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In Search of a Civil Solution: Tribal Authority to Regulate NonMember Conduct in Indian Country

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IN SEARCH OF A CIVIL SOLUTION: TRIBAL AUTHORITY TO REGULATE NONMEMBER CONDUCT IN INDIAN COUNTRY

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I. INTRODUCTION

A. *Summary*

Indian Tribes in the United States generally lack authority to criminally prosecute non-Indians accused of violating tribal laws and victimizing tribal citizens within the Tribe's Indian Country.[1] Additionally, the Supreme Court has strictly curtailed the ability of Tribes to exercise civil jurisdiction over non-members of the Tribe. These jurisdictional barriers have set the stage for a law and order crisis on the reservations that is appalling in its scope.

This paper proposes a partial solution, one that Indian Tribes can implement unilaterally based on their inherent sovereign authority as recognized under federal law. Tribes can maximize the reach of their law enforcement powers by enacting civil law enforcement codes that are designed to meet the Supreme Court's restrictive standards for such authority. Careful draftsmanship should help these tribal enforcement actions survive collateral review in federal court, particularly if tribal justice systems adhere to the highest standards of procedural fairness while exercising these powers.

This paper has five parts. After a brief introduction to the problem in Part I.B., Part II surveys the law of tribal jurisdiction over non-members in Indian Country, focusing on the extent to which federal courts review the exercise of tribal civil adjudications over non-Indians. Part III discusses how doctrines of judicial deference to legislative fact-finding and policy choices can be used to support tribal civil enforcement codes against federal court review. Part IV proposes a method for Tribes to exercise civil jurisdiction over non-Indians in Indian Country, designed to survive collateral review in federal or state court. Part V concludes the argument, and is followed by an Appendix setting forth model tribal civil enforcement code provisions consistent with this paper's recommendations.

B. *Background*

In the fall of 2012, at a tribal casino in northeastern Oklahoma, casino security officers apprehended a non-Indian in his attempt to steal a non-Indian casino patron's wallet.[2] The victim—a lifelong Oklahoma ranch woman and a great grandmother—caught the thief in the act, chased him down and cornered him long enough for the security officers to respond. The security officers confiscated the suspect's casino rewards card and photocopied his driver's license. The suspect was then allowed to leave.

The victim, wishing to press charges, waited more than two hours for tribal police officers to arrive and take her statement. It is unlikely that her diligent efforts resulted in

1. Indian Country is defined to include "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ." 18 U.S.C. § 1151. "Although this definition by its terms relates only to federal criminal jurisdiction," the Supreme Court "recognize[s] that it also generally applies to questions of civil jurisdiction." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

2. Letter from the victim to the author (Dec. 3, 2013) (on file with the Tulsa Law Review).

any charges against the perpetrator. Under federal law, neither the Tribe nor the federal government have jurisdiction to prosecute a crime between non-Indians in Indian Country.[3] The tribal officers' only recourse was to turn the information over to the state law enforcement agencies.

Purse-snatching at tribal casinos is hardly the worst crime plaguing Indian Country. Experts who study violence and rape against Indian women repeatedly invoke the same word: **"**epidemic.**"**[4] Congress agrees.[5] As a recent report by the bipartisan Tribal Law and Order Commission found,

> American Indian and Alaska Native communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country. Ironically, the U.S. government, which has a trust responsibility for Indian Tribes, is fundamentally at fault for this public safety gap. Federal government policies have displaced and diminished the very institutions that are best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities.[6]

One scholar recently compiled the following—shocking—statistics:

- Native American women suffer violent crime at the highest rates in the United States.
- 34% of Native women will be raped in their lifetimes. 39% will suffer domestic violence.
- On many reservations, Native women are murdered at a rate more than ten times the national average.

. . . .

- Non-Indians commit over eighty percent of the rapes and sexual assaults

3. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); United States v. McBratney, 104 U.S. 621 (1881). The federal government may prosecute crimes which violate substantive federal criminal law, *see, e.g.*, *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), but the federal criminal code is not designed to cover run-of-the-mill offenses such as the purse-snatching at issue here.

4. *See, e.g.*, United States Department of Justice Office of Public Affairs, *Attorney General Holder Announces Violence Against Women Tribal Prosecution Task Force in Indian Country*, THE U.S. JUSTICE DEPARTMENT (Jan. 21, 2011), http://www.justice.gov/opa/pr/2011/January/11-ag-086.html ("Violence against American Indian women occurs at epidemic rates."); NATIONAL CONGRESS OF AMERICAN INDIANS, THE VIOLENCE AGAINST WOMEN ACT REAUTHORIZATION—S.1925, *available at* http://www.ncai.org/attachments/PolicyPaper_TqvRDRNQQFuaiPDUQxUdGaYcPjTQierPUnfIlTFMpPSlfUVUYNk_Tribal%20Talking%20Points_021512.pdf (last visited Aug. 28, 2014) ("Violence against Native women has reached epidemic proportions."); Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, 11 (Mar. 2009), http://www.acslaw.org/sites/default/files/Fletcher%20Issue%20Brief.pdf ("Violence against women in Indian Country is an epidemic.").

5. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in various sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.), §202(a)(5)(A) (stating that "domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions").

6. INDIAN LAW AND ORDER COMMISSION at v, A ROADMAP FOR MAKING NATIVE AMERICA SAFER, (Nov. 2013), *available at* http://www.aisc.ucla.edu/iloc/report/.

against Indian women.[7]

Thus, it was no exaggeration when the Ninth Circuit Court of Appeals recently recognized that "Indian Country may be one of the most dangerous places in the United States."[8] Sexual predators take advantage of the difficulties enforcing the rule of law on Indian reservations, targeting women and children with little or no risk of prosecution.[9] International drug cartels and human traffickers bring their illicit business into Indian Country, often with the assistance—voluntary or otherwise—of the local community.[10] Jurisdictional uncertainty and the inability of tribal governments to enforce the laws within their own territories is a major contributor to the lawlessness and victimization that is rampant in Indian communities.[11]

Some Indian Tribes have developed innovative methods to enforce tribal laws against non-Indians in Indian Country. In the infamous "*Yellow Hummer Case*,"[12] the Muscogee (Creek) Nation ("Creek Nation") brought a civil forfeiture action against a vehicle that transported methamphetamine onto the Tribe's casino property. The perpetrator drove into the casino parking lot on the evening of June 15, 2004.[13] Illegally parking his yellow 2004 GM H2 model Humvee in a handicapped space, the suspect took methamphetamine in the parking lot before venturing into the casino.[14] The casino's security personnel suspected illegal activity and contacted the Creek Nation Lighthorse police department.[15] When the suspect returned to the vehicle, Lighthorse policemen were on the scene.[16] The suspect gave the officers permission to search the vehicle, and the officers discovered $1,463.14 in cash and 6.8 grams of methamphetamine.[17]

The tribal officers issued a civil citation for disorderly conduct, pursuant to the Creek

7. Ryan D. Dreveskracht, *House Republicans Add Insult to Native Women's Injury*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 1, 13-14 (2013), *available at* http://race-and-social-justice-review.law.miami.edu/wp-content/uploads/2013/12/House-Republicans-Add-Insult-to-Native-Women's-Injury.pdf (footnotes omitted).

8. Los Coyote Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1028-29 (9th Cir. 2013) (compiling additional statistics).

9. Dreveskracht, *supra* note 7, at 7 n.21.

10. "[I]nternational drug traffickers exploit the complicated jurisdictional rules and prosecutorial indifference to establish drug operations in Indian Country, often with devastating results for the community." *Los Coyote Band*, 729 F.3d at 1029 (citing a 2011 study published by the Government Accountability Office); *see also* Michel Martin, *Indian Reservations Grapple with Drug Trafficking, Tell Me More*, NATIONAL PUBLIC RADIO (June 15, 2010), http://www.npr.org/templates/story/story.php?storyId=128539859 (Interview with Tohono O'Odham Nation Director of Public Safety Ed Raina: "People are through various means induced to participate by offering substantial amounts of money to transport or store, within their communities. On occasions, some are forced to, through threats."); Sara Kershaw, *Drug Traffickers Find Haven in the Shadows of Indian Country*, N.Y. TIMES (Feb. 19, 2006), http://www.nytimes.com/2006/02/19/national/19smuggle.html?pagewanted=all&_r=0 ("[O]n a growing number of reservations, drug traffickers . . . are marrying Indian women to establish themselves on reservations.").

11. *See, e.g.*, AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIAN WOMEN FROM SEXUAL VIOLENCE IN THE U.S.A. 27-38 (2007), *available at* http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf; NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 4; Dreveskracht, *supra* note 7, at 8-11 (collecting sources).

12. Muscogee (Creek) Nation v. $ 1463.14, S.C. 05-01, 4 Mvs. L. Rep 253 (Creek Nation 2005) [hereinafter *Yellow Hummer Case*]; *see also* Miner Electric Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007).

13. *Yellow Hummer Case*, S.C. 05-01, 4 Mvs. L. Rep. at 258.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 258-59.

Nation civil enforcement code.[18] The Tribe also seized the drugs, money, and the Humvee under the Tribe's civil forfeiture statute.[19] The suspect voluntarily paid the $250 civil penalty but challenged the seizure of the Humvee.[20] The Creek Nation Supreme Court upheld the seizure, holding that:

> [T]he [Creek] Nation possesses the authority to regulate public safety through civil laws . . . [and] civil adjudicatory jurisdiction over forfeiture proceedings including the forfeiture of . . . vehicles used to transport or conceal controlled dangerous substances; and . . . monies and currency found in close proximity of a forfeitable substance.[21]

The suspect challenged the forfeiture in federal court, but the Tenth Circuit Court of Appeals dismissed the suit on the grounds of tribal sovereign immunity.[22] Thus, in that instance the Tribe imposed a civil sanction against a non-Indian offender for violating a public safety regulation on the reservation, and the penalty was immune from collateral attack in federal court.

Such tribal enforcement efforts are not always successful. In *Crowe & Dunlevy, P.C., v. Stidham*,[23] the Tenth Circuit rejected the Creek Nation's attempt to civilly regulate non-Indian attorneys litigating a tribal election dispute in tribal court. A dispute arose over attorney fees the prevailing party in a tribal election paid, out of the tribal treasury, to defend the election results.[24] The Creek Nation Supreme Court ordered the prevailing party's attorneys—who were members of the tribal bar association and, as such, had consented to be bound by the Tribe's rules of professional conduct—to repay the fees pending resolution of the dispute.[25] The lawyers resisted, seeking an injunction in federal court to prohibit the Tribe from enforcing the order.[26] The federal district court issued the injunction, which was upheld on appeal. The Tenth Circuit Court of Appeals reasoned the Tribe lacked civil jurisdiction over the firm, and tribal sovereign immunity did not protect the Tribe against a federal injunction barring prospective enforcement of an order that exceeded the Tribe's civil jurisdiction.[27]

It is important to note that in neither the *Yellow Hummer Case* nor *Crowe & Dunlevy* did the Court of Appeals acknowledge that the Tribe had acted within its power in enforcing its laws against non-Indians. The different outcome results from the fact that in the *Yellow Hummer Case* the Tribe seized the disputed property before the respondent was able to go to federal court and challenge the tribal authority.[28] But tribal governments

18. *Yellow Hummer Case*, S.C. 05-01, 4 Mvs. L. Rep. at 259; *see also* 22 MUSCOGEE (CREEK) NATION CODE ANN. § 2.101(9).
19. *Yellow Hummer Case*, S.C. 05-01, 4 Mvs. L. Rep at 253; *see also* 22 MUSCOGEE (CREEK) NATION CODE ANN. § 2-102.
20. *Yellow Hummer Case*, S.C. 05-01, 4 Mvs. L. Rep at 253.
21. *Id.* at 264.
22. *See* Miner Electric Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007).
23. Crowe & Dunlevy, P.C., v. Stidham, 640 F.3d 1140 (10th Cir. 2011).
24. *Id.* at 1145-46.
25. *Id.*; *see also In re* Adoption of American Bar Association Rules of Professional Conduct, Muscogee (Creek) Nation Supreme Court Order (Nov. 13, 2007) (on file with the Tulsa Law Review).
26. *Crowe*, 640 F.3d at 1146.
27. *Id.* at 1153, 1156.
28. Miner Electric Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1008-09 (10th Cir. 2007).

should have more effective, and more consistent, means to enforce their laws at their disposal.

II. TRIBAL JURISDICTION OVER NON-MEMBERS

The current problem of Tribes' being unable to enforce their laws against non-Indians is directly traceable to federal law, and specifically to key decisions from the United States Supreme Court starting in 1978.[29] This paper does not attempt to critique recent trends in Indian law jurisprudence,[30] but instead develops a practical solution to enable Tribes to exercise the legitimate powers of government over persons and activities within their borders.

With respect to criminal jurisdiction, the rule is simple—absent congressional action, Tribes have no authority to prosecute non-Indians in Indian Country.[31] For this reason, Tribes plagued by crimes committed by non-Indians must rely on (frequently inadequate) federal and state law enforcement efforts[32] or adopt alternative means of enforcing the Tribes' laws against non-Indians.

In the realm of civil regulation and adjudication, the rules are less clear. The "path-marking" case is *Montana v. United States.*[33] The issue in *Montana* was whether the Tribe had authority to regulate non-Indian hunting and fishing on lands owned in fee simple by non-Indians within the boundaries of the Tribe's reservation.[34] The Supreme Court "readily agree[d]" the Tribe could "prohibit non-members from hunting or fishing on lands belonging to the tribe or held by the United States in trust for the tribe . . . [and] condition their entry by charging a fee or establishing bag and creel limits."[35] Thus, the Court recognized that Tribes retained substantial authority to regulate the conduct of non-Indians on lands owned or controlled by the Tribe or federal government.

The Tribe's attempt to regulate non-member hunting and fishing on fee lands was a different matter. The Court decided the alienation of reservation lands to non-Indians necessarily limited the Tribe's regulatory authority over those lands.[36] The Court declared, the

29. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (deciding for the first time that Indian Tribes have no criminal jurisdiction with respect to non-Indians). *See also* Los Coyote Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1030 (9th Cir. 2013) (one factor contributing to the law and order crisis in Indian Country is that "the jurisdictional lines between tribal, state, and federal agencies are confusing and unhelpful"); INDIAN LAW AND ORDER COMMISSION, *supra* note 6, at v ("Ironically, the U.S. government, which has a trust responsibility for Indian Tribes, is fundamentally at fault for th[e] public safety gap" in Indian Country.).

30. This has thoroughly been covered in existing scholarship. *See, e.g.*, Philip P. Frickey, *A Common Law for Our Age of Colonialism*, 109 YALE L J. 1 (1999); Judith V. Royster, *Oliphant and its Discontents*, 13 KAN. J.L. & PUB. POL'Y 59 (2003).

31. *See Oliphant*, 435 U.S. at 194-95; *see also* United States v. Lara, 541 U.S. 193, 209 (2004) (affirming Congress's power to authorize Indian Tribes to exercise inherent criminal authority over Indians who are not members of the prosecuting Tribe). Congress has recently, for the first time since *Oliphant*, recognized tribal jurisdiction over a limited class of non-Indian domestic abusers of Indian women. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 42 U.S.C. § 904).

32. INDIAN LAW AND ORDER COMMISSION, *supra* note 6, at 3-17. *See* AMNESTY INTERNATIONAL, *supra* note 11, at 41-52; *see also* Dreveskracht, *supra* note 7, at 9 n.38 (citing sources).

33. Montana v. United States, 450 U.S. 544 (1981); *see* Strate v. A1 Contractors, 520 U.S. 438, 445 (1997).

34. Cases following *Montana* generally refer to lands owned in fee by non-Indians, including state or local governments, as "fee lands" and lands owned by Tribes, individual Indians, or held in trust by the federal government for the benefit of the Tribe or individual Indians, as "Indian lands." *See, e.g.*, *Strate*, 520 U.S. at 446; Nevada v. Hicks, 533 U.S. 353, 360 (2001). This paper follows this convention.

35. *Montana*, 450 U.S. at 577.

36. *Id.* Prior to this case, a non-Indian's purchase of land on an Indian reservation did not necessarily diminish

"[e]xercise of tribal power beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of tribes and so cannot survive without express delegation."[37] The court recognized certain circumstances under which a Tribe might exercise civil jurisdiction over non-members:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements [(the *Montana* I exception)]. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe [(the *Montana* II exception)].[38]

Post-*Montana* case law demonstrates these areas of retained tribal sovereignty—the two *Montana* exceptions—are narrowly construed.[39] The remainder of this section discusses various issues relevant to exercises of tribal civil enforcement jurisdiction under the two *Montana* exceptions.

A. Indian Lands or Fee Lands

In *Montana*, a crucial consideration for the Court was that the Tribe's attempted regulation governed the conduct of non-Indians on lands within the Tribe's territorial jurisdiction to which non-Indians held title. Essentially, the Court decided it would be inequitable to subject non-Indian purchasers of reservation lands to the jurisdiction of the Tribe. The Court reasoned those purchasers (or their predecessors) never expected they would be subject to perpetual tribal authority.[40]

Hence the Court's recognition in *Montana* that the Tribe could regulate hunting and fishing "on lands belonging to the tribe or held by the United States in trust for the tribe."[41] Such regulations do not undermine any rational expectation held by those early non-Indian settlers—they had every reason to suspect the Tribe would continue to exercise governmental power over the Tribe's communal property at the very least.[42] The federal courts,

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the Tribe's ability to exercise regulatory authority over that individual or his property. *See Powers of Indian Tribes*, 55 I.D. 14 (1935) (recognizing Indian Tribes have the power "[t]o levy dues, fees, or taxes upon the members of the tribe and upon nonmembers, residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders").

37. *Montana*, 450 U.S. at 577.

38. *Id.* at 565-66.

39. *See Hicks*, 533 U.S. at 357-66; *Strate*, 520 U.S. at 456-59.

40. *But see* Buster v. Wright, 135 F. 947, 953-54 (8th Cir. 1905) (finding non-Indian purchasers of township lots within the allotted Creek Nation reservation understood they would be subject to tribal taxing and regulatory authority). The Court has shown far less concern for the expectations of Indian Tribes, many of which ceded vast tracts of land to the United States in exchange for the promise of reservations within which they were to have a permanent right of autonomous self-rule. *See, e.g.*, Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 70-72 (1995).

41. *Montana*, 450 U.S. at 557.

42. *See, e.g.*, *Buster*, 135 F. at 951 (holding tribal authority "to fix the terms upon which noncitizens [of the

however, have not necessarily followed this seemingly obvious proposition.

The Supreme Court first muddied the water in 1997, with *Strate v. A1 Contractors*.[43] In *Strate*, a non-Indian woman (whose late husband and children were members of the Tribe) was driving on a highway when her vehicle collided with a construction truck owned and operated by non-Indians.[44] The highway was situated on a right-of-way in favor of the state and was maintained by the state, but title to the underlying property was held in trust by the federal government in favor of the Tribe.[45] Therefore, the state, and by extension non-Indian motorists, had an unqualified right to travel over the road.[46] The question was whether the tribal court had jurisdiction to hear the motorist's negligence action against the truck driver and his employer.[47]

The Supreme Court applied the *Montana* test.[48] As in *Montana*, the court "readily agree[d] . . . that tribes retain considerable control over nonmember conduct on tribal lands."[49] In *Strate*, though, the Court held the right-of-way to be "equivalent, for nonmember governance purposes, to alienated, non Indian land."[50] Thus, because the Tribe could not "assert a landowner's right to occupy and exclude" non-Indian motorists from the right of way, the *Montana* rule was applicable.[51]

The Supreme Court has weighed in on this issue just one other time. In *Nevada v. Hicks*,[52] the controversy involved a trespass and tort action that arose "on tribe-owned land within the reservation."[53] The wrinkle in that case was that the non-Indian defendants were the state of Nevada and state game wardens who were "executing a search warrant for evidence of an off-reservation crime."[54] The Court ultimately decided, notwithstanding the Tribe's ownership interest in the land, that "tribal authority to regulate state officers in executing process related to the violation, off-reservation, of state laws is not essential to tribal self-government or internal relations."[55] The Court created out of whole cloth a limitation on tribal jurisdiction based on the defendant's status as a state law enforcement officer.[56]

The *Hicks* majority's discussion of the issue created much uncertainty regarding the scope of tribal jurisdiction and the reach of the *Montana* rule. After suggestion in broad terms that "the rule of *Montana* applies to both Indian and non-Indian land," the Court explained that "the ownership status of land . . . is [a] factor to consider in determining

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Tribe] might conduct business within [the Tribe's] territorial boundaries . . . remained undisturbed" by federal law).

43. *Strate*, 520 U.S. at 438.
44. *Id.* at 442-43.
45. *Id.*
46. *Id.* at 454-56.
47. *Id.* at 444-45.
48. *Strate*, 520 U.S. at 453, 456.
49. *Id.* at 454.
50. *Id.*
51. *Id.* at 456.
52. Nevada v. Hicks, 533 U.S. 353 (2001).
53. *Id.* at 357.
54. *Id.* at 356-57.
55. *Id.* at 364.
56. *Id.* at 364-66.

whether regulation of the activities of non-members is necessary to protect tribal self-government or to control internal relations."[57] The Court then cryptically stated ownership status "may sometimes be a dispositive factor," noting that, in the Court's decisions to date, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction."[58] Thus, turning *Montana* on its head,[59] the Court suggested in *Hicks* that Tribes are almost conclusively presumed not to have jurisdiction over non-Indian activities on fee lands, and the *Montana* rule and its exceptions apply on tribal lands on the reservation.

The concurring opinions in *Hicks* demonstrate the scope of the confusion. In her partial concurrence, Justice O'Connor, joined by Justices Stevens and Breyer, suggested the majority opinion "finally resolve[d] that *Montana* . . . governs a tribe's civil jurisdiction over nonmembers, regardless of land ownership."[60] However, this concurrence also criticized the majority opinion for failing to give "due consideration to land status, which has always featured prominently in [the Court's] analysis of tribal jurisdiction,"[61] and for issuing a "sweeping opinion, [which] without cause undermine[d] the authority of tribes to 'make their own laws and be ruled by them.'"[62]

Like Justice O'Connor's concurrence, Justice Souter's concurrence, joined by Justices Kennedy and Thomas, suggested that the *Montana* rule applies on fee and tribal land alike.[63] However, Justice Ginsburg's concurrence suggested the *Hicks* decision has no bearing on the broader issue of *Montana's* applicability over tribal lands because the Tribe's attempt to regulate a state officer's conduct presented special circumstance—a state official's execution of a warrant relating to an off-reservation offense—which would not be implicated in the typical case.[64]

The lower federal courts have reached varying conclusions regarding the effect of *Hicks* on the fee land/Indian land distinction. The Tenth Circuit Court of Appeals has expressly held that *Hicks* extended the *Montana* analysis to all reservation lands, regardless of ownership.[65] The Eighth Circuit follows the Tenth Circuit.[66] The Ninth Circuit has adopted a far narrower interpretation of *Hicks*. In *Water Wheel Camp Recreational Area v. LaRance*, the court concluded, "where there are no sufficient competing state interests at play, . . . the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana*."[67]

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57. *Hicks*, 533 U.S. at 359-60.

58. *Id.* at 360. At the same time, *Hicks* seems to recognize tribal ownership of the relevant lands may sometimes be the dispositive consideration supporting tribal jurisdiction over non-members. *Id.* at 370-71. *Hicks* provides no guidance concerning when land ownership is dispositive and when it is merely a factor.

59. Recall that as recently as 1997 the Supreme Court "readily agreed" with its recognition in *Montana* that "tribes retain considerable control over nonmember conduct on tribal lands." Strate v. A1 Contractors, 520 U.S. 438, 454 (1997) (citing Montana v. United States, 450 U.S. 544, 557 (1981)).

60. *Hicks*, 533 U.S. at 387 (O'Connor, J., concurring in part and concurring in the judgment).

61. *Id.* at 395.

62. *Id.* (quoting *Strate*, 520 U.S. at 459).

63. *Id.* at 375-76 (Souter, J., concurring).

64. *Id.* at 386 (Ginsburg, J., concurring).

65. Macarthur v. San Juan County, 497 F.3d 1057, 1069 (10th Cir. 2007); *see also* Crowe & Dunlevy, P.C., v. Stidham, 640 F.3d 1140, 1151 (10th Cir. 2011) (applying *Montana* analysis to controversy arising out of tribal judicial proceedings presumptively taking place on tribal or trust lands).

66. Attorney's Process and Investigation Servs., Inc., v. Sac and Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 936 (8th Cir. 2010).

67. Water Wheel Camp Recreation Area v. LaRance, 642 F.3d 802, 805 (9th Cir. 2011); *see also* McDonald

It is thus unclear the extent to which *Hicks* limits the Tribes' authority over non-Indians on tribal lands. What is clear is that under current law, Tribes asserting jurisdiction over non-Indians on the reservation might be required to justify their actions under the *Montana* rule, even when regulating conduct on tribal lands or trust lands. Tribes must, therefore, consider *Montana* when drafting civil enforcement codes, even where applying the code on tribal or trust lands.[68]

B. The First Montana Exception: Consensual Relations

Even if the *Montana* rule applies, Tribes retain some authority to regulate non-members within the Tribe's territorial jurisdiction. The *Montana* Court recognized two circumstances in which the *Montana* rule does not preclude tribal authority over non-members.[69] The first exception applies where the non-Indian enters into consensual relations with the Tribe or its members.[70] Cases following *Montana* have shown this to be a narrow exception, and parties advancing tribal jurisdiction under a consensual relationship theory have a heavy burden to establish the parties to the litigation entered into the type of relationship necessary to satisfy this test.

In *Strate v. A1 Contractors*, the Court considered whether a construction company's contract to perform work for the Tribe created a sufficient consensual relationship to support the tribal court's jurisdiction over a negligence claim brought by a non-Indian motorist, Gisela Fredericks, against the company and its employee regarding a traffic accident between Mrs. Fredericks and the employee operating a company vehicle.[71] The Court answered in the negative, reasoning the relationship identified by Mrs. Fredericks—that between the Tribe and the company regarding a construction activity—was not sufficiently related to the cause of action, the automobile accident.[72] As the Court put it, Mrs. Fredericks "was not a party to" the contract between the company and the Tribe, "and the tribes were strangers to the accident" between Mrs. Fredericks and the company driver.[73]

The *Strate* Court indicated that the presumptive scope of the consensual relationship exception is demonstrated by the precedents upon which *Montana* relied. The Court's precise wording bears repeating:

> *Montana*'s list of cases fitting within the first exception, *see* 450 U. S., at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember owned livestock within boundaries of the Chickasaw Nation);

v. Means, 309 F.3d 530, 540 (9th Cir. 2002) (recognizing "*Hicks* makes no claim that it modifies or overrules *Montana*").

68. This is not to say tribal advocates should concede that the *Montana* limitations apply to tribal regulatory efforts on tribal lands. The Ninth Circuit's decision in *Water Wheel* demonstrates federal courts might recognize a Tribe's inherent authority to regulate non-members on tribal lands, notwithstanding the Supreme Court's aggressive application of *Montana*. Tribal civil enforcement codes should take advantage of this possibility.

69. Montana v. United States, 450 U.S. 544, 565-66 (1981).

70. *Id.*

71. Strate v. A1 Contractors, 520 U.S. 438, 442-43 (1997).

72. *Id.* at 456-57.

73. *Id.* at 457.

> *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U.S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").[74]

The Court offered no further explanation regarding the limitations these precedents impose on the consensual relationship exception,[75] and it is far from clear why the Court believed these precedents so clearly precluded Mrs. Fredericks' lawsuit. Regardless, the various circumstances invoked by the *Montana* Court, and emphasized in *Strate*, seem to suggest the Tribe can exercise jurisdiction over broad categories of economic activity occurring within the Tribe's territory. Significantly, a sufficient relationship arises when a non-Indian partakes of "the privilege of conducting business within [a] tribe's borders," owing to the Tribe's "inherent . . . authority . . . to prescribe the terms upon which noncitizens may transact business within its borders."[76] Subsequent applications, however, suggest the Court's conception of the Tribes' inherent authority may be more limited.

In *Atkinson Trading Co. v. Shirley*,[77] the Court considered whether the Navajo Nation had authority to impose an occupancy tax on guests staying at a hotel owned by a nonmember on fee land.[78] After determining the *Montana* analysis governed the issue,[79] the Court declared there was not a sufficient consensual relationship between the hotel occupants and the Tribe.[80]

The Tribe argued the Tribe's provision of emergency services to the hotel and its guests justified the imposition of the tax, but the Court rejected this argument.[81] Clarifying the nature of the exception, the Court noted "[t]he consensual relationship must stem from 'commercial dealings, contracts, leases, or other arrangements,' and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection."[82] The Court stated that the Tribe's argument "ignore[d] the dependent status of Indian tribes and subvert[ed] territorial restriction upon tribal power."[83] The Court further clarified that "*Montana*'s consensual relationship exception requires that the tax or

74. *Id.*
75. *Id.*
76. *Strate*, 520 U.S. at 457.
77. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).
78. *Id.* at 647-48.
79. *Id.* at 654. Prior to *Atkinson Trading Co*., it was widely understood that Tribes had inherent power to tax non-members on the reservation, powers that were not limited by the *Montana* rule. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) ("we conclude that the tribe has the authority to impose a . . . tax on the [economic] activities of [non-members doing business on the reservation] as part of its power to govern and to pay for self-government"); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152-54 (1980) (upholding imposition of a tribal cigarette sales tax and recognizing "[t]he widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power"); *see also* Buster v. Wright, 135 F. 947, 951 (8th Cir. 1905) (recognizing the Tribe had the power to impose a business tax on non-members doing business on fee lands on the allotted reservation).
80. *Atkinson Trading Co*., 532 U.S. at 654-57.
81. *Id.* at 654-56.
82. *Id.* at 655.
83. *Id.*

regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. . . . A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'"[84]

With *Atkinson*, the Court retreated from its position in *Strate* that Tribes retained "inherent . . . authority . . . to prescribe the terms upon which noncitizens may transact business within [their] borders," including the power to "tax . . . nonmembers for the privilege of conducting business" on the Tribe's reservation.[85] It is beyond dispute that both the hotelier and his guests were "transact[ing] business" on the Navajo reservation, but this was not sufficient to support the Tribe's jurisdiction over the non-member hotel guests.

Strate and *Atkinson* demonstrate the consensual relationship exception is not easily met. At the very least, there must be a nexus between the consensual relationship and the regulation or controversy at issue—an unrelated relationship between the Tribe, or Tribe-members, and the dispute or the subject of the regulation does not suffice.[86] There must also be the proper sort of relationship. The "generalized availability of tribal services" is also insufficient.[87] A sufficient relationship can arise where a non-member avails himself of the "privilege of conducting business" on the reservation,[88] but sometimes this relationship is not enough.[89] Due to these limitations and uncertainties, Tribes seeking to utilize the consensual relationship exception to support a civil regulatory enforcement code must carefully craft the code provisions to take maximum advantage of the consensual relationships that suffice to support the Tribe's jurisdiction on collateral federal review.[90]

C. The Second Montana Exception: Political Integrity, Economic Security, or Health or Welfare

The second *Montana* exception permits Tribes to exercise jurisdiction over non-members where the non-member's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[91] The *Montana* Court provided no useful guidance on the application of this exception; subsequent

84. *Id.* at 656.

85. Strate v. A1 Contractors, 520 U.S. 438, 457 (1997).

86. *See* McArthur v. San Juan Cnty., 309 F.3d 1216, 1223 (10th Cir. 2002) (emphasizing the *Montana* I exception requires a sufficient "nexus between the consensual relationship and the exertion of tribal authority"); *see also* Crowe & Dunlevy v. Stidham, 640 F.3d 1140 (10th Cir. 2011) (deciding that attorneys' membership in a tribal bar association and decision to represent a tribal official in an election dispute in tribal court was not sufficient to allow the tribal court sua sponte to review the payment of attorney fees, where there was no actual dispute between the law firm and the tribal client).

87. *Atkinson Trading Co.*, 532 U.S. at 655.

88. *Strate*, 520 U.S. at 457.

89. *Atkinson Trading Co*., 532 U.S. at 655-57.

90. Some authorities have suggested that a consensual relationship alone is not sufficient to support tribal jurisdiction, reasoning that there must be an independent showing that such tribal jurisdiction is "'necessary to protect tribal self-government and internal relations.'" Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 177 (5th Cir. 2014) (Smith, Circuit Justice, dissenting), *petition for cert. filed*, 2014 WL 27040006 (U.S. June 12, 2014) (No. 13-1496). However, to date, "no court has, despite finding a consensual relationship with a nexus to a tribal regulation, rejected tribal jurisdiction because the relationship did not 'implicate tribal governance and internal relations.'" *Id.* at 175. And with good reason—this suggested limitation would "read the first *Montana* exception out of existence" because "[i]f regulation of some consensual relationship is necessary to protect tribal self-government or control internal relations, it would seem to fall necessarily within the second *Montana* exception." *Id.* at 175 n.6. However, as of the publication of this article, a petition for certiorari has been filed in the *Dolgencorp* case, and it remains to be seen whether the Supreme Court will agree to review the question.

91. Montana v. United States, 450 U.S. 544, 566 (1981).

courts were left to guess as to what sort of conduct would sufficiently impact tribal self-governance to justify tribal regulation of non-members. The Supreme Court has, thus far, construed the exception quite narrowly.

Take the *Strate* case. As previously discussed, *Strate* involved a tort claim between non-members arising out of an automobile accident on a state road running through the reservation.[92] The Court admitted—it hardly could have denied—that, "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members."[93] But, the Court cautioned, the second *Montana* exception is not to be read too broadly.[94] The Court instructed:

> Key to its proper application is the [*Montana*] Court's preface: Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.[95]

In short, tribal civil jurisdiction under *Montana* II is limited to that "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"[96] Regulating a simple automobile tort between non-members on a state highway on the reservation was not sufficient to meet this test.[97] For whatever reason, conduct the Court admitted was a public safety hazard, endangering life, health, and property on the reservation, did not sufficiently impact the "economic security, political integrity, or the health or welfare of the tribe" to justify allowing the Tribe to regulate a non-member's tortious conduct on the reservation.

The next significant application came in 2001, with the twin cases of *Atkinson Trading Co. v. Shirley*,[98] and *Nevada v. Hicks*.[99] In *Shirley*, the Navajo Nation attempted to impose a hotel occupancy tax on a non-Indian hotelier operating on fee land within the Tribe's reservation. Without further analysis, the Court dismissed the notion that the *Montana* II exception could support the tax, simply stating that "we fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[100]

Hicks involved a highly unusual application of *Montana* II.[101] In *Hicks*, a Tribe-member plaintiff sued state game wardens for trespass and damage to property, when the wardens entered the plaintiff's on-reservation home pursuant to search warrants issued by

92. *Strate*, 520 U.S. at 442-43.
93. *Id.* at 457-58.
94. *Id.* at 458-59.
95. *Id.* (quoting *Montana*, 450 U.S. at 564) (alterations in original).
96. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
97. *Strate*, 520 U.S at 458-59. In *Nord v. Kelly*, 520 F.3d 848, 856-57 (8th Cir. 2008), the Eighth Circuit extended the *Strate* holding to a vehicle tort action brought by a Tribe-member against a non-Indian. Except for the fact that a tribal member was the plaintiff, the facts in *Nord* were identical to those in *Strate* in all relevant respects. *Id.*
98. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).
99. Nevada v. Hicks, 533 U.S. 353 (2001).
100. *Shirley*, 532 U.S. at 657 (quoting *Montana*, 450 U.S. at 566).
101. *Hicks*, 533 U.S. at 353.

state and tribal authorities.[102] Reviewing the tribal court's jurisdiction over the suit, the Supreme Court decided that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to the right to make laws and be ruled by them."[103] Given the unique and specific factual context in which *Hicks* arose, it is doubtful that this case sheds meaningful light on the scope of the *Montana* II exception in other contexts.[104]

Most recently, the Court in *Plains Commerce Bank v. Long Family Land and Cattle Company* continued the trend of revising the *Montana* II exception to preclude tribal jurisdiction under whatever set of facts the case before it presented.[105] In this case, the Court explained:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. One commenter has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences."[106]

Perhaps most troubling in these cases is the suggestion that a Tribe's jurisdiction over non-Indians is limited to circumstances in which that power is strictly necessary to preserve the Tribes' right to "make their own laws and be governed by them";[107] conduct that literally "imperils the subsistence of the tribal community."[108] This narrow view of tribal authority over nonmembers is contrary to *Montana*, wherein the court "readily agreed" the Tribe retained "considerable control" over the conduct of nonmembers on Indian lands, and could regulate non-members on fee lands where the non-member's conduct had "direct effects" on the "political integrity, the economic security, or the health or welfare of the tribe."[109] In any event, in spite of the Supreme Court's sometimes overly narrow language, the lower federal courts have occasionally demonstrated that the *Montana* II exception is more than a dead letter, and can be a viable option to support tribal regulation and adjudication under the proper circumstances.[110]

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102. *Id.*

103. *Id.* at 364.

104. *See id.* at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").

105. Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709, 2726-27 (2008). *See, e.g.*, Dean Suagee, *The Supreme Court's "Whack-A-Mole" Game Theory in Federal Indian Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 99-106 (2002).

106. *Plains Commerce Bank*, 128 S. Ct. at 2726 (internal citations omitted).

107. *See Hicks*, 533 U.S. at 360-61, 364; Strate v. A1 Contractors, 520 U.S. 438, 459 (1997); *see also Plains Commerce Bank*, 128 S. Ct. at 2723.

108. *Plains Commerce Bank*, 128 S. Ct. at 2726.

109. Montana v. United States, 450 U.S. 544, 565-66 (1981).

110. *See, e.g.*, Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 819 (9th Cir. 2011) (holding that tribal court had adjudicative jurisdiction under *Montana* II over a trespass claim brought by the Tribe against a holdover tenant, where the tenants "unlawful occupancy and use of tribal land not only deprived the [Tribe] of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income"); Attorney's Process and Investigation Servs., Inc., v. Sac and Fox

D. Residual Jurisdiction: The Power to Exclude

Even while limiting the scope of tribal authority over non-Indians within the Tribe's Indian Country, the Supreme Court has consistently maintained that Tribes retain the "residual" authority to exclude undesirables from their jurisdiction, and the "ancillary" authority to stop and investigate suspected lawbreakers. In *Duro v. Reina*, for instance, the Court explained:

> The tribes . . . possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. . . . Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, *tribal officers may exercise their power to detain the offender and transport him to the proper authorities*.[111]

The Tribe's power to exclude is expansive, encompassing "the lesser included, incidental power to regulate non-Indian use of" the lands to which the Tribe grants access.[112]

It is unclear whether the tribal power to exclude extends to alienated fee lands within the Tribe's jurisdiction. In *Merrion v. Jicarilla Apache Tribe*, the Court rejected the argument that the Tribe, in leasing tribal lands to a non-Indian mineral developer, had waived its sovereign power to exclude or to impose conditions on the developer's entry onto the Tribe's territory.[113] The Court reasoned that the Tribe, as a land owner, granted the developer certain property rights, but that this agreement in no way diminished the Tribe's governmental prerogative to secure its borders and exclude from the reservation those who do not abide by the Tribe's conditions for entry.[114]

In *Brendale v. Confederated Tribes of the Yakima Indian Nation*, a case in which a fractured Court limited the power of Tribes to pass zoning laws applicable to nonmember landowners in the Tribe's territory,[115] a plurality of the Court suggested the Tribe "no longer ha[d] the power to exclude fee owners from its land within the boundaries of the reservation," because the tribal exclusion power "was necessarily overcome by . . . an 'implici[t] grant' of access to the land."[116] The Court speculated that, by permitting non-Indians to own property and settle within the Tribe's territory, the resulting confusion caused by fractured and inconsistent regulatory authority was all part of Congress's plan.[117] However, the Court made no further attempt to explain its apparent departure from

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Tribe of the Miss. in Iowa, 609 F.3d 927, 939 (8th Cir. 2010) (holding that tribal court had adjudicative jurisdiction under *Montana* II over claims brought by Tribe against non-Indian private security contractors who staged an armed raid on the seat of tribal government with the intent to "seize control of the tribal government and economy by force").

111. Duro v. Reina, 495 U.S. 676, 696-97 (1990) (emphasis added).

112. South Dakota v. Bourland, 508 US 679, 688 (1993); *see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-48 (1982).

113. *Merrion*, 455 U.S. at 144-48.

114. *Id.*

115. Brendale v. Confederated Tribes of the Yakima Indian Nation, 492 U.S. 408, 430-31, 444-47 (1989).

116. *Id.* at 424 (internal marks and alterations omitted).

117. *Id.* at 435-37.

Merrion's recognition that the Tribes' power to exclude is an inherent aspect of sovereignty, not simply an expression of Tribes exercising "a landowner's right to occupy and exclude."[118]

Two years after *Brendale*, the Court in *Duro v. Reina* reaffirmed the Tribe's power to "exclude persons whom they deem to be undesirable from tribal lands."[119] The *Duro* Court did not clarify whether this power extends to excluding non-Indian owners of reservation fee land. In fact, the Court's use of the phrase "tribal lands" might indicate the Court was simply referring to the Tribe's right as a landowner to occupy and exclude. But context matters. This passage in *Duro* responded to the (indisputably true)[120] argument that the Court's aggressive limitations on tribal criminal jurisdiction had created a law and order crisis in Indian Country.[121] While the opinion made clear that the Court was not moved by such concerns,[122] the Court suggested the Tribe's power to exclude could serve as a substitute for criminal law enforcement jurisdiction.[123] This exclusion power would be a poor substitute indeed if the Tribe could not use it against those who in many instances would present the greatest threat—lawbreakers who actually own property and live on the Reservation.

Just three years later, however, the Court endorsed the *Brendale* plurality's position, remarking:

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. . . . [This conveyance] eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.[124]

Thus, the Court has suggested the Tribe's "traditional and undisputed power to exclude"[125] is limited where non-Indian fee owners had a property interest within the Tribe's jurisdiction.

Four year after *Bourland*, the Court in *Strate* changed course yet again, unanimously endorsing a more expansive reading of the tribal exclusion power.[126] The *Strate* Court affirmed that Tribes have the power to "detain and turn over to state officials nonmembers stopped on the [state] highway for conduct violating state law."[127] This was so even though the highway was situated on a right-of-way favoring the state, the "equivalent, for nonmember governance purposes, to alienated, non Indian land."[128] Thus, while the Supreme

118. Strate v. A1 Contractors, 520 U.S. 438, 456 (1997); *see Merrion*, 455 U.S. at 144-48.
119. Duro v. Reina, 495 U.S. 676, 696 (1990).
120. *See supra* notes 5-9 and accompanying text.
121. *Duro*, 495 U.S. at 696.
122. *Id.* at 698.
123. *Id.* at 696-97.
124. South Dakota v. Bourland, 508 U.S. 679, 689 (1993).
125. *Duro*, 495 U.S. at 696-97.
126. Strate v. A1 Contractors, 520 U.S. 438, 456 n.11 (1997).
127. *Id.*
128. *Id.* at 454.

Court has consistently described this power as "traditional and undisputed," it has struggled for decades to define the nature and scope of this power, and to reconcile the power with the constraints the Court continues to place on tribal authority more generally.

However, the Court has confirmed that the tribal exclusion power (whatever its reach may be) does include the lesser power "to set conditions on entry to that land."[129] The Court in *Plains Commerce Bank* recognized that the conditional entry power can support "licensing requirements and hunting regulations" and taxation.[130] In fact, that Court broadly recognized "[r]egulatory authority goes hand in hand with the power to exclude."[131] *Plains Commerce* somewhat inconsistently suggested Indian Tribes may "exclude outsiders from entering tribal land[, but] do not, as a general matter, possess authority over non-Indians who come within their borders."[132] But this isolated passage, presented without analysis or explanation, can hardly be thought to undermine the Court's express recognition that the power to exclude encompasses the related power to regulate those who are granted conditional permission to enter onto tribal lands.

One federal court of appeals decision has analyzed the scope of the Tribe's exclusion power, and the associated authority to regulate non-members who enter onto tribal lands, in great depth. The Ninth Circuit Court of Appeals in *Water Wheel Camp Recreation Area v. LaRance*, recognized an Indian Tribe's authority to regulate and adjudicate a dispute involving a non-Indian closely held corporation and business owner (collectively, "Water Wheel") charged with unlawful detainer, breach of a lease of tribal lands, and trespass onto tribal lands.[133] Responding to Water Wheel's argument that the *Hicks* case required the court to apply the *Montana* analysis, the court held that, unless special circumstances like those in *Hicks* were implicated, "the tribe's status as landowner [was] enough to support regulatory jurisdiction without considering *Montana*."[134]

The Supreme Court, then, has not adopted a consistent position regarding the scope of the tribal power to exclude, but seems to reverse its position with each new case. What is clear is that Indian Tribes retain a sovereign power to exclude;[135] this power encompasses the "lesser power" to impose certain restrictions and regulations on those to whom the tribe permits entry;[136] this power is separate from, and broader than, "a landowner's right to occupy and exclude";[137] but this power is somewhat limited with respect to lands over which the Tribe's rights as landowner have been limited or extinguished.[138] How those principles will be applied in future cases is purely a guessing game.

III. DOCTRINES OF LEGISLATIVE DEFERENCE

This article's proposed statutory approach to tribal civil regulatory authority relies

129. Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709, 2723 (2008).
130. *Id.*
131. *Id.* (quoting South Dakota v. Bourland, 508 U.S. 679, 691 n.11 (1993)).
132. *Id.* at 2719-20.
133. Water Wheel Camp Recreation Area v. LaRance, 642 F.3d 802, 804-05 (9th Cir. 2011).
134. *Id.* at 814.
135. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 696 (1990).
136. Brendale v. Confederated Tribes of the Yakima Indian Nation, 492 U.S. 408, 423-24 (1989); *see also Plains Commerce Bank*, 128 S. Ct. at 2721.
137. Strate v. A1 Contractors, 520 U.S. 438, 456 (1997); *see, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-48 (1982).
138. *Compare* South Dakota v. Bourland, 508 U.S. 679, 689 (1993), *with Strate*, 520 U.S. at 456 n.11.

on two doctrines of legislative deference, each of which has been consistently and zealously applied by the United States Supreme Court in non-Indian-law contexts. Following well-established precedent, the Court should afford deference to the clearly expressed intent and factual findings of the tribal legislatures adopting the proposed civil enforcement codes. As will be explained below, careful drafting of tribal enforcement codes, supported by the Supreme Court's own rules for legislative deference, should greatly enhance the case for recognizing tribal civil jurisdiction to enforce the tribal civil regulatory code against non-Indian offenders.

A. The Civil/Criminal Distinction

Because Tribes have no authority to exercise criminal jurisdiction over non-members, but limited civil authority to regulate and adjudicate disputes involving non-members, the dispositive threshold question is whether the tribal enforcement action is a civil regulatory sanction or a criminal punishment. The federal courts have not, it appears, addressed this question directly.[139] In principal, however, tribal governments should be able to use civil means, governed by carefully drafted tribal codes, to regulate the conduct of non-members, consistent with the limitations on tribal jurisdiction imposed by the federal courts.

The Supreme Court has addressed the civil/criminal distinction as it is applies to federal constitutional rights.[140] Under the federal test, whether a penalty is civil or criminal "is, at least initially, a matter of statutory construction."[141] If the legislature creating the remedy plainly intended that it be a civil matter, the legislative intent is given great deference.[142] The Court will reject the legislature's manifest intent only where the party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."[143] This rule recognizes that "all civil penalties have some deterrent effect,"[144] so the mere fact that a sanction is punitive is insufficient to overcome the legislature's judgment that a remedial statute created a civil, rather than criminal, penalty.

The Supreme Court applies a multi-factor test to gauge whether a putatively civil regulation is actually a criminal penalty in disguise. In *Kennedy v. Mendoza-Martinez*, the Court considered the following factors:

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139. In *Miner Electric Inc. v. Muscogee (Creek) Nation*, 503 F.3d 1007, 1009-10 (10th Cir. 2007), the court dismissed a non-Indian's challenge to a tribal civil enforcement action based on the Tribe's assertion of sovereign immunity. However, the court did not address the merits of the non-Indian's challenge to the Tribe's jurisdiction. *Id.*

140. *See, e.g.*, Hudson v. United States, 522 U.S. 93 (1997) (considering whether successive civil and criminal penalties relating to the same conduct implicated the double jeopardy clause); Kansas v. Hendricks, 521 U.S. 346, 360 (1997) (double jeopardy and ex post facto clauses); United States v. Ward, 448 U.S. 242 (1980) (Fifth Amendment prohibition against self-incrimination, Sixth Amendment protections, and the proof beyond a reasonable doubt standard).

141. *Hudson*, 522 U.S. at 99.

142. *Id.* at 99-100; One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972) (suggesting a statutory penalty must be "unreasonable or excessive" before the Court will disregard Congress' intent); Flemming v. Nestor, 363 U.S. 603, 617 (1960).

143. *Hendricks*, 521 U.S. at 361 (citing *Ward*, 448 U.S. at 248-49). *See also Hudson*, 522 U.S. at 100 ("[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.").

144. *Hudson*, 522 U.S. at 102.

> [(1)] Whether the sanction involves an affirmative disability or restraint; [(2)] whether it has historically been regarded as a punishment; [(3)] whether it comes into play only on a finding of scienter; [(4)] whether its operation will promote the traditional aims of punishment—retribution and deterrence; [(5)] whether the behavior to which it applies is already a crime; [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it; and [(7)] whether it appears excessive in relation to the alternative purpose assigned.[145]

At first blush, tribal lawmakers could be forgiven for thinking this test could be problematic, because an effective tribal civil enforcement regime will satisfy many, perhaps most, of these "punishment" criteria. However, the Supreme Court has demonstrated that this test is not onerous in the least.

In *Hudson v. United States*, the Court considered a double jeopardy challenge brought by individuals accused of violating federal banking regulations and subjected both to civil penalties and criminal charges for their purported misdeeds.[146] For the civil penalties, the government levied substantial fines against the petitioners, and barred them from any future transactions with federally insured deposit banks.[147] After the petitioners stipulated to the civil penalties, the government brought a criminal indictment based on this same conduct.[148] The petitioners challenged the indictment based on double jeopardy.[149] The Supreme Court rejected the petitioners' challenge, holding the "civil" penalties were indeed civil and therefore double jeopardy was not implicated.[150]

Applying the *Kennedy* factors, the Court found "very little showing" that the civil penalties were effectively criminal in nature. Applying the first factor, the Court said barring the petitioners from future participation in banking activities was not an "affirmative disability or restraint" because it was less severe than the "'infamous punishment' of imprisonment."[151] On the second factor, the Court found neither the debarment nor the monetary penalty were "punishment" as the term is used in this context.[152] Third, the Court noted the civil penalty did not come "into play only on a finding of scienter," even though petitioners' bad faith was a substantial factor in determining the amount of the fine and whether they would be subject to debarment.[153] Finally, the Court acknowledged that the petitioners' conduct was indeed criminal, and the penalties served substantial deterrence purposes.[154] The Court dismissed these last factors as unimportant.[155]

Thus, in a case where essentially every punishment factor indicated the purported "civil" sanctions were indeed wolves in sheep clothing, the Court dismissed the *Kennedy* factors out of hand, finding "very little" indication that the legislature's "civil" designation was improper. Tribal lawmakers should take heart—tribal civil regulatory systems will not

145. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).
146. *Hudson*, 522 U.S. at 95-96.
147. *Id.* at 96-97.
148. *Id.* at 97-98.
149. *Id.* at 98.
150. *Id.* at 105.
151. *Hudson*, 522 U.S. at 104.
152. *Id.* at 104.
153. *Id.* at 104-05.
154. *Id.* at 105.
155. *Id.*

be deemed criminal, and will not run afoul of *Oliphant's* bright-line rule, if the Court applies its established *Hudson*/*Kennedy* approach to distinguish civil from criminal sanctions.[156]

The federal courts have not confirmed the *Hudson*/*Kennedy* rule applies in the context of tribal jurisdiction. There are good reasons to assume this rule, however. The Supreme Court has drawn a sharp line between a Tribe's criminal and civil jurisdiction as they relate to non-Indians.[157] These limitations are creatures of federal law, devised by the Supreme Court and reflecting the Court's judgment as to the restrictions congressional policy implicitly placed on tribal jurisdiction.[158] If the distinction between tribal civil and criminal authority, as reflected in the *Montana* and *Oliphant* decisions, has any meaning at all, that meaning must come from federal law. And the *Hudson*/*Kennedy* analysis is sufficient, in the Court's view, to preserve constitutional rights implicated by criminal prosecutions. It has never been suggested that protecting non-Indians from tribal regulation requires a more stringent analysis than that used to protect the constitutional rights of criminal defendants. Thus, there is every reason to believe Tribes have an inherent power to, consistent with the *Montana* limitations, exercise civil regulatory authority over non-Indians on the Tribe's reservation, and that these civil regulations will be recognized as such by federal courts, provided the regulations at issue meet the Supreme Court's fairly relaxed standard for classifying penalties as 'civil.'

B. Judicial Deference to Legislative Fact-finding

The Supreme Court has also given great deference to explicit and implicit legislative findings of fact when evaluating whether a statute or executive action is lawful.[159] The Court has cited two principal justifications for this deference. First, Courts properly defer to legislative fact-finding because legislatures have an institutional advantage over courts in making factual judgments regarding "legislative" facts with broad-ranging policy implications.[160] Second, the Court defers to legislatures out of "respect for [their] authority

156. *See also* United States v. Ward, 448 U.S. 242, 248-49 (1980); Flemming v. Nestor, 363 U.S. 603, 617 (1960); Helvering v. Mitchell, 303 U.S. 391, 400 (1938); *but see* Dep't of Rev. of Mont. v. Kurth Ranch, 511 U.S. 767, 783 (1994) (invalidating a state tax on possession of illegal narcotics, finding the tax to be "too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."). Justice Scalia's dissent in *Kurth Ranch* emphasized that the Double Jeopardy question in that case, whether the state's tax constituted multiple punishments for the same conduct, was fundamentally different from the question in *Kennedy*, whether the legislature's characterization of a penalty as "civil" was constitutionally permissible. *See id.* at 805-07.

157. *Compare* Montana v. United States, 450 U.S. 544, 565-66 (1981), *with* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

158. *See Montana*, 450 U.S. at 565-66 ("*Oliphant* only determined inherent authority in criminal matters[;] . . . Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians."). The Court recognized the *Oliphant* prohibition on criminal jurisdiction drastically limited the Tribe's ability to enforce even civil regulations against non-Indians. *See id.* at 565 n.14. However, the Court has had no opportunity to consider the criminal/civil distinction in the Indian law context.

159. *See, e.g.*, Turner Broad. v. F.C.C., 520 U.S. 180, 195-96 (1997); Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 569 (1990); Rostker v. Goldberg, 453 U.S. 57, 68 (1981).

160. *See, e.g.*, *Metro Broad., Inc.*, 497 U.S. at 569 (with respect to "'complex' empirical question[s]," the Court "must pay close attention to the . . . fact finding of Congress and "give 'great weight to the decisions of Congress'"); McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (legislatures possess greater competency to "weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976))); Walters v. Nat'l Ass'n. of Radiation Survivors, 473 U. S. 305, 331 n.12 (1985) (recognizing "[w]hen Congress makes findings on essentially factual issues . . . those findings are . . . entitled to a great deal of deference); United States v.

to exercise the legislative power,"[161] particularly with regard to matters that are specially entrusted to the legislative office.[162]

In *Turner v. Federal Communications Commission*, the Court recognized that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions."[163] This judicial deference to Congress's institutional advantage is well established in the Court's precedents. The Court has consistently recognized legislatures have an institutional advantage over courts to decide "complex empirical questions,"[164] make "predictive judgments,"[165] and "weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[166] In contrast, courts are particularly ill-suited to make such determinations.[167]

Wholly apart from the Court's view of Congress's institutional advantage in reaching factual conclusions bearing on public policy, the Court has recognized that deference is required out of separation-of-powers concerns. *Turner* recognized that the Court owed Congress deference "out of respect for its authority to exercise the legislative power . . . lest [the Court] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."[168] This deference is particularly strong when the subject matter of the legislation is particularly within the legislative purview. In *Rostker v. Goldberg*, for example, the Court deferred to Congress's judgment that men, but not women, should register for the selective service, because the Constitution specifically vested Congress with the authority to regulate the armed forces.[169] The Court noted that, "[b]ecause of Congress's constitutional role in regulating military affairs, [courts] must be particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch."[170]

Both of these rationales strongly favor the federal and state courts deferring to tribal legislatures to determine legislative facts bearing on the necessity of enforcing civil regulatory laws against non-Indians on the reservations. First, federal and state courts are particularly ill-equipped to decide "complex empirical questions"[171] regarding the extent to which a tribal regulatory scheme is necessary to preserve the Tribe's rights to self-government. As the Supreme Court recognized, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that

Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) (reiterating the Court should defer on factual questions to "Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds [the Court's]").

161. *Turner Broad.*, 520 U.S. at 195-96.

162. *See Rostker*, 453 U.S. at 68 (granting particular deference to Congress's judgment regarding regulation of the military).

163. *Turner Broad.*, 520 U.S. at 595-96 (internal quotation marks omitted).

164. *Metro Broad., Inc*., 497 U.S. at 569.

165. *Turner Broad.*, 520 U.S. at 195-96.

166. McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

167. United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

168. *Turner Broad.*, 520 U.S. at 195-96.

169. Rostker v. Goldberg, 453 U.S. 57, 68 (1981).

170. *Id.*

171. Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 569 (1990).

sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative decisions."[172] Evaluating, for example, the extent to which on-reservation crime impacts the "political integrity, economic security, [and] health [and] welfare of the tribe,"[173] necessarily requires that someone "weigh and 'evaluate the results of statistical studies in terms of . . . local conditions.'"[174] Tribal legislatures can do this "with a flexibility of approach that is not available to the courts.'"[175]

Moreover, Congress's and the Executive Branch's policy to respect tribal self-governance requires the federal courts to defer to the judgments of Tribes regarding the factual basis for a Tribe's assertion of jurisdiction over non-Indians. As recently as 2010, Congress affirmed that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country; . . . [and that] tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country."[176]

In *National Farmers Union Insurance Company v. Crow Tribe of Indians*, the Court held that, where a non-member tribal court defendant challenges the tribal court's jurisdiction, that challenge must initially be presented to the tribal court.[177] This is so, the Court explained, because "Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[178] Much like how the Constitution vests in Congress a unique obligation to govern the armed forces, the Court has recognized congressional policy vests in the tribal government the power to resolve factual questions regarding the scope of the Tribe's jurisdiction over non-members as it relates to the Tribe's powers of self-government. The federal courts should defer to tribal legislative findings implicating this federal policy supporting tribal self-governance and inherent sovereignty.

IV. TRIBAL ENFORCEMENT CODES

Many Tribes have explored the use of civil remedies for addressing the problem of enforcing tribal law against non-Indians. The Creek Nation's efforts in this regard were discussed in Part I. Other Tribes have civil enforcement laws on the books and pursue enforcement actions against non-Indians.[179] Some utilize creative and unorthodox means of enforcing such laws against recalcitrant non-Indian offenders.[180] To be most effective,

172. Nat'l Farmers Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985).

173. Montana v. United States, 450 U.S. 544, 566 (1981).

174. McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

175. *Id.*

176. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261, §202(a)(5)(A) (codified as amended in various sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

177. *Nat'l Farmers Ins. Co*., 471 U.S. at 856-57; *see also* Dish Network Serv., L.L.C. v. Laducer, 725 F.3d 877 (8th Cir. 2013) (reaffirming and applying *Nat'l Farmers*).

178. *Nat'l Farmers Ins. Co*., 471 U.S. at 855-56.

179. Hopi Code § 3.4.5 (authorizing the Tribe to enforce the Tribe's criminal code through civil damages actions against "[a]ny person subject to the civil jurisdiction of the Hopi Tribe, but not subject to the [Tribe's] criminal jurisdiction"); Oglala Sioux Law and Order Code Ch. 2 § 20(a) (providing for "[i]mplied consent to Tribal Jurisdiction by Non-Members of the Oglala Sioux Tribe").

180. *See* The Tulalip Tribes v. 2008 White Ford Econoline Van, 11 Am. Tribal Law 232 (Tulalip Ct. App. May 31, 2013), *available at*

however, Tribes should design their remedial schemes in such a way as to maximize the chances that their sanctions will survive collateral review in federal or state court. Therefore, Tribes designing and implementing civil enforcement codes, and tribal advocates seeking to support tribal code enforcement in collateral federal or state court challenges, must be mindful of the Supreme Court's rules governing tribal civil jurisdiction. The following section attempts to make the best case for aggressive tribal civil enforcement under the various exceptions available for the exercise of civil jurisdiction over non-Indians.

A. Substantive Provisions of Tribal Enforcement Codes

1. Conditional Entry Onto Indian Lands

As discussed in Part II.A., above, it is unclear at this time whether *Montana*'s limitations on tribal civil jurisdiction generally apply on Indian lands. In *Hicks*, the Supreme Court at least arguably expanded the *Montana* rule onto Indian lands,[181] and some federal circuit courts have adopted this position.[182] The suggestion that *Montana* applies in full force on Indian lands, however, suffers from a fatal conceptual flaw—Tribes still "possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands,"[183] and this power includes the lesser power "to set conditions on entry to that land."[184] The conditional entry power can support "licensing requirements and hunting regulations" and taxation.[185] In fact, "[r]egulatory authority goes hand in hand with the power to exclude."[186]

Plainly, then, the civil enforcement code should take full advantage of the Tribe's power to exclude and corollary power to regulate those individuals granted the conditional privilege to enter onto the Tribe's territory. This approach may not be a magic bullet, capable of circumventing the *Montana* limitations in all instances. The Tribe's power to exclude might be limited with respect to fee land on the reservation,[187] and in circumstances where a right-of-way, easement, or lease grants non-Indians an unqualified right to enter

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http://www.nics.ws/Tulalip/Tulalip%20Tribes%20v%20%202008%20White%20Ford%20Econoline%20Van.pdf (applying tribal forfeiture statute against the property of a non-Indian charged with bringing illegal narcotics onto the Tribe's reservation); *see also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1049-50 n.7 (2005) (describing how a Navajo Nation police officer convinced the author to voluntarily pay a tribal speeding ticket in lieu of having the offense reported on her state driving record); *Creative Civil Remedies against Non-Indian offenders in Indian Country, Report of the National Roundtable on Creative Civil Remedies against Non-Indians in Indian Country*, SOUTHWEST CENTER FOR LAW AND POLICY (2008), http://www.swclap.org/uploads/file/d03f27dc405e4a0aa821aedf4bc7bd04/Creative%20Civil%20Remedies%20Against%20Non-Indian%20Offenders%20In%20Indian%20Country.pdf.

181. Nevada v. Hicks, 533 U.S. 353, 360 (2001); *see supra* Part I.A.

182. *Compare* Attorney's Process and Investigation Servs., Inc., v. Sac and Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 936 (8th Cir. 2010); McArthur v. San Juan Cnty., 497 F.3d 1057, 1069 (10th Cir. 1997), *with* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 812-13 (9th Cir. 2011).

183. Duro v. Reina, 495 U.S. 675, 696-97 (1990).

184. Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709, 2723 (2008).

185. *Id.*

186. *Id.* (quoting South Dakota v. Bourland, 508 U.S. 679, 691 n.11 (1993)). *See also Water Wheel*, 642 F.3d at 810-12 (holding that, absent exceptional circumstances such as those in *Hicks*, the Tribe's power to exclude broadly supports tribal jurisdiction over non-Indians on Indian lands).

187. *See, e.g.*, Montana v. United States, 450 U.S. 544, 558-59 (1981) (noting the alienation of fee lands to non-Indians implicitly overruled treaty language granting the Tribe "absolute and undisturbed use and occupation" of the Tribe's reservation); *but see* Strate v. A1 Contractors, 520 U.S. 438, 455-56 n.11 (1997) (noting the Tribe's right to detain and investigate lawbreakers on the equivalent of fee lands on the reservation).

onto tribal property.[188] Also, like in *Hicks*, the Tribe's right to exclude may be limited by special circumstances in which the Court decides, for whatever reason, that some countervailing interest overrides the Tribe's power to exclude in extraordinary cases.[189] However, in the run-of-the-mill case arising on Indian lands—a purse-snatching at the tribal casino,[190] white-collar crime at a tribal government or business office,[191] sexual assault on tribal government property,[192] a domestic incident at a tribally-controlled housing development[193]—as well as in more unusual situations—willful trespass on tribal property,[194] armed insurrection against the tribal government[195]—the Tribe's exclusion power provides a relatively solid foundation for the Tribe's civil regulatory enforcement scheme.

2. Consent

A consensual relationship between the Tribe and the regulated party provides an alternative theory to support tribal civil enforcement. Plainly, the purse-snatchers, drug mules, and serial rapists who routinely take advantage of the jurisdictional quagmire that is Federal Indian law are unlikely to affirmatively consent to be bound by the Tribe's enforcement code, either before or after committing their crimes. But the law recognizes many types of consent, and the Supreme Court has never required the regulated party under the *Montana* II test to expressly consent to suit in tribal court. Synthesizing the Court's various pronouncements regarding this exception,[196] the consensual relationship test is likely to be met where (1) the Tribe and the non-Indian party enter into a consensual relationship (2) arising out of "commercial dealings, contracts, leases, *or other arrangements*,"[197] and (3) the regulation—here, application of the civil enforcement code—arises out of this relationship.[198] The civil enforcement code, then, should establish a relationship between the Tribe and the regulated party based on the doctrine of implied consent.[199] The code should provide that any person who chooses to enter the Tribe's jurisdiction, patronizes tribal or private businesses on the reservation, or avail themselves of tribal public

188. *See Strate*, 520 U.S. at 456.

189. In *Hicks*, the Court did not expressly hold that state officers are empowered to enter onto Indian lands on the reservation to execute search warrants relating to off-reservation conduct, but the Court did hold that Tribes cannot regulate state officials executing such warrants. *See* Nevada v. Hicks, 533 U.S. 353, 363-64 (2001). Whatever *Hicks* may be, tribal advocates should take comfort in the fact that it is not typical.

190. *See supra* note 2 and accompanying text.

191. *See, e.g.*, United States v. Big Eagle, 702 F.3d 1125, 1127-29 (8th Cir. 2013) (describing a kick-back scheme operated by tribal elected officials).

192. *See, e.g.*, United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) (describing systematic sexual assault and abuse of power by a tribal officer against tribal employees, occurring on property held in trust by the United States for the benefit of the Tribe).

193. JUDICIAL COUNCIL OF CALIFORNIA, JUDGES GUIDE TO DOMESTIC VIOLENCE CASES: TRIBAL COMMUNITIES AND DOMESTIC VIOLENCE 13 (2013), *available at* http://www.courts.ca.gov/documents/Tribal-DVBenchguide.pdf (recognizing Tribes can exclude domestic abusers from tribal housing).

194. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 805-06 (9th Cir. 2011).

195. *See* Attorney's Process and Investigation Servs., Inc., v. Sac and Fox Tribe of the Miss. in Iowa, 609 F.3d 927 (8th Cir. 2010) (detailing an armed invasion of the tribal seat of government by private investigators in the wake of a disputed tribal election).

196. *See supra* Part I.B.

197. Montana v. United States, 450 U.S. 544, 564-65 (1981) (emphasis added).

198. *See* Strate v. Al Contractors, 520 U.S. 438, 457 (1997).

199. *See* BLACK'S LAW DICTIONARY 346 (9th ed. 2009) ("Consent inferred from one's conduct rather than from one's direct expression."). *See also* Oglala Sioux Law and Order Code Ch. 2 § 20(a) (codifying such a provision).

services, consents to be bound by the Tribe's code of conduct.

While this expression of tribal jurisdiction would, in many cases, overlap with the previously described conditional entry theory, the implied consent provision differs from conditional entry in two important respects. First, implied consent may justify tribal jurisdiction in situations where the Tribe has no inherent power to exclude non-Indians (say, on a state highway right-of-way traversing the reservation).[200] If the non-Indian individual knows about the implied consent provision and still chooses to enter onto the Tribe's jurisdiction, implicitly accepting the Tribe's terms of entry, this may suffice to sustain the Tribe's jurisdiction under the *Montana* II exception even if the Tribe's right to exclude does not apply. Second, the implied consent provision explicitly targets the first *Montana* exception. To the extent federal or state courts might insist the *Montana* analysis always applies on Indian lands, rejecting the notion that the Tribe's power to exclude is sufficient, outside of *Montana*'s framework, to support tribal jurisdiction, the implied consent provision strengthens the case for jurisdiction under *Montana*, on both Indian and fee lands.

There is a potential limitation to the effectiveness of the implied consent provision. In *Atkinson Trading Company v. Shirley*,[201] the Supreme Court rejected the Navajo Nation's argument that non-Indian hotel guests' receipt of tribal governmental services was sufficient to support the Tribe's imposition of a hotel occupancy tax under the first *Montana* exception. The Court reasoned "the generalized availability of tribal services [is] patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land."[202] The Court proceeded to explain:

> The consensual relationship must stem from commercial dealing, contracts, leases, or other arrangements, and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the "advantages of a civilized society" offered by the Indian tribe. Such a result does not square with our precedents; indeed, we implicitly rejected this argument in *Strate*, where we held that the nonmembers had not consented to the Tribes' adjudicatory authority by availing themselves of the benefit of tribal police protection while traveling within the reservation. We therefore reject respondents' broad reading of *Montana*'*s* first exception, which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power.[203]

This passage suggests that a civil enforcement scheme that relies on expansive application of the consensual relationship exception to reach every, or nearly every, person within the Tribe's territorial boundaries might be a non-starter. But there are ways to distinguish *Atkinson* and make a better case for a consensual relationship exception. First, in *Atkinson* there is no argument that the tribal tax code explicitly included an implied con-

200. *See Strate*, 520 U.S. at 456.
201. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).
202. *Id.* at 655.
203. *Id.* (internal marks and citations omitted).

sent provision. So an explicit implied consent provision in the tribal code, expressly requiring non-Indians to consent to tribal civil jurisdiction when they enter the Tribe's territory, might fare better before the courts. Furthermore, the Court in *Atkinson* "d[id] not question the [Tribe's] ability to charge an appropriate fee for a particular service actually rendered."[204] So the Court acknowledged access to tribal services is a privilege, not a right, and the Tribe could condition an individual's access to such services on that individual's voluntary agreement to pay a proscribed fee.

The implied consent provision seeks to create a consensual relationship between the Tribe and the regulated non-Indian by exploiting this relationship between the Tribe as service provider and the non-Indian service recipient. When an individual enters onto the reservation and, in the ordinary course, takes advantage of the Tribe's water, electricity, sewer systems, the protections of tribal law enforcement (to the limited extent tribal officers are permitted to enforce the laws), and myriad other services tribal governments provide, that individual has chosen to avail him or herself of the Tribe's largess while knowing there is a price to be paid. And that price is eminently reasonable—all they must do is obey the law or accept the consequences of their failure to do so.

This theory, of course, does not sit comfortably beside *Atkinson*'s admonition that *Montana*'s first exception should not "swallow the rule" by "subvert[ing] the territorial restriction upon tribal power."[205] In order to limit this exception's reach, consistent with *Atkinson*, a court might find a consensual relationship of the sort described only exists where the regulated party accepted the benefit of a particularized and discreet tribal service, i.e., "a particular service actually rendered."[206] But even if this is the case, it benefits the Tribe to establish an implied consent provision applicable to all who receive tribal services. This would establish unambiguously that all who receive such services are in fact subject to the Tribe's jurisdiction and its civil enforcement code, giving fair notice to service recipients that they are expected to comply with tribal laws, and providing clear and uniform standards to guide tribal attorneys and courts in implementing the civil remedies provisions against non-Indians. That such provisions could improve the odds of tribal regulation and adjudication surviving collateral judicial review is an added bonus.

3. Direct Effects

If one were to poll one-hundred legislators—local, state, federal, and tribal—and ask what single recurring social problem most substantially threatens "the political integrity, the economic security, [and] the health [and] welfare" of their communities,[207] one of the most common answers would surely be: crime. Violent crime, crime against property, drug crime, crime against citizens, crime against outsiders—external business partners and tourists and passers-through. It is no exaggeration to say that crime, largely unchecked on Indian reservations across the country, truly imperils the right and ability of Indian Tribes to "make their own laws and be governed by them."[208] The epidemic of crime in reservation communities, including staggering rates of violence against Indian women and the

204. *Id.* at 655.
205. *Id.*
206. *Atkinson Trading Co.*, 532 U.S. at 655.
207. Montana v. United States, 450 U.S. 544, 565-66 (1981).
208. Nevada v. Hicks, 533 U.S. 353, 361 (2001).

targeted activities of international drug cartels, beyond any doubt threatens the political integrity and health and welfare of Indian Tribes to their very core.[209]

The Supreme Court and lower federal courts may not necessarily agree that specific acts of crime or violence on Indian reservations sufficiently imperil tribal self-governance to support civil jurisdiction over individual offenders. In *Strate*, for instance, the Supreme Court acknowledged that unsafe driving on the reservation "endanger[ed] all in the vicinity . . . [and] jeopardized the safety of tribal members" but found "[n]either regulatory nor adjudicatory authority over the state highway accident at issue [was] needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"[210] Similarly, federal courts of appeals have decided the "generalized threat that torts by or against its members pose for any [society] is not what the second *Montana* exception is intended to capture."[211] These courts disregard the aggregate effects of the conduct Tribes attempt to regulate, asking only whether any particular instance, taken in isolation, actually poses an existential threat to the very existence of the tribal community. Some do,[212] but most do not. The rest merely threaten the life, health, safety, economic security, and general well-being of the people who are the immediate victims of these unregulated crimes and torts on reservation communities.

Tribal civil regulatory codes, then, must target this exception by equating the threat such crimes pose to individuals with the core political integrity and general welfare of the community. Here, legislative fact-finding is the key. As noted above,[213] courts defer to legislatures to determine facts bearing on important public policy matters, and tribal legislatures should be accorded particular deference in light of Congress's policies respecting tribal self-governance. Tribal legislatures should make explicit factual findings—in appropriate detail, relying on specific statistical data and the documented testimony of experts and community members—explaining why the civil regulatory scheme is necessary to preserve tribal self-government and support the health, safety and welfare of their communities. State and federal courts cannot possibly understand the extent to which rampant, unchecked pick-pocketry at tribal casinos (not to mention domestic violence or the drug trade) truly harms the economy, public safety, and the well being of the community. This is a classic matter of legislative concern, and the courts' institutional disadvantage in deciding these issues counsels deferring to the Tribe's legislative judgments.

Even if the courts require proof that the non-member's conduct "imperils the subsistence or welfare of the tribe" and the Tribe's regulation and adjudication regarding that conduct is "necessary to avert catastrophic consequences,"[214] the tribal legislatures (and tribal courts)[215] are in the best position to determine whether this is the case in light of the particular circumstances of their tribal communities.

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209. *See supra* notes 5-9 and accompanying text.

210. Strate v. A1 Contractors, 520 U.S. 438, 457-59 (1997).

211. Attorney's Process and Investigation Servs., Inc., v. Sac and Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 939 (8th Cir. 2010); Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 943 (9th Cir. 2009).

212. *See Attorney's Process and Investigation Servs., Inc*., 609 F.3d at 931-34, 940 (armed insurrection against tribal government).

213. *See supra* Part II.B.

214. Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709, 2726 (2008).

215. *See* Nat'l Farmers Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985).

B. Enforcement[216]

The preceding discussion suggests a method for Tribes to assert the power to regulate the conduct of non-Indians on the reservation to promote public safety, general health and wellness, and desirable social conduct on the reservation—essentially to enforce criminal law norms and standards through civil mechanisms. This leads to the question: How might a Tribe enforce a civil sanction or penalty imposed under this legal structure? There are a number of potential enforcement mechanisms, which may be effective given the proper circumstances.

1. Seizure of Property

Tribes will often have effective enforcement mechanisms if the individual to be punished has property located on the reservation or within the Tribe's sphere of influence. Recall the *Yellow Hummer Case*.[217] In that case, the Tribe seized the civil offender's vehicle—the eponymous yellow Hummer—when the offender and his vehicle were literally in the Tribe's custody within the Tribe's territorial jurisdiction. The officers simply impounded the vehicle upon suspicion that it had been used in the commission of a crime on the reservation. The Nation's courts perfected the seizure in a subsequent in rem civil forfeiture proceeding against the vehicle itself. And, as discussed above, the seizure survived collateral review in federal court because the Tribe asserted sovereign immunity. Thus, if the Tribe is able to seize individual property *before* the property owner can bring a defensive action in federal court to enjoin the Tribe's assertion of jurisdiction,[218] the Tribe can enforce civil remedies against a non-Indian defendant without having to justify the seizure in federal court. Tribal law and tribal courts will be able to determine whether the seizure was justified.[219]

2. Domesticating Tribal Court Judgments in State Court

Indian Tribes may enforce a valid tribal court judgment against a non-Indian defendant by domesticating the judgment in a jurisdiction where the defendant or his property can be reached.[220] This is the traditional way to enforce any judgment when the defendant

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216. The remedies discussed in this section are not intended to be exclusive. Tribes can, and should, utilize any remedies traditionally available under tribal law or in American courts, and develop new remedies designed to meet the unique problems faced by modern tribal court systems.

217. *Yellow Hummer Case*, S.C. 05-01, 4 Mvs. L. Rep 253 (Creek Nation 2005); *see also* Miner Elec. Inc. v. Muscogee (Creek) Nation, 503 F.3d 1007 (10th Cir. 2007).

218. In *Crowe & Dunlevy, P.C., v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the non-Indian law firm won an injunction in federal court preventing the Tribe from seizing attorney fees the Tribe had already paid to the law firm.

219. It should not be assumed that the procedural protections available to non-Indian defendants in tribal court will fall short of the standards of federal or state courts. In *The Tulalip Tribes v. 2008 White Ford Econoline Van*, for instance, the Tulalip Tribal Court of Appeals heard an appeal in an action to forfeit a vehicle which the non-Indian appellant had used illegally to transport and sell marijuana on the Tribe's reservation. In spite of the appellant's multiple procedural defaults, the Court of Appeals (on its own initiative) granted the appellant extensions and relief from default, agreed with appellant that forfeiture of the vehicle under tribal law could constitute an "excessive fine," and remanded to the tribal trial court to determine the vehicle's value and other facts relevant to determining whether the penalty was in fact excessive. No. TUL-CV-AP-2012-0404, *available at* http://www.nics.ws/Tulalip/Tulalip%20Tribes%20v%20%202008%20White%20Ford%Econoline%20Van.pdf.

220. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07[2][b] (2012) [hereinafter COHEN'S HANDBOOK].

or his property cannot be reached by the court that rendered the judgment.[221] The relevant issue here is the extent to which the state courts will choose to recognize tribal court judgments.[222] Some state courts grant full faith and credit to tribal court judgments, while others enforce such judgments as a matter of comity.[223] Under either model, the state court will decline to enforce a tribal court judgment if the judgment exceeded the tribal court's jurisdiction.[224] Thus, in order for the Tribe to enforce a civil judgment against a non-Indian or his property located outside of the Tribe's jurisdiction, the Tribe will likely have to prove that it had jurisdiction under federal law to enter the judgment in the first place.

3. Civil Contempt Incarceration

The Tribe might also enforce the civil monetary penalty by incarcerating a willfully non-compliant civil defendant, through the process of civil contempt. It is a firmly embedded feature of common law justice systems that, where a recalcitrant party refuses to comply with a lawful court order, the court has the equitable power to incarcerate that defendant until she is ready to comply with the court's orders.[225] Thus, if a tribal court imposes a civil sanction on a non-Indian defendant and that defendant has the ability to pay the fine but refuses to do so, the Tribe would be well within its rights to detain her until she decides that paying the fine would be preferable to remaining in custody.

Civil contempt incarceration of a non-Indian defendant should not raise any problems under *Oliphant*.[226] The purpose of civil contempt incarceration is not to penalize the detainee; it is a purely civil remedy designed to encourage compliance with a lawful court order.[227] Therefore, civil contempt is (by definition) not a criminal penalty to which the *Oliphant* rule could apply.

As recently as 2011, the United States Supreme Court reaffirmed this distinction, deciding that a state imposing civil contempt on an individual for failing to pay child support had no obligation to provide that individual with legal counsel, even though the imposition of an equivalent criminal sanction would have given rise to a constitutional right to appointment of counsel.[228] "Civil contempt differs from criminal contempt," the Court reasoned, "in that [civil contempt] seeks only to 'coerce the defendant to do' what a court had previously ordered him to do."[229] And unlike a criminal punishment, the civil detainee "carries the keys of [her] prison in [her] own pockets,"[230] because she has the right to be released at any time, so long as she agrees to comply with the court's orders.

To be sure, the federal courts will closely scrutinize any effort by Indian Tribes to

221. *Cf.* REV. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, Prefatory Note ("The usual practice requires that an action be commenced on the foreign judgment."), *available at* http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf.

222. *See, e.g.*, COHEN'S HANDBOOK, *supra* note 220, §7.07[2][b].

223. *See, e.g.*, *In re* Adoption of Buehl, 555 P.2d 1334 (Wash. 1976) (full faith and credit); John v. Baker, 982 P.2d 738, 763 (Alaska 1999) (comity); *see also* COHEN'S HANDBOOK, *supra* note 220, §7.07[2][b].

224. *See* COHEN'S HANDBOOK, *supra* note 220, §7.07[2][a]; *see also Buehl*, 555 P.2d at 1334 (deciding whether Tribe had jurisdiction to enter a child custody order prior to granting the order full faith and credit).

225. *See* Turner v. Rodgers, 131 S. Ct. 2507, 2516 (2011).

226. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

227. *Turner*, 131 S. Ct. at 2516.

228. *Id.* at 2520.

229. *Id.* at 2516 (quoting Gompers v. Buck Stove & Range Co., 221 U.S. 418, 442 (1911)).

230. *Id.* (quoting Hicks v. Feiock, 485 U.S. 624, 633 (1988)).

incarcerate non-Indians for violations of tribal law, even if the proceedings are inherently civil in nature. The detainee will have the right to challenge her incarceration in federal court through the habeas corpus provision in the Indian Civil Rights Act.[231] Among other concerns, the courts are certain to question whether the Tribe had jurisdiction to impose the civil penalty in light of the limitations on tribal jurisdiction under *Montana*.[232] Thus, civil contempt incarceration will, as a rule, only be effective in cases where the Tribe can convince a federal court the underlying civil judgment was within the Tribe's jurisdiction.

There may be only one published federal court decision regarding a tribal court's civil contempt authority over a non-Indian. In *United States v. Blackfeet Tribe of the Blackfeet Indian Reservation*, federal authorities attempted to seize allegedly illegal gambling devices, and the Tribe, in order to protect its interest in the devices, threatened the agents with contempt.[233] The federal agents sought a protective order in federal court, and the court found the Tribe was without power to interfere with the federal agent's law enforcement activities.[234] The holding in *Blackfeet Tribe* is based on the supremacy of federal law and the immunity of federal law enforcement officers.[235] There is no indication that *Blackfeet Tribe* signals a broader prohibition against tribal courts exercising the powers of contempt, and there do not seem to be any additional federal court opinions addressing the issue.[236] Absent special circumstances like those of *Blackfeet Tribe*, it is presumed that Tribes retain the inherent sovereign power to utilize civil contempt incarceration to enforce valid tribal court orders.[237]

VI. CONCLUSION

The law and order crisis in Indian Country is appalling in it scope. And Tribes cannot afford to wait for the federal government to solve the problem, or even to get out of the way. People are suffering now, and things are just getting worse. Tribes must find a way to take matters into their own hands, to develop an inherent sovereignty solution to the problem.

The approach outlined in this paper may be one of the few viable options under

231. 25 U.S.C. §1303 (2012).

232. *Cf.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194-95 (1978) (granting habeas corpus relief under the Indian Civil Rights Act where the prosecution of a non-Indian defendant exceeded federal limitations on tribal jurisdiction).

233. *United States v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 364 F. Supp. 192, 194 (D. Mont. 1973).

234. *Id.* at 194-95.

235. *See, e.g.*, United States v. White Mountain Apache Tribe, 784 F.2d 917, 920 (9th Cir. 1986) (citing *Blackfeet Tribe* for the proposition that Tribes are "without authority to restrict federal officials in their conduct of official business on the Reservation"); *see also* United States v. Yakima Tribal Court, 806 F.2d 853, 860 (9th Cir. 1986) (same). This rationale is arguably consistent with the *Hicks* Court's subsequent holding that tribal sovereignty does not permit Tribes to interfere with state agents entering the Tribe's jurisdiction to investigate off-reservation crime. *See* Nevada v. Hicks, 533 U.S. 353, 364-65 (2001).

236. *Cf.* FLETCHER, MATTHEW L. M., A PRIMER ON TRIBAL COURT CONTEMPT POWER 11 (MSU LEGAL STUDIES RESEARCH PAPER NO. 06-08, 2009), *available at* http://ssrn.com/abstract=1134936 or http://dx.doi.org/10.2139/ssrn.1134936. *See also Creative Civil Remedies against Non-Indian offenders in Indian Country, Report of the National Roundtable on Creative Civil Remedies against Non-Indians in Indian Country*, SOUTHWEST CENTER FOR LAW AND POLICY (2008), http://swclap.org/pdfs/Creative%20Civil%20Remedies%20Against%20Non-Indian%20Offenders%20In%20Indian%20Country.pdf.

237. *See Creative Civil Remedies*, *supra* note 180, at 23.

current law,[238] to allow Indian Tribes to enforce their laws, and protect their citizens. Comprehensive civil regulatory codes return the mechanisms of justice to the proper authority—the local (tribal) government—which is in the best position to understand community needs and values, and is politically accountable to the people it is charged to protect. "When Tribal law enforcement and courts are supported—rather than discouraged—from taking primary responsibility over the dispensation of local justice, they are often better, stronger, faster, and more effective in providing justice in Indian country than their non-Native counterparts located elsewhere."[239] Tribes currently possess all of the tools necessary to implement an inherent sovereignty solution to the epidemic of non-Indian crime in tribal communities. The time to act is now.

APPENDIX
MODEL TRIBAL CIVIL ENFORCEMENT CODE PROVISIONS

I. Preamble

This Act is established under the inherent sovereign authority of [NAME OF TRIBE] (Tribe) to strengthen tribal self-government; provide protection for persons and property within the Tribe's territorial jurisdiction; promote the health, safety and general welfare of the tribal community; protect business expectations and encourage economic development within the Tribe's jurisdiction; preserve the Tribe's unique cultural heritage, community identity, traditions and values; and to enforce the rule of tribal law.

II. Findings[240]

WHEREAS

American Indians are victims of violent crime at a rate more than twice that of any other racial or ethnic sub-group.[241]

American Indians are victimized by rape at a rate more than twice that of any other racial or ethnic sub-group.[242] Domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions.[243]

238. The bipartisan Tribal Law and Order Commission recommends, in a 2013 report, Congressional action to restore inherent criminal jurisdiction to federally recognized tribal governments. INDIAN LAW AND ORDER COMMISSION, *supra* note 6, at 25, Recommendation 1.1. Congress should certainly follow the Commission's counsel, but until federal authorities decide to act, Tribes should be implementing their own solutions.

239. *Id.* at 17.

240. The findings and citations in this section are included for purposes of illustration only. The most effective legislative findings—those likely to garner the greatest deference from the federal courts—will be based upon the research and conclusions of well-credentialed experts, reflecting the specific circumstances of the affected tribal community.

241. STEVEN W. PERRY, AMERICAN INDIANS AND CRIME 4 (2004), *available at* http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

242. *Id.* at 5.

243. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261, §202(a)(5)(A) (codified as amended in various sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).

Non-Indians are responsible for 66% of violent crime, and 86% of rapes, committed against Indians.[244]

Drug and alcohol dependency substantially contributes to instances of domestic violence, burglary, assault, and child abuse in the tribal community.[245]

The Tribe possesses the inherent sovereign authority to make laws and govern within the Tribe's territorial jurisdiction.[246]

Policies of the United States restricting the ability of Indian Tribes to enforce the rule of law and promote public safety within their borders by regulating non-Indian lawbreakers has a significant negative impact on the Tribe's ability to provide public safety to Indian communities and has been increasingly exploited by criminals who target reservation communities and tribal citizens.[247]

The United States Congress and the President of the United States have acknowledged that tribal justice systems are often the most appropriate institutions for maintaining law and order and promoting public safety in Indian Country.[248]

The Tribe possesses inherent sovereign authority to exercise civil regulatory and adjudicative jurisdiction over non-Indians within the Tribe's Indian Country.[249]

The Tribe possesses inherent sovereign authority to exclude any person from tribal territory, including non-Indians, and this power includes the power to stop, detain, and investigate persons suspected of violating tribal law.[250]

The Tribe can condition an individual's privilege to enter the Tribe's territory, conduct business within such territory or with the Tribe or Tribe-members, and enjoy the benefits of tribal governmental services upon the individual's consent to be subject to tribal law, including tribal civil regulatory and adjudicative jurisdiction.[251]

Criminal activity victimizing Indian and non-Indian individuals within the Tribe's territory threatens the political integrity, economic security, and health and welfare of the Tribe.[252]

Regulating criminal activity by non-Indians within the Tribe's territory is necessary to preserve the Tribe's right to make its own laws and be ruled by them.[253]

244. Perry, *supra* note 241, at 9.
245. Tribal Law and Order Act, §202(a)(5)(A).
246. Williams v. Lee, 358 U.S. 217, 220, 223 (1959).
247. Tribal Law and Order Act, §202(a)(4).
248. *Id.* §202(a)(2)(B).
249. Montana v. United States, 450 U.S. 544, 565-66 (1981).
250. Duro v. Reina, 495 U.S. 676, 696-97 (1990).
251. South Dakota v. Bourland, 508 US 679, 688 (1993); *see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-48 (1982).
252. *Montana*, 450 U.S. at 565-66; *see* Attorney's Process and Investigation Servs., Inc., v. Sac and Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 939-40 (8th Cir. 2010).
253. Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.").

III. Jurisdiction

Personal and In Rem Jurisdiction: This Act shall apply, without limitation, to all persons and property located within the Tribe's territorial jurisdiction, and to all conduct taking place within said jurisdiction. The [NAME OF TRIBAL COURT] shall have jurisdiction over all persons and property subject to the Act.

Subject Matter Jurisdiction:

Any person who voluntarily enters onto the Tribe's territorial jurisdiction, enters into or transacts business with the Tribe or Tribe-members, or takes advantage of tribal public services or business or commercial opportunities available within said territory, will conclusively be deemed to have consented to tribal regulatory and adjudicative jurisdiction, including but not limited to this Act. The consensual relationship established under this provision exists between the Tribe and the regulated person, as well as between the regulated person and any other person or persons protected under tribal law.

Additionally, any person who engages in conduct regulated by this Act shall be subject to tribal regulatory and adjudicative jurisdiction, regardless of consent, because conduct regulated by this Act directly effects the political integrity; economic security; health, safety, and welfare of the Tribe, and such conduct is directly connected to the Tribe's ability to make its own laws and the right of the tribal community to be governed by such laws.