indians.[137] As noted in the title of this Comment, "The slide down the sovereignty slope has gained momentum since *Montana*."[138] One problem may be that in extending their jurisdiction over non-Indians, tribes are stepping outside the traditional stereotype of how a tribal government should operate, and the Supreme Court is not comfortable with this. [139]

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[132] *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 174-78 (2d ed. 2010) (discussing the numerous ways in which tribes are attempting to gain jurisdiction over non-Indians).

[133] *See* SW. CTR. LAW & POLICY, CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN OFFENDERS IN INDIAN COUNTRY, 2008 REPORT: NATIONAL ROUNDTABLE ON CREATIVE CIVIL REMEDIES AGAINST NON-INDIANS IN INDIAN COUNTRY (2008), *available at* http://www.ovw.usdoj.gov/docs/civil-remedies.pdf (outlining a practical guide for tribes to use to enforce their tribal laws over non-Indians and generate revenue in the process).

[134] Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to* Oliphant, 9 AM. INDIAN L. REV. 51, 61 (1981) (outlining an initial response to *Oliphant* and a history of how the Supreme Court got there).

[135] *See infra* Part III.

[136] Thomas P. Schlosser, *Tribal Civil Jurisdiction Over Nonmembers*, 37 TULSA L. REV. 573, 594 (2001).

[137] *See generally supra* Section I.C.

[138] Braveman, *supra* note 1, at 117.

[139] *Id.* at 77. "The use of the them/us construction leads the current Court to its conclusion that inherent tribal sovereignty should be limited to instances when Indian

In her directive to federal courts, professor of American Indian law Sarah Krakoff suggested two ways that tribes could begin to extend their jurisdiction over non-Indians:

> First, nonmember actions that occur on or affect tribal lands implicate the tribe's gatekeeping rights, and they therefore stand a better chance of fitting within the Supreme Court's rationale for affirming tribal authority. Second, nonmember conduct that threatens the tribe's ability to protect its members (as opposed to nonmember conduct that harms individual tribal members) may fit within the Supreme Court's definition of a threat to tribal self-government. . . . But if a tribe or tribal member can demonstrate that a central governmental function necessary to preserve health and safety may be at risk, the argument is more likely to succeed.[140]

While Krakoff's arguments hold considerable weight, the overwhelming showing by the Supreme Court that it does not wish to extend *Montana*'s exceptions[141] makes it unlikely that the Court will be willing to hold any action by a non-Indian, short of a catastrophe,[142] to be enough for a tribe to exercise civil jurisdiction. Instead, a better solution is for tribes to work on extending Krakoff's rationale to the creation of local, state, and tribal compacts regarding civil infraction penalty systems.[143]

Tribes have been particularly successful in exercising jurisdiction over non-Indians in their regulatory capacity in environmental cases. These cases have affirmed the Environmental Protection Agency's (EPA) "commitment to viewing tribal governments as the appropriate non-federal parties for making decisions and carrying out environmental program responsibilities on the reservation."[144] Congress has authorized the EPA "to treat Indian tribes as States" in the Clean Air Act[145] and the Clean Water Act.[146]

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peoples are behaving in a distinctive fashion and only to the extent of governing themselves." *Id.*

[140] Krakoff, *supra* note 77, at 1233.

[141] *See supra* Part I.

[142] *See supra* note 87.

[143] *See infra* Part V.

[144] GETCHES, *supra* note 18, at 636.

[145] 42 U.S.C. § 7601(d).

Tribes are now setting their own environmental quality standards.[147]

These standards apply to every business and individual on the reservation, regardless of whether the land involved is owned in fee simple by a non-Indian or held in trust by the tribe.[148] This non-distinction between fee land and tribal trust property may become a powerful argument for civil infraction codes in the future.[149]

III. Survey: Tribal Civil Infraction Codes

As with any statute, the composition and drafting of a civil infraction code is very important in determining its ultimate authority and reach. Many tribes have begun to implement these codes, with various reaches of jurisdiction.[150] The Pokagon Band of Potawatomi has a detailed civil infraction code that is actively being implemented.[151] Additionally, five other tribal codes and courts will be surveyed in this Part, each with their own expanse of jurisdiction and methods of enforcement.[152] Although not exhaustive, these tribal codes offer a good sample of the current state of tribal jurisdiction.[153]

A. Case Study: Pokagon Band of Potawatomi Indians

The Pokagon Band of Potawatomi Indians, located in southwestern Michigan, has begun exercising civil jurisdiction over

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146 33 U.S.C. § 1377(a).

147 *See* ISLETA PUEBLO TRIBAL CODE art. 43, §§ 1.1030, 1.2.030, 1.4.020, 1.7.010 (2013) (setting reservation standards for waste management, hazardous materials, and corporate responsibility); *see also Environmental Protection*, CONFEDERATE SALISH & KOOTENAI TRIBES, http://www.cskt.org/tr/epa.htm (last visited Feb. 18, 2014) (detailing the Tribes' many programs to manage air quality, water quality, and hazardous materials).

148 Montana v. EPA, 137 F.3d 1135, 1138 (9th Cir. 1998) (holding that tribal regulation of water quality standards could apply to all surface waters within the Flathead Indian Reservation); *see* City of Albuquerque v. Browner, 97 F.3d 415, 418-19 (10th Cir. 1996) (holding that the Pueblo of Isleta had the authority to promulgate its water quality standards over the Rio Grande River, even though the standards required the City of Albuquerque to increase its water quality standards at a waste treatment facility that empties into the Rio Grande River five miles north of the Isleta Pueblo Indian Reservation).

149 *See supra* notes 80, 96-101, and accompanying text.

150 *See infra* Sections III.A.-B.

151 *See infra* note 167 and accompanying text.

152 *See infra* Section III.B.

153 *See infra* note 179 and accompanying text.

non-Indians in an effort to further elevated levels of community standards and behaviors.[154] The court rules for civil infractions "apply to any person who commits a civil infraction of the Pokagon Band of Potawatomi Indians tribal law on reservation land."[155] The court rules detail the process for respondents under the tribal code, including provisions for notice, a hearing process, and an ability to appeal.[156] The offenses for which a non-Indian may be found liable are found in the Band's Code of Offenses.[157] These offenses range from disorderly conduct to issuing a bad check,[158] but most citations occur in connection with the tribal casino.[159] Punishment for these offenses is usually a fine, but may also include civil forfeiture, restitution, or expulsion from the reservation.[160]

The general jurisdictional expanse of the tribal court is detailed in the correlating Tribal Court Code.[161] This code includes a general provision of jurisdiction over "civil claims that arise on or relate to land held in trust for the Band by the United States."[162] The fact that the Pokagon Band will exercise jurisdiction only over those civil claims that occur on trust land is important because of the interpretation that the civil limitations of *Montana* may apply on tribal land.[163] This proposition has support from a recently decided Ninth Circuit case, *Water Wheel Camp Recreational Area, Inc. v. LaRance*.[164] In this case, the appellate court decided that the district court had unnecessarily applied *Montana* to a case involving a non-Indian refusing to vacate his rental land after failing to continue to pay rent for land that was owned by the tribe.[165] The Ninth Circuit held that the district court had "improperly expanded limitations on tribal

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[154] Telephone Interview with Michael Petoskey, Chief Judge of the Pokagon Band of Potawatomi, and Stephen Rambeaux, Pokagon Court Administrator (Jan. 14, 2014) (on file with author).

[155] POKAGON BAND OF POTAWATOMI INDIANS CT. R. CIV. INFRACTIONS ch. 3, § 1.A. (2011).

[156] *Id.* §§ 4, 6, 7; *see* POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES §§ 3.A.-D. (2008).

[157] POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES §§ 5-14.

[158] *Id.* §§ 10.A., 8.M.

[159]Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[160] POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES § 2.F.

[161] POKAGON BAND OF POTAWATOMI TRIBAL CT. CODE § 3.A.1 (2002).

[162] *Id.* § 3.A.1.a.

[163] *See supra* notes 80, 96-101 and accompanying text.

[164] 642 F.3d 802 (9th Cir. 2011).

[165] *Id.* at 804-05.

sovereignty that, with only one narrow exception, have been applied exclusively to non-Indian land."[166]

In the ordinary course of events, and such events have occurred 814 times since the Pokagon Band began enforcing its civil infraction code in 2009, the process begins with a tribal or county police officer issuing a non-Indian a citation.[167] The individual has the option of admitting to the offense on the spot, signing the back of the citation, and mailing it to the tribal court with the applicable fine.[168] The individual may also have an initial hearing scheduled, where the charge and rights are explained and a plea of responsible or not responsible is entered.[169] If a plea of not responsible is entered, the individual has the opportunity to meet with a tribal prosecutor and discuss options moving forward.[170] Trials are occasionally set after this process, but there have only been five throughout the time of enforcement.[171] If an individual does not appear to respond to a citation, or does not pay the required fine, there is the possibility of the issuance of a bench warrant or arrest for civil contempt through the Michigan LEIN system.[172]

Chief Judge Petoskey of the Pokagon Band of Potawatomi made it clear that this civil infraction system was not created to take jurisdiction over non-Indians, but rather was designed to ensure that people would be held accountable to standards of community behavior.[173] Chief Judge Petoskey noted that the usual citations that are issued are too small for state or federal prosecutors to deal with,[174]

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[166] *Id.* at 807 n. 4.

[167] Email from Steven Rambeaux, Pokagon Court Administrator, to Leah Hickey (Sept. 23, 2013, 08:48 EST) (on file with author).

[168] *Id.*

[169] *Id.*

[170] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[171] Email, *supra* note 167.

[172] *Id.* Mr. Rambeaux noted that the possibility of these relatively strict consequences has led the system to be very successful, with 70% of individuals showing at the initial appearance. *Id.*

[173] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[174] The inability to gather admissible evidence and "witness problems" are often used as a justification for many declinations of prosecution for incidents occurring within Indian country. U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS, 10 (2010), *available at* http://www.gao.gov/new.items/d11167r.pdf. Between 2005 and 2009, 40% of all non-violent crimes, like many of the property crimes covered in the Pokagon Band's

and this system was developed to "fill the void."[175] The Pokagon Band is thus ensuring a safe community and exercising, via *de facto* sovereignty,[176] its inherent sovereignty.[177]

B. Miscellaneous Survey of Civil Infraction Codes

Many other tribes are implementing civil infraction codes similar to the Pokagon Band's. Just as state statutes vary, so too do the following tribal codes vary in their composition and reach.[178] The brief survey of codes to follow represents only a portion of the tribes that have taken civil jurisdiction over non-Indians.[179] The Tulalip Tribe of Washington is using a particularly aggressive method of enforcement of their civil infraction code by exercising the power of civil forfeiture.[180] While the Nottawaseppi Huron Band of Potawatomi have incorporated a wide range of activities within their civil infraction code and language harkening to *Montana*'s second exception,[181] the Sault Tribe extends a more limited reach of jurisdiction over non-Indians with language reminiscent of *Montana*'s first exception.[182] When compared together, these tribal codes offer a juxtaposition of the sliding scale of clarity in the jurisdiction of various tribes.[183]

i. Tulalip Tribes of Washington

The Tulalip Tribes of Washington have begun prosecuting

Civil Infraction Code, were not prosecuted by the United States Attorney's Office. *Id.* at 3.

[175] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[176] *See supra* notes 25-27 and accompanying text; *see also* discussion *infra* accompanying notes 280-283.

[177] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[178] *See infra* Subsections III.B.i-v.

[179] With 566 federally recognized, and completely sovereign, tribes, it is difficult to determine exactly how many tribes are using these types of civil infraction systems; *see* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26384 (May 6, 2013) (listing the federal government's most recent accounting of all federally recognized tribes).

[180] *See infra* Subsection III.B.i.

[181] *See infra* Subsection III.B.ii.

[182] *See infra* Subsection III.B.iii.

[183] *See infra* Subsections III.B.i-v.

non-Indians for civil infraction violations committed within the boundaries of the reservation.[184] The Tribes' tribal justice system code begins with a jurisdictional statement.[185] The Tulalip Tribes extend a general reach of jurisdiction, limited only by applicable federal law, to "all persons natural and legal of any kind."[186] The court also includes a long-arm statute extending jurisdiction to any "nonmember of the Tribe residing outside the Tribes' territorial jurisdiction,"[187] if the person commits "any tortious act within the Reservation."[188]

The Tulalip Tribes recently used their civil forfeiture code to enforce their civil infraction system over a non-Indian.[189] In *Tulalip Tribes v. 2008 White Ford Econoline Van*, a non-Indian was charged with possession and sale of marijuana after attempting to sell marijuana to an undercover police officer while on the reservation.[190] The tribe seized the defendant's van, and the court found that the seizure was subject to the excessive fines clause of the Indian Civil Rights Act.[191] The court remanded for a determination of whether the seizure of the defendant's vehicle was "excessive in light of the facts" of the case.[192]

There are positive and negative aspects of tribes implementing their codes through civil forfeiture systems. Civil forfeiture systems are a stable way for tribes to assert their jurisdiction over non-Indians when necessary and ensure the fines assessed are paid.[193] However, these civil forfeiture systems can be too strict and discretionary, resulting in the loss of property by persons having no involvement in the civil infraction itself.[194] Especially within the common reservation culture of sharing among family and community members, civil forfeiture codes can have an unwanted impact on

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[184] TULALIP TRIBAL CODE § 3.70 (2010).
[185] *Id.* § 2.05.020.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] Tulalip Tribes v. 2008 White Ford Econoline Van, No. Tul-CV-AP-2012-0404 (Tulalip Tribal Ct. May 31, 2013).
[190] *Id.* at 3.
[191] *Id.* at 8.
[192] *Id.*
[193] *See* Henry S. Noyes, *A "Civil" Method of Law Enforcement on the Reservation: In rem Forfeiture and Indian Law*, 20 AM. INDIAN L. REV. 307, 331 (1996) (explaining the applicability of civil forfeiture systems to the tribal–federal–state relationship).
[194] *See* Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman (detailing the harms that can arise because of the implementation of civil forfeiture systems).

tribal members because of a non-Indian infraction.

ii. Nottawaseppi Huron Band of Potawatomi

The Nottawaseppi Huron Band of Potawatomi has a chapter of its code dedicated to civil infractions.[195] In language remarkably similar to the second *Montana* exception, this code states that its purpose is to "[p]romote the health, safety and general welfare of the tribe."[196] The code applies to "all persons within the territorial jurisdiction of the Tribe."[197] The code then goes on to detail all of the offenses that are considered civil offenses by the tribe, including consumption of alcohol by a minor,[198] possession of marijuana,[199] and possession of drug paraphernalia.[200] The code concludes with an authority of the tribal court to exercise jurisdiction over any offense committed within the code.[201] This authoritative section combined with the general grant of jurisdiction in the purpose statement codifies the tribal court's jurisdiction over non-Indians for these civil offenses.[202]

iii. Sault Tribe of Chippewa Indians

The Sault Tribe of Chippewa Indians extend jurisdiction over civil actions regardless of whether "the Plaintiff is the Tribe or Tribal entity."[203] However, the tribal code allows for actions to be brought against non-Indian defendants only if "[t]he defendant does business

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[195] NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW AND ORDER CODE tit. VII, ch. 9, § 102 (2012).

[196] *Id.* § 102.A.

[197] *Id.* § 102.C.

[198] *Id.* § 301.

[199] *Id.* § 308.

[200] *Id.* § 309.

[201] NOTTAWASEPPI HURON BAND OF THE POTAWATOMI INDIANS LAW AND ORDER CODE tit. VII, ch. 9, § 401.A (2012).

[202] *Id.* Although both "Indian" and "non-Indian" are defined in the definition section, neither term is used throughout the rest of the code, suggesting the tribe expects all individuals to abide by the code provisions. *Id.* §§ 201.C, 201.E.

[203] SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS CODE § 81.103.3 (1998).

upon Tribal land with the Tribe, a tribal member, or a tribal member owned business."[204] This exercise of jurisdiction is limited in a way that directly comports with *Montana*'s first exception, which allows tribal courts to exercise civil jurisdiction over non-Indians only if the non-Indian has a consensual relationship with the tribe through business dealings.[205] Although this language means that the Sault Tribe would fare better in federal court should this provision be challenged, it also shows restraint on the part of the tribe for not exercising their powers of *de facto* sovereignty to the fullest extent.[206]

iv. Red Lake Band of Ojibwe

The Red Lake Band of Ojibwe have a unique history within the state of Minnesota, as they have always resisted any state intrusion into their reservation.[207] The tribe has undergone a change in the last twenty years, revamping its code and its tribal court.[208] The 1990 Code allows for civil jurisdiction only where "the defendant is an Indian residing on the Red Lake Reservation."[209] The 2001 revisions of the Code extend jurisdiction to "any civil matter wherein the

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[204] *Id.* § 81.103(5)(b).

[205] *See supra* note 75 and accompanying text.

[206] *See supra* notes 25-27 and accompanying text.

[207] *See supra* note 43. The Red Lake reservation was never opened up for allotment; all of the land within the reservation is owned by the tribe in trust, so there are very few non-Indians that live there and little need for state regulation. *See Tribes: Red Lake Nation: Unique in Indian Country*, INDIAN AFFAIRS COUNCIL STATE OF MINNESOTA, http://mn.gov/indianaffairs/tribes_redlake.html (last visited Nov. 12, 2014).

[208] The Red Lake tribal court was a Federal Court of Indian Offenses for many years, with strict oversight by the Bureau of Indian Affairs, but is no longer listed within the applicable state statute as one. *See generally* J.W. Lawrence, *Tribal Injustice—The Red Lake Court of Indian Offense*s, 48 N.D. L. REV. 639 (1972) (describing the history of the Red Lake tribal court, including the many injustices it once perpetuated); 25 C.F.R. § 11.100 (describing the current locations of all Federal Courts of Indian Offenses); United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380 (1987) (positing various arguments regarding the proper name and identification of the tribal court). The Red Lake tribal government remains one of the most elusive and closely held; its tribal codes are not listed anywhere within the tribal website. *See Red Lake Nation Tribal Courts*, RED LAKE NATION, http://www.redlakenation.org/ (last visited Nov. 14, 2014).

[209] RED LAKE COURT OF INDIAN OFFENSES CODE, ch. 4 (1990), *available at* http://www.maquah.net/Legal_Documents/1958_Indian_Code/IndianCourt-40.html.

parties . . . are non-Indians,"[210] and the cause of action arose "under the Constitution, Laws or Ordinances of the Red Lake Band,"[211] or "on the Red Lake Indian Reservation."[212] Despite the extension of this jurisdiction, the Eighth Circuit has held that the Red Lake Band of Ojibwe does not have adjudicatory jurisdiction over a suit filed in tribal court against a non-Indian.[213] In Nord v. Kelly, the court held that because it was constrained by Strate,[214] the Red Lake Band did not have jurisdiction over an automobile accident that occurred on a state highway located within the reservation.[215] Nord diminished tribal jurisdiction in the Eighth Circuit even more than Strate did by holding that the tribe did not have jurisdiction despite the fact that, unlike in Strate, the non-Indian physically harmed a tribal member.[216]

v. Navajo Nation

The Navajo Nation Code includes an extension of civil jurisdiction over those actions "in which the defendant: (1) is a resident of Navajo Indian country; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation."[217] This is a wider grant of jurisdiction than other codes, because it is not limited to only those actions or injuries that occur on tribal land, but anywhere within the Navajo Nation.[218] However, much of the land within the Navajo Reservation is owned by the tribe or held in trust,[219] so it may not make much of a functional difference in the enforcement of the code.

The Pokagon Band offers a great example of how tribal legislation may be written and enforced in a meaningful way to ensure

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[210] RED LAKE TRIBAL CODE § 100.03 (2001), *available at* http://www.maquah.net/Legal_Documents/Red_Lake_Indian_Courts/Title_01.html#_Toc66021056.

[211] *Id.* §100.03(a).

[212] *Id.* §100.03(b).

[213] Nord v. Kelly, 520 F.3d 848 (2008).

[214] *See supra* text accompanying note 84.

[215] *Nord*, 520 F.3d at 857.

[216] *Id.* at 856.

[217] NAVAJO CODE ANN. tit. 7, § 253.2 (2005).

[218] *Id.*; *see supra* Section III.A, Subsection III.B.iii (explaining that the Pokagon Band and the Sault Tribe extend jurisdiction only over tribal lands).

[219] NAVAJO NATION ECON. DEV., CHALLENGES TO AND STRATEGIES FOR ECONOMIC DEVELOPMENT IN INDIAN COUNTRY: CASE STUDY OF THE NAVAJO NATION 326, *available at* http://content.knowledgeplex.org/kp2/cache/documents/92820.pdf (noting that 94% of Navajo Reservation land remains in trust).

that everyone entering the reservation is held to the same standards.[220] The enactment of these civil jurisdiction codes is the first major step towards ensuring a tribal-wide standard of community values, but the only opportunity for any meaningful difference to be made is through enforcement. This enforcement necessarily requires clear goals as well as a tactful strategy for implementation.[221]

IV. Importance of Civil Jurisdiction over Non-Indians

The continued exercise of civil jurisdiction over non-Indians is important to affirm the independent sovereignty of tribes, encourage safety and lawfulness on tribal lands, and encourage economic development on reservations.[222] Several important issues of fairness, due process, and democratic participation are raised, however, surrounding this exercise of jurisdiction.[223] Acknowledging and carefully considering these issues will be vital to the continued success of tribal civil infraction codes.[224]

A. Independent Sovereignty

Beginning with the "Marshall trilogy"[225] and extending through *United States v. Wheeler*,[226] the Supreme Court has consistently affirmed that tribes have an inherent sovereignty that is retained unless specifically removed or divested.[227] Exercising civil jurisdiction over non-Indians is an important way tribes can use the inherent

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[220] *See supra* note 173 and accompanying text.

[221] *See infra* Part V.

[222] *See infra* Sections IV.A-C.

[223] *See infra* Section IV.D.

[224] *See infra* Part V.

[225] *See* Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding that while Indian tribes may not alienate their land to parties other than the federal government, they retain the right to use and occupy the land); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (establishing the domestic, dependent nations framework for tribal sovereignty); Worcester v. Georgia, 31 U.S. 515 (1832) (noting that States have no authority to enforce their laws within Indian country).

[226] 435 U.S. 313 (1978) (affirming the sovereignty of tribes by holding that the double jeopardy clause does not apply to tribal-federal prosecutions).

[227] *See supra* Section I.A.

sovereignty they have retained.[228] *Montana* may have severely limited the extent of civil jurisdiction over non-Indians, but it did not eliminate it completely, especially on tribal trust property.[229] As Chief Judge Petoskey of the Pokagon Band of Potawatomi noted, most civil infraction citations occur within casinos on tribal trust property.[230] Civil infraction codes have the most traction with the inherent sovereignty argument on tribal trust property, like casinos, tribal housing, and tribal administration buildings.[231]

Oliphant may have completely eliminated tribal criminal jurisdiction over non-Indians,[232] but the reauthorization of the Violence Against Women Act in 2013 has reclaimed part of that authority.[233] The exercise of jurisdiction over non-Indians through the use of civil infraction and civil forfeiture codes currently exists in a grey area between the *Montana* and *Oliphant* line of cases and the underlying basis of inherent tribal authority.[234] Escaping this negative scrutiny will require tribes to use compelling arguments regarding an intent to enforce community standards and values, rather than gain a

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[228] It is important to recognize that the cases, legislation, and inherent sovereignty discussed in Part I, *supra*, are a necessary background for any discussion of tribal sovereignty and any exercise of inherent tribal authority expressed by tribes. Tribal governments must always be aware of the constantly evolving and often contradictory restraints on their sovereignty by the federal government. *See, e.g.*, *supra* note 82.

[229] *See supra* notes 74-81 and accompanying text.

[230] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[231] *Id.*

[232] *See supra* note 61 and accompanying text.

[233] *See supra* note 124 and accompanying text. The Pascua Yaqui Tribe, the Tulalip Tribes, and the Umatilla Tribes were recently authorized by the United States Justice Department to being a pilot program of extending this criminal jurisdiction over non-Indians for crimes of domestic violence. *See Justice Department Announces Three Tribes To Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013*, RED LAKE NATION NEWS (Feb. 7, 2014), http://www.redlakenationnews.com/story/2014/02/07/news/justice-department-announces-three-tribes-to-implement-special-domestic-violence-criminal-jurisdiction-under-vawa-2013/20083.html?m=true.

[234] The Supreme Court has decided no cases regarding the ability of tribes to obtain jurisdiction over non-Indians using these civil infraction systems. *See generally supra* Section I.C. However, based on the well-established doctrine of inherent tribal authority, *supra* Section I.A., combined with the doctrine of *de facto* sovereignty, *supra* notes 25-27 and accompanying text, tribes should be on solid legal ground, subject to the whims of the Supreme Court.

political advantage over non-Indians.[235]

The continued exercise of jurisdiction over non-Indians through these civil infraction systems can build a base of positive empirical evidence.[236] Tribes will have a strong argument that these codes are a positive outgrowth of inherent tribal sovereignty, rather than an attempt to gain political power over non-Indians, if they are able to demonstrate that the civil infraction systems have strengthened the base of community standards and that tribal members and guests are safer and happier.[237] Evidence of this type will be vital should tribal court jurisdiction over civil infraction codes be challenged in the Supreme Court.[238]

B. Reservation Safety and Security

Ensuring the safety and security of its constituents is one of the most important powers of sovereignty for any government.[239] This idea becomes even more important in the realm of tribal governments due to the historical lack of judicial enforcement on reservations, created in part by the presence of three sovereigns with both overlapping and exclusive jurisdiction.[240] Many of the offenses found in civil infractions codes are relatively minor.[241] A history of policies limiting and shifting jurisdiction,[242] a general lack of funding for tribal police presence and tribal courts on reservations,[243] and the remote location of most reservations make it difficult and unlikely that a federal prosecutor will choose to take these cases.[244] Tribal civil infraction systems may actually be the only way that a tribe can protect itself, its members, its properties, and its guests from the destructive forces of non-Indians,[245] however small the infractions may seem.

Having a clear and consistent tribal code, applicable to

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[235] *See supra* notes 173, 177 and accompanying text; *see also infra* notes 295-299 and accompanying text.

[236] Kalt & Singer, *supra* note 25, at 6.

[237] *See supra* note 173 and accompanying text.

[238] Particularly, tribes could compile their evidence into a Brandeis brief. Pioneered in *Muller v. Oregon*, a Brandeis brief is a collection of data, both scientific and social political, about the particular issue, rather than solely legal precedent. *See* David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 9-10 (2011) (discussing the origins and myths surrounding the Brandeis brief).

[239] *See* EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, bk. I, ch. I, § 15 (1758) ("The . . . object of civil society is to procure for the citizens . . . a method of obtaining justice with security, and . . . a mutual defense against all external violence.").

Indians and non-Indians alike, will improve the physical safety and security of every individual living, working, and visiting the reservation.[246] While there are many over-dramatizations and anecdotal stories of the lawlessness of reservations,[247] perceptions and stereotypes play a large role in the determination people make when deciding where to live or travel,[248] and reservation communities do generally have a much higher rate of crime than the United States' average.[249] Creating a safe tribal community can assist in changing the perceptions and stereotypes of Indian reservations.[250]

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[240] *See supra* note 63.

[241] *See* POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES §§ 8-10 (2008) (delineating offenses against property, public administration, and public order).

[242] *See supra* note 34 and accompanying text.

[243] *See supra* note 41 and accompanying text.

[244] *See* Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act*, FBI L. ENFORCEMENT BULL. 24, 28 (2012) (explaining the remoteness of many reservations and location's relation to proper investigation and prosecution); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711-13 (detailing the "daunting distances" from many reservations to federal courts).

[245] *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1015 (2010) (explaining how the jurisdiction gap caused by the cases and Acts detailed in Part I, *infra*, the low level of funding appropriated to federal civil actions within reservations, and the "disproportionate levels of federal prosecution declinations" result in civil infraction systems being the "only conceivable remedy for tribes.").

[246] *See* BUREAU OF INDIAN AFFAIRS: OFFICE OF JUSTICE SERVS., CRIME-REDUCTION BEST PRACTICES HANDBOOK 4-5 (2012), *available at* http://www.bia.gov/cs/groups/xojs/documents/text/idc-018678.pdf (explaining the link between updated codes, community collaboration, and safety on reservations).

[247] *See* Troy R. Johnson, *Introduction to Part IV*, CONTEMP. NATIVE AM. POL. ISSUES 177 (ed. Troy R. Johnson 1999) (commenting on the "perceived state of 'lawlessness' on Indian reservations").

[248] *See* Rickers, *Info on Indian Reservations*, CITY-DATA (Jan. 31, 2008, 8:35 AM), http://www.city-data.com/forum/montana/244681-info-indian-reservations.html.

[249] Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html?pagewanted=all. *See* Hart, *supra* note 119, at 148.

[250] *See* U.S. DEPT. OF JUST., INDIAN COUNTRY BUDGET REQUEST, FISCAL YEAR 2014 (2013), *available at* http://www.justice.gov/jmd/2014factsheets/indian-country.pdf (noting the connection between perceptions of safety and economic growth); *see also* Joseph E. Trimble, *Self-Perception and Perceived Alienation Among American Indians*, 15 J. CMTY. PSYCHOL. 316, 320 (1987) (offering data on how negative stereotypes from non-Indians can affect the self-perception and capabilities of Indian children).

C. Tribal Economic Interests

There is an economic incentive for tribal governments to implement and enforce a functional civil infraction code. Reservations will appear more inviting to economic developers if they have an established code.[251] This is not only from a public safety standpoint,[252] but also from a view that developers and investors will be more apt to relocate to a particular reservation if they can plan for the exact regulations and laws that will apply to them.[253] A fundamental teaching of business development is that consistency and planning are key;[254] tribes with expansive codes and competent courts will make planning easier for businesses and investors.[255]

Although it may be tempting to assume that civil infraction systems can give reservation economies a boost from the fines they impose, this is unlikely. The fines themselves may be conceptually thought of as "just and accurate compensation to the government" for damages incurred by the infractions. [256] In reality, however, the fines are far too small to create any meaningful source of revenue or act as reparations.[257] Additionally, the cost of prosecuting these infractions often uses more than 75% of the fine itself.[258] These

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[251] *See* U.S. DEPT. OF JUST., *supra* note 250.

[252] *Id.*

[253] *See* Lisa M. Slepnikoff, *More Questions than Answers:* Plains Commerce Bank v. Long Family Land & Cattle Company, Inc. *and the U.S. Supreme Court's Failure to Define the Extent of Tribal Civil Authority over Nonmembers on Non-Indian Land*, 54 S.D. L. REV. 460 (2009) (explaining the economic impacts that civil jurisdiction over non-Indians can have on tribes beyond the individual fines in each case).

[254] Stefan Topfer, *The Importance of Business Planning*, NASDAQ (Feb. 25, 2011, 3:51 PM), http://www.nasdaq.com/article/the-importance-of-business-planning-cm59436.

[255] *See* Debora Juarez & Gabriel S. Galanda, *Attracting Private Investment in Indian Country*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 11, 2005), https://indiancountrytodaymedianetwork.com/2005/05/11/attracting-private-investment-indian-country-98168; Paula Woessner, *Energizing Native Economies: Tribes Build Corporate Governance to Spur Investment and Development*, CMTY. DIVIDEND (Cmty. Dev. Dep't of the Fed. Reserve Bank of Minn., Minneapolis, Minn.), Jan. 2012, at 1, 4, *available at* http://www.minneapolisfed.org/pubs/cd/12-01/CommDiv_2012_01.pdf.

[256] Stetson, *supra* note 134, at 77.

[257] *See* POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES, CIVIL OFFENSES, § 2.D (2008) (showing that Class A and B Offenses make up many of the crimes in the civil code and have fines that may not exceed $100 or $250, respectively).

[258] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note

economic arguments are necessarily a subset to the compelling arguments in favor of retaining inherent sovereignty and promoting and enforcing community values for safe communities.[259]

D. Counter Analysis: Fairness Concerns

There is a common argument, both inside and outside of the professional legal context, which suggests it would be unfair to allow non-Indians to be prosecuted in tribal courts because the tribal courts are foreign to non-Indians,[260] do not have to follow state and federal court guidelines,[261] or are simply incompetent.[262] These allegations do not have a basis in current truth; "Tribal court criticism seems to be based to a large extent on anecdotal evidence . . . ."[263] A survey of recent cases has suggested that tribal courts have actually awarded non-Indians "stronger guarantees of fundamental fairness under tribal law than . . . American jurisprudence."[264] Non-Indians are not receiving any fewer protections under tribal civil infraction codes than

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[259] *See supra* Part IV.A-B.

[260] *See* Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get a Fair Trial*,' HUFFINGTON POST (Feb. 21, 2013), http://www.huffingtonpost.com/2013/02/21/chuck-grassley-vawa_n_2735080.html (explaining Senator Grassley's concerns that a non-Indian tried in tribal court for a violation of the Violence Against Women Act would not receive a fair trial). Although Senator Grassley was expressing concerns about a criminal trial in a tribal court, the argument has the underpinnings of the inherent fear that tribal courts are biased and not competent to try non-Indians. *Id.*

[261] *See* Keith Fierro, *Congress Kills Domestic Violence and Civil Rights*, THE COLLEGE CONSERVATIVE (Mar. 4, 2013), http://thecollegeconservative.com/2013/03/04/congress-kills-domestic-violence-and-civil-rights/ ("VAWA offers up American citizens to tribal judges who aren't appointed by the president, don't have certain constitutional characteristics of American courts, and don't have to respect the civil rights guaranteed by the Bill of Rights and the Fourteenth Amendment."); *see also* McCarthy, *supra* note 53, at 466 (detailing common objections from high ranking officials about tribal courts).

[262] *See* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) (stating that although the Petitioners raised the argument that they should have their case heard in federal court because of the incompetency of tribes, the alleged incompetency of tribes is not a factor to be considered when requiring certain cases to be heard first in tribal court).

[263] McCarthy, *supra* note 53, at 489.

[264] Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 91 (2013) (noting that tribal courts generally abide by common principles of fundamental fairness).

they would under criminal codes.[265] Outside of tribal codes, the Indian Civil Rights Act offers additional safeguards while in tribal courts, although interpreted within particularized tribal values.[266] These safeguards are not going unnoticed by non-Indian offenders. Not one person has objected to the Pokagon Band's jurisdiction; Court Administrator Steve Rambeaux believes this results from the Band's appropriate jurisdiction combined with the due process procedural safeguards offered in the tribal court.[267]

There is also another concern about a perceived "democratic deficit" and consent of the governed within Indian country.[268] This argument takes issue with the fact that a tribe has asserted jurisdiction over a non-Indian who will never have the opportunity to become a full part of the community.[269] Thus, a non-Indian will never be able to participate in elections, sit on a jury, or hold public office.[270] The simple response to this concern is that every state and country exercises jurisdiction over non-citizens who break laws within that jurisdiction, but this jurisdiction is rarely a source of objection.[271] The more difficult component to this is the concern that a non-Indian will almost never, due to tribal enrollment requirements, be able to

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[265] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[266] *See supra* notes 52-54; s*ee also* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000) (providing a comprehensive and exhaustive explanation of the Indian Civil Rights Act in tribal courts).

[267] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[268] T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115 (2002). *See* Duro v. Reina, 495 U.S. 676, 688 (1990).

[269] Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 319 (2011) [hereinafter Fletcher, *Race and American Indian Tribal Nationhood*]; *see Hearing on Tribal Sovereign Immunity Before the Sen. Comm. on Indian Affairs*, 104th Cong. 321-26 (1996) (written statement of Darrell Smith, non-Indian Rancher voicing complaints about having to pay taxes and abide by regulations without the right to vote or participate in tribal government).

[270] ALEINIKOFF, *supra* note 268.

[271] *See* 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, 89 (1993) (arguing that these concerns about the democratic and political process is a "privileging of European-derived political theory [that] hampers tribal efforts to create the social, economic and political infrastructure which is essential for effective self-government according to a tribe's own vision of its reservation and government").

participate in the tribal democracy.[272] Conversely, it is possible for a state citizen to change his or her citizenship to another state and begin to participate in the transferred state's democracy.[273] However, there are instances where regulation across state lines occurs, such as state sales taxes, without democratic participation.[274] While the transient guest of a casino may not have legally consented to tribal jurisdiction, non-Indians who live and work on the reservation or marry tribal citizens should have, either implicitly or explicitly, consented to tribal jurisdiction.[275]

As a matter of policy, it seems fundamentally unfair and dangerous that non-Indians should be granted the equivalent of immunity[276] simply because of an inability to participate in the political process. The crimes committed by non-Indians on reservations that federal or state prosecutors may potentially decline to prosecute range from arson to theft.[277] The costs to repair and remedy the damages caused by these crimes can be detrimental to many tribes with small budgets, who would otherwise use the funds to provide for essential governmental services.[278] Thus, tribal members could be harmed twice, first from the non-Indian's action and second from a reduction in governmental services.

V. Suggestions for Tribes Implementing Civil Infraction Codes

As detailed above, civil infraction codes for tribes often assert jurisdiction in line with their inherent authority as nations, but in a

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[272] Jessica Bardill, *Tribal Sovereignty and Enrollment Determinations*, AM. INDIAN & ALASKA NATIVE GENETICS RESEARCH CENTER, http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm (last visited Nov. 12, 2014) (discussing the differences between blood quantum and lineal descendancy for membership in Indian tribes).

[273] *See* Zobel v. Williams, 457 U.S. 55 (1982) (noting that the Privileges and Immunities Clause of the Constitution allows individuals to freely cross state lines and become state citizens elsewhere).

[274] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 183 (4th ed. 2012).

[275] *See* Fletcher, *Race and American Indian Tribal Nationhood*, *supra* note 269, at 326.

[276] *See* Williams, *supra* note 249; *see also supra* notes 119, 244-245 and accompanying text.

[277] *See* POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES §§ 8.A, 8.F. (2008).

[278] *See* Washington v. Confederated Tribes of the Collville Indian Reservation, 447 U.S. 134, 156-57 (1980) (noting that a tribe has a strong interest in raising and maintaining revenues in order to provide essential governmental services).

creative way to fit in with the current mood of federal Indian law policy.[279] The tribes in these cases are taking "action in accordance with [their] inherent authority that Congress or other branches of the federal government have not considered."[280] In this way, tribes are exercising *de facto* sovereignty[281] when they exercise civil jurisdiction over non-members without the practice having been explicitly affirmed by the federal government.[282] Exercising this *de facto* sovereignty by implementing civil infraction systems to enforce standards of community behavior is necessary for tribes, because currently, "[n]o branch of the federal government is ready to opine on these issues" of civil infraction jurisdiction over non-Indians on tribal trust lands.[283]

Just because the federal government has not yet spoken on the particular issue of tribal civil infraction systems does not mean that it will not take action in the near future. [284] If tribes are not cautious in how they exercise their civil jurisdiction over non-Indians, it could end in disaster. In enacting these civil forfeiture codes, it may be seen by outside analysis,[285] including a tepid Supreme Court,[286] as a decriminalization of tribal codes in order to find a loophole for *Oliphant* [287] or a power play to gain jurisdiction over non-Indians. To avoid this potentially devastating misunderstanding of the purpose behind civil infraction codes, tribes must ensure that in the formation of the codes more development occurs than "substitut[ing] the word 'civil' for the word 'criminal.'"[288] If these tribal codes look like loopholes, they will draw the close attention of the federal government, especially if non-Indians are treated unfairly or unusually harsh in the tribal court.[289] It likely would not matter what standards

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[279] *See supra* Part III.

[280] Fletcher, *The Supreme Court and Federal Indian Policy*, *supra* note 57, at 181 (explaining that in new cases of tribal exertion of authority, the federal government often waits to take action).

[281] KALT & SINGER, *supra* note 25, at 5.

[282] *See* Sanders, *supra* note 27, at 19-21.

[283] Fletcher, *The Supreme Court and Federal Indian Policy*, *supra* note 57, at 181.

[284] *See id.*

[285] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154 (noting that it is a misconception that tribes are attempting to *gain* jurisdiction over non-Indians, but rather they wish to hold everyone living, working, and visiting the community to the same standards).

[286] *See* Fletcher, *Factbound and Spitless*, note 12 and accompanying text.

[287] Stetson, *supra* note 134, at 66.

[288] *Id.*

[289] Krakoff, *supra* note 77 at 1235.

of behavior the tribe was attempting to enforce.[290] To avoid a potentially disastrous interpretation of these codes,[291] the fines must remain proportionate to the offense, and tribes must ensure procedural safeguards and actual fault of the non-Indian offender.[292] The presence of proportionality, safeguards, and actual fault can work to show that the goal of these civil infraction systems is to enforce a common level of community standards,[293] not punish non-Indians.[294]

With the cases and legislation detailed above, it may seem impossible for tribes to work within the various legal precedents to enforce their civil infraction codes over non-Indians.[295] If challenged, tribes will need to distinguish their codes from past precedents. Tribal courts may be able to distinguish the *Atkinson Trading* case from their civil infraction jurisdiction over non-Indians.[296] In *Atkinson Trading*, the hotel guests had committed no wrongs against the tribal community; no one was immediately injured or harmed if the tribe could not extend its jurisdiction to these non-Indians.[297] In contrast, many of the offenses for which a tribal court would exercise jurisdiction over non-Indians cause direct harm to either the tribe as a whole or its individual members.[298] Similarly, tribes can argue that the *Montana* test should not be applied on tribal trust lands because an appropriate reading of *Nevada v. Hicks* should be extremely narrow in scope.[299]

Tribes that continue to work with local and state

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[290] *See* John P. LaVelle, *The Story of* Montana v. United States, *in* INDIAN LAW STORIES 535, 583 (Carol Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011) ("A caldron of doctrinal confusion, *Montana* made at least one thing clear: Indians would have a much harder time . . . enlisting the aid or sympathy of the United States Supreme Court in securing protection for tribes' sovereign authority and property interests.").

[291] *See* 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, 85 (1999) (suggesting that an informed conversation between sovereigns, rather than a twisted and etched common law or treacherous congressional lobbying in the shadow of colonialism, is the best future for Indian law).

[292] Stetson, *supra* note 134, at 73.

[293] *See supra* note 173 and accompanying text.

[294] *See* Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[295] *See* discussion *supra* Part I.

[296] Atkinson Trading Co. v. Shirley, 532 U.S. 645, 652-54 (2001).

[297] *Id.* at 654-55.

[298] *See* POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES §§ 8-10 (2008) (detailing offenses against property, public officials, and the public order).

[299] *See supra* notes 80, 96-101 and accompanying text.

governments stand the best chance of carrying their civil infraction systems into the future. "Dialogue and compromise among sovereigns" is the key to meaningful implementation of these codes and mutual respect between communities.[300] A conversation between sovereigns can emphasize mutual sovereignty, cost saving measures, and an improvement of overall safety and security in neighboring areas, similar to many cross-deputization agreements.[301] Cross-deputization and other forms of state-tribal agreements are becoming common ways for states and tribes to work together.[302] These agreements occur in the areas of law enforcement,[303] tax,[304] and natural resource management.[305] Each of these agreements, including civil infraction systems, necessarily evolves from an open and honest dialogue and collaboration between sovereigns.[306]

Conclusion

Tribes are exercising their inherent authority by using civil infraction systems to fill jurisdictional holes on their reservations, not to obtain menacing amounts of power over non-Indians.[307] These civil jurisdiction codes are varied in their terms and extent,[308] but they

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[300] Frickey, *supra* note 291, at 85.

[301] *See generally* Bobee et. al., *Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization* 11 (Indigenous L. & Policy Ctr., Working Paper No. 2008-01).

[302] *See* Andrew G. Hill, *Another Blow to Tribal Sovereignty: A Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes*, 34 AM. INDIAN L. REV. 291, 293-94 (2010) (discussing that cross-deputization agreements may perpetuate racism and confusion over inherent tribal sovereignty).

[303] BUREAU OF JUSTICE ASSISTANCE, PROMISING STRATEGIES: PUBLIC LAW 280, 6-9 (2013), *available at* http://www.walkingoncommonground.org/files/Promising%20Strategies%20280%20Final%203-13%281%29.pdf.

[304] *See generally* TAX AGREEMENT BETWEEN THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN AND THE STATE OF MICHIGAN (2010), *available at* http://www.sagchip.org/council/events/2010/StateTaxMOA/StateTaxAgreement.pdf.

[305] Consent Decree, United States v. Michigan, No. 2:73-CV-26 (W.D. Mich. 2008), *available at* http://www.glifwc.org/Recognition_Affirmation/MI36ConsentDecree.pdf.

[306] Telephone Interview with Michael Petoskey and Stephen Rambeaux, *supra* note 154.

[307] *See supra* Part III.A. (detailing the Pokagon Band's reasons for enacting a civil infraction code).

[308] *See supra* Part III.B.

all exist as powerful ways in which tribes are getting creative to exercise their inherent sovereignty while ensuring the safety and security of their reservation.[309] As an outgrowth of cooperation with local and state governments,[310] these systems have the possibility to make huge changes on reservations across the country, especially once concerns of tribal court fairness are answered.[311]

Given the current climate of the Supreme Court, it is best for tribes to continue to enact and enforce civil infraction systems to build up a solid base of empirical evidence.[312] This evidence can be built on a foundation of the necessity for tribal governments to maintain safe and secure communities for both tribal members and non-Indians.[313] There is a place for these codes between *Oliphant*, *Montana*, and PL-280, but tribes need to dig their heels in now to stop the "slide down the sovereignty slope"[314] and establish that these civil infraction systems belong in modern federal Indian law.

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309 *See supra* Part IV.B. (noting the importance of reservation safety and security).

310 *See supra* Part V.

311 *See supra* Part IV.D.

312 *See supra* note 238 and accompanying text.

313 *See supra* Part IV.B.

314 Braveman, *supra* note 1, at 117.