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OUT WITH THE NEW, IN WITH THE OLD: RE-IMPLEMENTING TRADITIONAL FORMS OF JUSTICE IN INDIAN COUNTRY

Nicholas R. Sanchez

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OUT WITH THE NEW, IN WITH THE OLD:
RE-IMPLEMENTING TRADITIONAL FORMS OF
JUSTICE IN INDIAN COUNTRY

By Nicholas R. Sanchez

I. THE HISTORY AND CURRENT LIMITATIONS OF CRIMINAL TRIBAL JURISDICTION	73
A. <i>The History of Criminal Law in Indian Country</i>	74
1. Standing in Federal Courts and the Cherokee Nation Cases	74
a. <i>Cherokee Nation v. Georgia, the Creation of the Domestic Dependent Nation</i>	75
b. <i>Worcester v. Georgia, the Creation of Tribal Sovereignty</i>	76
2. <i>Kan-gi-shun-ca, the Creation of Criminal Jurisdiction</i>	77
3. Congress’s Response to <i>Kan-gi-shun-ca</i> : the Major Crimes Act	78
4. The Indian Civil Rights Act	79
5. <i>Oliphant v. Suquamish Indian Tribe, Taking Away Tribal Criminal Jurisdiction over non-Indians</i>	80
B. <i>Current Test for Criminal Law Jurisdiction</i>	82
1. Was the Crime Physically in Indian Country	82
2. Federal Statute Conferring Exclusive Jurisdiction on a State.....	83
3. General Federal Applicability	84
4. Race of the Victim and the Accused	84
II. THE APPLICABILITY OF CIVIL JURISDICTION TO NON-INDIANS	84
A. <i>Checkerboard Jurisdiction</i>	85
B. <i>Civil Regulatory and Adjudicatory Authority over Non-Members</i>	86
C. <i>The Montana Rule</i>	86
1. The Montana Rule Applied	88

III. RESTORATIVE JUSTICE PRACTICES AND THE NEED FOR TRADITIONAL JUSTICE SYSTEMS IN INDIAN COUNTRY	89
A. <i>Introduction to the Process and Purpose of Traditional Forms of Justice</i>	91
B. <i>How Similar Methods of Justice has been Implemented in Non-Indian Country</i>	92
C. <i>The Benefits of Having Traditional Forms of Justice in Indian Country</i>	95
1. Indians Suffer from High Crime Rates in their Communities	95
2. Healing Trauma in Court.....	98
a. Re-Enforcing Power to the Victims.....	98
b. Strengthening the Community.....	99
IV. USING THE <i>MONTANA</i> RULE AND CIVIL JURISDICTION TO ENFORCE TRIBAL JUSTICE	100
A. <i>Contractual Agreements Creating Civil Jurisdiction for Traditional Forms of Justice</i>	100
B. <i>Application of Forum Selection Clause</i>	102
V. CONCLUSION	104

OUT WITH THE NEW, IN WITH THE OLD: RE-
IMPLEMENTING TRADITIONAL FORMS OF JUSTICE
IN INDIAN COUNTRY

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*I speak for our ancestors.
They cry out to you from the unstill grave.
I speak for the children yet unborn.
They cry out to you from the unspoken silence.*

*I am the Indian voice.
Listen to me!
I am a chorus of millions.
Hear us!
Our Eagle cry will not be stilled!*

* * *

*We are the voice of the earth,
Of the future,
Of the Mystery.*

-Leonard Peltier²⁸²

*Think of a system with an end goal of restorative justice,
which uses equality and the full participation of disputants
in a final decision. If we say of law that: "life comes from it,"
then where there is hurt, there must be healing.*

-Chief Justice of the Navajo Nation Robert Yazzie²⁸³

²⁸² LEONARD PELTIER, PRISON WRITINGS, 48–49 (Harvey Arden, 1999).

²⁸³ Robert Yazzie, *Life Comes from It: Navajo Justice*, DAILY GOOD NEWS THAT INSPIRES (Jun. 30, 2016), <http://www.dailygood.org/story/1327/life-comes-from-it-navajo-justice-chief-justice-robert-yazzie/> [https://perma.cc/W6WG-XLKS].

Euro-American law has viewed the tribal justice system with disdain and mistrust.²⁸⁴ Often times, outright racist and slanderous language have been used to describe traditional tribal justice systems. For instance, traditional forms of justice have been called “red man’s revenge.”²⁸⁵

However, traditional forms of Indian²⁸⁶ justice tend to be more similar to civil alternative dispute resolutions or mediation than to the U.S.’s punitive criminal justice system.²⁸⁷ These justice systems are important to Indian victims to allow healing to the individual, the community, and even the offender.

Because of the differences and mistrust between tribal justice and Euro-American justice systems, the U.S. Legislature and the federal courts have continually limited tribal courts’ jurisdiction.²⁸⁸ Legislation and Supreme Court cases have placed limits on jurisdiction that have hindered the ability for Indians to use traditional forms of justice to help heal victims, offenders, and Indian communities.²⁸⁹ Perhaps the biggest obstacle to traditional justice is the fact that, because of legislative actions and case law, tribal courts have no criminal jurisdiction over non-Indians.²⁹⁰

Until 1978, Indian people in the U.S. held the ability to prosecute non-Indians for crimes committed on tribal lands. In 1978, the Supreme Court limited tribal courts’ criminal jurisdiction to only Indian people in a decision called *Oliphant*. After *Oliphant*, if a non-Indian commits a crime in Indian Country, the non-Indian cannot be prosecuted in tribal courts.²⁹¹ Non-Indian defendants may only be prosecuted in federal district court or state court—federal courts

²⁸⁴ Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 58 (2011).

²⁸⁵ *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, 571 (1883).

²⁸⁶ The term Indian is used in this paper as that is the term is used in the United States Constitution and statutory law. To keep consistent throughout this paper, Indian will be used to mean Indigenous or Native American.

²⁸⁷ Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 39 (1994).

²⁸⁸ *See, e.g.*, Major Crimes Act 18 U.S.C. § 1153 (2013) (diminishing criminal jurisdiction for serious crimes to federal courts); Indian Civil Rights Act of 1968 25 U.S.C. § 1301–1341 (2010) (forcing a modified version of the Bill of Rights onto Tribal governments); *Oliphant v. Suquamish*, 435 U.S. 191 (1978) (disallowing tribes to prosecute non-Indians, for crimes committed in Indian Country) (hereinafter *Oliphant*).

²⁸⁹ *See supra* Section I.

²⁹⁰ *See supra* Section I, II.

²⁹¹ *Oliphant*, 435 U.S. at 204.

have jurisdiction over non-Indians and for some tribes, whose land is governed by Public Law 280, states have jurisdiction.²⁹² However, given the limited resources that federal prosecutors have,²⁹³ the high crimes rates on reservations,²⁹⁴ and the relatively low federal prosecution rates for several common crimes committed in Indian Country²⁹⁵ crimes committed by non-Indians on tribal lands are rarely investigated or prosecuted.²⁹⁶

In this paper, I argue that *Oliphant* has limited the ability for Indian people to heal and recover from crimes that harm individuals and the community. Section I gives a background of the history of Indian criminal law and explains the current test for criminal jurisdiction for tribal courts. Section II explores the *Montana* rule, which governs whether there is civil jurisdiction over non-Indians in tribal courts. Section III introduces Navajo Peacemaking, a traditional form of justice, as a case study for other forms of traditional justice. The purpose, procedure, and history of peacemaking is described as well. Next, the section presents one city that has used peacemaking as a basis for their own justice system. This Section further discusses how traditional forms of justice can help Indian and non-Indian people. Section IV proposes using civil jurisdiction to employ traditional justice techniques to what would otherwise be criminal matters. Specifically, it explores creating civil jurisdiction for non-Indians by creating a consensual relationship using contracts.

One possible way to re-implement traditional forms of justice despite this obstacle, is by using a “consensual relationship” to create civil jurisdiction. The United States Supreme Court has recognized that an Indian nation has civil authority when the parties enter “consensual relationships” with the tribe or its members.²⁹⁷

²⁹² 18 U.S.C. § 1162 (2010) (giving state jurisdiction over criminal matters in Indian Country); *Oliphant*, 435 U.S. at 204.

²⁹³ Larry Cunningham, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2203 (2000).

²⁹⁴ *Id.* at 2198 (stating that “Indians face a disproportionately higher rate of violent crimes than other races.”).

²⁹⁵ *Id.* at 2203 (federal prosecutors are busy prosecuting the many other nationally recognized cases within their very broad subject-matter jurisdiction...In contrast, Indian country offenses are often relatively minor...like drunk driving, reckless driving, petty theft, petty assault, vandalism, littering, and even parking violations.”).

²⁹⁶ *Id.*

²⁹⁷ *Montana v. United States*, 450 U.S. at 547, 565. (1981).

Although it has not been fully litigated, the Supreme Court has explained that such relationships can be created by commercial dealing, contracts, leases, or other arrangements.²⁹⁸ To form the consensual relationship could be as simple as putting up a sign requiring those who enter Indian Country to consent to tribal court jurisdiction.²⁹⁹ To constitute a consensual relationship a contract between the tribe and non-Indian visitors, would have to be valid under contract law and have a sufficient nexus to implementing traditional justice.

The paper concludes that non-Indians should be subject to traditional forms of justice to keep tribal people healthy, keep their community safe, and further the goals of tribal courts. This paper proposes that these goals can be met within the confines of current Supreme Court case law. Specifically, tribes could use their civil regulatory power to expand traditional forms of justice akin to civil alternative dispute resolution.

I. THE HISTORY AND CURRENT LIMITATIONS OF CRIMINAL TRIBAL JURISDICTION

In the context of criminal jurisdiction, the Supreme Court and Legislative Branch have set out the parameters of their jurisdiction thoroughly. The implementation of Euro-American laws into Indian justice systems have substantially limited tribal sovereignty.³⁰⁰ This Section discusses major Supreme Court decisions, legislation, and the current test for criminal and civil jurisdiction over non-Indians.

Following the first contact between Indian people and Europeans, Europeans started to settle America with the purpose to trade with the Indigenous populations and to acquire lands.³⁰¹ In 1787, a newly formed United States of America adopted its constitution and formalized the relationship the country had with

²⁹⁸ *Id.* at 565.

²⁹⁹ A sign is only one potential way to make a contract. Tribes can find creative ways to create a contractual relationship with those on or using their land.

³⁰⁰ Zoann Snyder-Joy, *Self-Determination and American Indian Justice*, NATIVE AMERICANS, CRIME, AND JUSTICE 38 (Marianne O. Nielsen & Robert Sullivan 1996).

³⁰¹ FRANK POMMERSHEIM, *BROKEN LANDSCAPE INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 3 (2009).

Indians.³⁰² Diplomatic interactions between the two parties, after the Revolutionary War, usually culminated in treaties, which were agreements between two sovereigns.³⁰³ Although there were over 350 treaties signed, nearly all have since been broken or disregarded.³⁰⁴ Even though the U.S. Constitution recognizes tribal sovereignty in the Indian Commerce Clause, there has been no constitutional test or boundary set to prevent over-encroachment into that sovereignty.³⁰⁵

A. *The History of Criminal Law in Indian Country*

Indian criminal law and jurisdiction is a jumbled puzzle of Supreme Court cases and legislative actions that have resulted in a steady decline of tribal sovereignty. The following is the history of relevant cases and legislative action that create the modern test for criminal jurisdiction.

1. Standing in Federal Courts and the Cherokee Nation Cases

The Cherokee Nation cases are the cornerstone of which Indian jurisdictional issues were built upon. The Cherokee Nation cases were two of the three cases that make up what has become known as the Marshall Trilogy, named for Supreme Court Justice John Marshall, who penned them.³⁰⁶ The two Marshall trilogy cases that relate to tribal criminal jurisdiction are *Cherokee Nation v. State of Georgia*³⁰⁷ and *Worcester v. Georgia*.³⁰⁸

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ These three cases are the cornerstone of the legal and political standing of Indian nations. *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831) (hereinafter *Cherokee Nation*); *Worcester v. Georgia*, 31 U.S. 515 (1832) (hereinafter *Worcester*).

³⁰⁷ *Cherokee Nation*, 30 U.S. 1.

³⁰⁸ *Worcester*, 31 U.S. 515.

a. Cherokee Nation v. the State of Georgia, the Creation of the Domestic Dependent Nation

Cherokee Nation, was the paramount case on Indian criminal jurisdiction. The Cherokee Nation was facing the Removal Act of 1830, pursuant to which the Cherokee were forcefully removed from their homes resulting in the death of twenty percent of the Cherokee population.³⁰⁹ The Cherokee Nation challenged the removal in two ways. First, they wrote a plea to the United States government.³¹⁰ Congress was unmoved, and President Jackson refused to uphold the Cherokee Nations treaty rights. ³¹¹ The Cherokee Nation then appealed to the Supreme Court.

In the Cherokee Nation’s appeal to the Supreme Court the Tribe invoked the Court’s original jurisdiction, but Georgia questioned the Court’s original jurisdiction.³¹² The Supreme Court only has original jurisdiction, as established in Article II of the Constitution, where there is a case “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party The Cherokee Nation argued that the Supreme Court had original jurisdiction to hear its case stating that it was a “foreign nation” against a state.³¹³ The Supreme Court decided that an Indian tribe is not a “foreign state” in Article III terms, because in Article I, Section 8, treats Indian tribes and foreign nations as discrete, and not identical entities.³¹⁴

Justice Marshall, continuing his opinion in dicta, created an Indian law doctrine which has been both a blessing and a curse to Indian Sovereignty. The Court pronounced the relationship in which the Federal Government and Indian tribes interact for purposes of Indian affairs as one of “pupilage.”³¹⁵ Tribes are “domestic

³⁰⁹ Indian Removal: 1814-1858, PBS, <https://www.pbs.org/wgbh/aia/part4/4p2959.html> (last visited Dec. 19, 2017).

³¹⁰ Pommersheim, *supra* note 20, at 103 (The Cherokee Nation wrote a memorial to Congress stating: “[w]e wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties guarantee our resident and privileges and secures us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.”).

³¹¹ *Id.*

³¹² *Id.* at 104.

³¹³ *Id.*; *Cherokee Nation*, 30 U.S. at 11.

³¹⁴ *Cherokee Nation*, 30 U.S. at 11.

³¹⁵ *Id.* at 13.

dependent nations” of the federal government and the “guardian-ward” analogy has become a doctrine of the trust relationship between the United States and tribal nations.³¹⁶

The decision both recognized the tribal sovereignty, and reasoned that tribes are reliant on the federal government’s “kindness and its power.”³¹⁷ This case defined U.S.-tribal relations as a fiduciary relationship where the trustee, the United States, acts for the beneficiary tribe in regard to land, natural resources, and protecting the tribe from states imposing their power over the tribe.³¹⁸

The opinion in *Cherokee Nation* recognized an essential tribal sovereignty, created a unique tribal-federal relationship, and established a basic principle in Indian law that the federal government, not the states, has exclusive authority in Indians affairs.

b. Worcester v. Georgia, the Creation of Tribal Sovereignty

Two years later, tribal jurisdiction was questioned again in *Worcester*. However, this case was appealed using the Supreme Court’s appellate jurisdiction, and in this case the Court stated its appellate jurisdiction over the matter was “clear.”³¹⁹ The substantive issue was: did Georgia have criminal jurisdiction over non-Indians on Indian land? This time, the Court, able to reach the substantive matter, answered in the negative.

The Court, recognizing the tribe’s sovereignty and the trust relationship between the Government and the tribe looked to the treaty. The Court noted that the treaty: “explicitly recognize[es] the national character of the Cherokees, and their right of self-government; thus, guaranteeing their lands; assuming the duty of protection, and of course pleading the faith of the United States for that protection; has been frequently renewed, and is now in full force.”³²⁰ The Court stated that because the government, by making a treaty with the Indian tribe, recognizes them as a “distinct, independent political communit[y], retaining their original natural

³¹⁶ Pommersheim, *supra* note 20, at 105.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

³²⁰ *Id.* at 519.

rights.”³²¹ Therefore, the State cannot impose its legal system on tribal lands to either Indians or non-Indians.³²²

2. Kan-gi-shun-ca, the Creation of Criminal Jurisdiction

Kan-gi-shun-ca, or the case formerly known as *Crow Dog*,³²³ furthered the recognition of tribal sovereignty, by recognizing criminal jurisdiction over Indians on a reservation as inherent to a tribe’s sovereignty.³²⁴ In this case, Kan-gi-shun-ca shot and killed Chief Spotted Tail.³²⁵ Both the victim and assailant were Brule Sioux and Brule law required that Kan-gi-shun-ca make reparations to Spotted Tail’s family, thus providing justice for the victim’s family.³²⁶ While justice had been served under traditional Brule law, non-Indians who lived near the reservation were not satisfied with the outcome, and Kan-gi-shun-ca was arrested.³²⁷ Kan-gi-shun-ca was found guilty of murder and sentenced to hang.³²⁸ Kan-gi-shun-ca appealed his sentence, as the Supreme Court ruled that the government did not have jurisdiction over Indian on Indians crimes.³²⁹

Similar to *Worcester*, the U.S. Supreme Court looked to the treaty to find jurisdiction as the tribe was recognized as a sovereign state through the tribe’s treaty. The Court stated that the Brule Sioux’s treaty only discussed the forfeiture of criminal jurisdiction of non-Indians committing crimes within Indian Country and “offenses committed by Indians against white persons.”³³⁰ Because

³²¹ *Id.*

³²² Snyder-Joy, *supra* note 19 at 39.

³²³ *Ex Parte Kan-gi-shun-ca*, 109 U.S. 556, 571 (1883) (Kan-gi-shun-ca is Crow Dog in the traditional Sioux Brule language).

³²⁴ CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE*, 40 (Jerry Gardner, 2004).

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, 563, 571 (1883) (reading that, “[i]f bad men among the whites or among other people subject to the authority of the United States shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States and also reimburse the injured person for the loss sustained.”).

of the language of the treaty, it was clear that the Brule Sioux forfeited criminal jurisdiction to the state with crimes involving an Indian and non-Indian.³³¹ Although the tribe forfeited its ability to prosecute non-Indians in the treaty, the treaty did not discuss Indian-on-Indian crime.³³² Therefore, the United States did not have jurisdiction over Indian-on-Indian crime. The court in its reasoning noted that tribes are their “own political body” and that a part of being its own political body “necessarily implies” the ability of “self-government.”³³³ Including the ability to “regulat[e] by themselves . . . their own domestic affairs, the maintenance of order[,] and peace among their own members by the administration of their own laws and customs.”³³⁴

3. Congress’s Response to Kan-gi-shun-ca: the Major Crimes Act

Congress, unhappy with the Supreme Court’s decision, came out with the Major Crimes Act of 1885, 18 U.S.C. § 1153.³³⁵ The Major Crimes Act gives criminal jurisdiction to federal courts for seven crimes—murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.³³⁶ The Major Crimes Act had been originally proposed by the Indian Rights Association (IRA).³³⁷ The IRA believed that what was best for Indians was to assimilate to Euro-American culture and to follow the rules of whites.³³⁸

The Major Crimes Act was deliberately lobbied for the purpose of assimilation, even though many missionaries and teachers on reservations had noticed that as the reach of traditional Indian law was diminished, the crimes from and against Indians began to increase at a disturbing rate.³³⁹ For instance, Bishop H. Hare, a missionary for the Sioux tribe, noted that as the Sioux Indian’s legal system began to disappear:

³³¹ *Id.*

³³² *Id.* at 572.

³³³ *Id.* at 568.

³³⁴ *Id.*

³³⁵ Garrow, *supra* note 43, at 40; 18 U.S.C. § 1153 (2013).

³³⁶ 18 U.S.C. § 1154 (2013).

³³⁷ Garrow, *supra* note 43, at 44.

³³⁸ *Id.*

³³⁹ *Id.*

Civilization has loosened . . . Women are brutally beaten and outraged; men are murdered in cold blood; the Indians who are friendly to schools and churches are intimidated and preyed upon by the evil-disposed; children are molested on their way to school, and schools are dispersed by bands of vagabonds; but there is no redress . . . as long as by the absence of law Indian society is left without a base.³⁴⁰

Pursuant to the Major Crimes Act, Indian people were now subject to Euro-American law and punishment. Because the previous restorative justice foundations that Indian culture was built upon had been swiftly eroded in a single act, a void was created on reservations for law and order.

4. Indian Civil Rights Act

The Indian Civil Rights Act (ICRA), was enacted in 1968, for the purpose of guaranteeing Indian tribes some of the protections that are guaranteed to states.³⁴¹ While ICRA did promulgate some of the Bill of Rights to tribes, it also severely restricted the ability for tribes to use their court systems to have a justice system, as tribes were only able to subject a person to a sentence no greater than one year of imprisonment or a fine of \$5,000.³⁴²

ICRA was proposed in response to Indians complaining of civil rights deprivations on reservation land.³⁴³ In response, the bill was framed by Senator Sam Erwin (D-NC) as a remedy for what he saw was an inability of the tribes to administer justice on reservations.³⁴⁴ That is even though Indian nations complained

³⁴⁰ *Id.* at 45.

³⁴¹ 11 Fed. Proc. Forms § 41:71; 41 Am. Jur. 2d Indians; Native Americans § 29.

³⁴² 25 U.S.C. § 1302(a)(7)(B) (2010).

³⁴³ Hearings on Constitutional Rights of the American Indian Before the Subcomm. On Constitutional Rights of the Senate Comm. On the Judiciary, 87th Cong., pt. 3, at 769 (1962).

³⁴⁴ Donald L. Burnett, Jr., An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act, 9 HARV. J. ON LEGIS. 557, 582–588 (1972) (listing the mistreatments as physical abuses towards Indians, the failure to prosecute crimes, refusal to fund tribal justice systems, and imposition of federal restrictions on the operation of tribal courts); *see also* Hearings on Constitutional Rights of the American Indian Before the Subcomm. On

during the drafting period; expressing concerns over the trouncing of culture and traditions the bill would cause.³⁴⁵ By applying most of the Bill of Rights provisions to Indian nations, Congress directly shaped the development and application of tribal law.³⁴⁶

ICRA also granted power to Indian nations by defining their “powers of self-government.”³⁴⁷ These powers include: “all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed.”³⁴⁸ This text expressly grants Indian nations judicial power, one that the United States Supreme Court previously had assumed was inherent in their right to self-govern.³⁴⁹

ICRA was later amended to include Public Law 280.³⁵⁰ This amendment gave some specifically listed states criminal jurisdiction in Indian Country.³⁵¹ Originally, Public Law 280’s jurisdiction was mandatory for both the state and the tribe, but it was later amended so that the state can retrocede their criminal jurisdiction.³⁵²

5. *Oliphant v. Suquamish Indian Tribe*, Taking Away Tribal Criminal Jurisdiction over non-Indians

In *Oliphant*, the Supreme Court ruled that tribal courts do not have jurisdiction over offenders that are non-Indian.³⁵³ In *Oliphant*, two non-Indians, Mark Oliphant and Daniel Belgrade,

Constitutional Rights of the Senate Comm. On the Judiciary, 87th Cong., pt. 3, at 769 (1962) (statement of Sen. Ervin).

³⁴⁵ Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 434 (2014).

³⁴⁶ *Id.*

³⁴⁷ Pub. L. No. 90–284, tit. II, § 201(2), 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. § 1301 (2012)).

³⁴⁸ Habeas corpus, 25 U.S.C. § 1303 (2012).

³⁴⁹ *Ex Parte Kan-gi-shun-ca*, 109 U.S. 556, 565. (1883).

³⁵⁰ State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012); 25 U.S.C. §§ 1321–1326 (2012); 28 U.S.C. § 1360 (2012)).

³⁵¹ Assumption by State of Criminal Jurisdiction, 25 U.S.C. § 1321 (2011); Those five states were California, Minnesota, Nebraska, Oregon, and Wisconsin. Later, Alaska was added. Public Law 280, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/pl280.htm> [<https://perma.cc/ENG2-MHCP>].

³⁵² Retrocession of Jurisdiction by State, 25 U.S.C. § 1323. (2011).

³⁵³ *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191,195. (1978).

lived on a reservation and independently violated Suquamish Law and Order Code.³⁵⁴ Mark Oliphant was arrested for assaulting a tribal police officer and resisting arrest. Daniel Belgrade was arrested for taking tribal police on a high-speed chase through reservation land and crashing into a tribal police car. They were arraigned and an appeal followed, in which the federal district court ruled that tribal courts had no jurisdiction over non-Indians.³⁵⁵

The Suquamish Indian Tribe argued that criminal jurisdiction over all persons on a reservation is a “*sine qua non*”³⁵⁶ of tribal sovereignty.³⁵⁷ The Supreme Court disagreed stating that Congress had “believed” they legislated the inability for Indians to impose criminal penalties to non-Indians and that the Supreme Court at that point expressly forbade it.³⁵⁸

This decision was a major blow to tribal sovereignty and reaffirmed the belief of many Indians that they were powerless to stop people of other races from committing crimes against them.³⁵⁹ For the tribal police, the decision was an attack on their ability to protect their own people.³⁶⁰ Scholars criticized Justice Rehnquist’s opinion as a “novel departure from the basic tenet of Indian law . . . that Indian tribes retain inherent sovereignty over internal affairs absent express abrogation by Congress.”³⁶¹ In this respect, Justice Rehnquist reversed the deference given to Congress over Indians, holding that Indians can only have criminal authority over non-Indians with Congress’s approval where generally, before this decision, Indians had authority unless Congress had taken that authority away.

While the *Oliphant* decision severely limited criminal jurisdiction, later decisions have allowed tribes to use civil

³⁵⁴ *Id.* at 194.

³⁵⁵ *Id.* at 191.

³⁵⁶ Meaning an essential condition.

³⁵⁷ *Id.* at 196.

³⁵⁸ *Id.* at 204–10.

³⁵⁹ Geoffrey C. Helsey, *Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress’s Plenary Power to Restore Territorial Jurisdiction*, 73 IND L.J. 1051, 1055 (1998).

³⁶⁰ *Id.*

³⁶¹ Philip S. Deloria & Neil Jessup Newton, *The Criminal Jurisdiction of Tribal Courts Over Non-Member Indians*, 38 NOTRE DAME L. REV. 70, 71 (1991) (“Throughout most of the history of federal Indian law, the United States Supreme Court has expresses extraordinary deference to Congress as the principal policymaker in Indian affairs.”); Congress’s power in this area is referred to as its “plenary power.” *Id.*

regulatory powers that this paper argues could be used to implement traditional means of Indian justice.³⁶²

B. *Current Test for Criminal Law Jurisdiction*

The current test for criminal jurisdiction is oftentimes described as a “patchwork” jurisdiction.³⁶³ Three distinct governments are involved in criminal jurisdiction for Indians: tribal, state, and federal.³⁶⁴ There is a four-part inquiry to determine if one of those three government entities have criminal jurisdiction—(1) where did the crime occur?; (2) does a federal statute, such as Public Law 280, confer exclusive jurisdiction on a state?; (3) is the crime one of general federal applicability?; (4) what is the race of the victim and the accused?³⁶⁵

1. Was the Crime Physically Committed in Indian Country

The first question in the inquiry is whether the crime occurred within the bounds of “Indian Country.” Indian Country is statutorily defined as “all land within the limits of any Indian reservation”; “all dependent Indian communities”; and “all Indian allotments, the Indian titles to which have not been extinguished.”³⁶⁶

Indian Country does cover land that is owned by non-Indians. For instance, during the Allotment Era, large amounts of Indian land were sold off to white people heading west.³⁶⁷ This created a checkerboard effect on Indian land.³⁶⁸ After the Allotment Era ended, the checkerboard was defined as a part of Indian Country, as part of the treaty land promised to Indians, but was no longer owned by Indians.³⁶⁹ A “dependent Indian communit[y]” is land that is “dependent on the federal government for assistance.”³⁷⁰ All that

³⁶² See *infra* Section I. C.

³⁶³ Cunningham, *supra* note 129, at 2189.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ Indian country defined, 18 U.S.C. § 1151(a)–(c) (1994).

³⁶⁷ Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 920–21 (2012).

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 921.

³⁷⁰ Cunningham, *supra* note 129, at 2190.

is required is that the community be “a ward of the federal government.”³⁷¹

If the crime was not committed in Indian Country, the state or federal government has authority over the matter.³⁷² If the crime was committed on Indian Country, then the second question is asked.

2. Federal Statute Conferring Exclusive Jurisdiction on a State

The second question is whether a federal statute confers exclusive jurisdiction to a state. Congress has the inherent power to change jurisdiction between the tribal, state, and federal judiciaries.³⁷³ The largest conference of judicial authority was done through the passage of Public Law 280, wherein 1953³⁷⁴, the federal government mandated criminal jurisdiction to five states.³⁷⁴ In 1968 that statute was amended to add a sixth state and allowed the tribe to consent to the jurisdiction.³⁷⁵ Congress has also ceded federal jurisdiction to New York³⁷⁶ and Kansas³⁷⁷ in other Acts.

In Public Law 280 states, New York, and Kansas, the federal government maintains no jurisdiction. Currently, tribes may maintain concurrent jurisdiction, but scholars believe that concurrent jurisdiction is “incompatible with the current jurisdictional regime in Public Law 280 states.”³⁷⁸ Thus generally, if the crime was committed in a Public Law 280 state, or New York or Kansas, the state has jurisdiction. If the crime was not committed in one of those states, the jurisdictional question proceeds to step three.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L REV. 1405 (1997).

³⁷⁴ State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country, 18 U.S.C. § 1162 (1953).

³⁷⁵ Goldberg-Ambrose, *supra* note 42, at 1406.

³⁷⁶ Act of July 2, 1948, Pub. L. No. 80-881, 62 Stat. 1224.

³⁷⁷ Act of June 8, 1940, Pub. L. No. 76-565, 54 Stat. 249.

³⁷⁸ Cunningham, *supra* note 129, at 2191.

a. General Federal Applicability

If the crime committed is a crime of general federal applicability, then the federal government has exclusive jurisdiction. These are crimes such as mail theft and treason. If the crime is not one of general federal applicability, then the prosecutor moves to step four.

b. Race of the Victim and the Accused

The race of the victim and the offender is the most essential question of whether the tribal courts have jurisdiction. Whether or not someone is an “Indian” is determined by “whether the person in question has some demonstrable biological identification as an Indian and has been socially or legally recognized as an Indian.”³⁷⁹ Only if both the victim and the offender are Indian, or if the offender is Indian and the crime is a victimless crime, does the tribe have jurisdiction over the matter. If the victim is a non-Indian, then the tribe has concurrent jurisdiction.

The modern test for criminal jurisdiction prevents tribal courts from being able to prosecute non-Indian people. Therefore, this paper proposes other workarounds are necessary to be able to maintain some order within Indian Country. Civil jurisdiction presents one such workaround.³⁸⁰

II. THE APPLICABILITY OF CIVIL JURISDICTION
TO NON-INDIANS

A tribe generally has civil jurisdiction over a non-Indian on Indian fee simple land.³⁸¹ However, due to the checkerboard of interests that non-Indians have in Indian Country, it is not uncommon for a non-Indian to escape civil jurisdiction in tribal

³⁷⁹ Robert Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 520 (1976).

³⁸⁰ See *infra* Section I.C.; Section III.

³⁸¹ *Montana v. U.S.*, 450 U.S. 544, 565 (1981); see *supra* Section II a (stating that later court decisions have muddied this rule and lower courts have gone in different directions on what rule applies). A fee simple land interest is “[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.” FEE SIMPLE, Black's Law Dictionary (11th ed. 2019).

courts for any number of reasons.³⁸² In addition to civil jurisdiction on fee simple lands, the Supreme Court of the United States has created civil jurisdiction in tribal courts over non-Indians in certain circumstances under the *Montana* Rule.³⁸³ Since Indian tribes are unable to criminally enforce laws, and Indian land has become a patchwork of jurisdictions due to a plethora of historic disenfranchisement of Indian people to their land, Indian tribes can extend their civil regulatory power in Indian Country using the *Montana* Rule.

A. *Checkerboard Jurisdiction*

For perhaps all of the United States' legislative, political, and social history tribal land has been actively divided into many ownerships, such that a person traveling through Indian Country will typically travel in and out of Indian fee-land.³⁸⁴ The Allotment Era, for instance, vested areas of Indian land of no more than 160 acres to any one Indian.³⁸⁵ At the same time, however, the federal government divested a lot of that land causing Indian inventory of land to fall by sixty-two percent.³⁸⁶

Even when Indian land was not affected by the Allotment Era, non-Indians “used the Burke Act to obtain lands from Indians that otherwise would have remained in trust.”³⁸⁷ Of the 86,000,000 total acres that were lost, 38,000,000 were sold to non-Indians as “surplus” lands.³⁸⁸ Following these sales, the exterior boundaries of many reservations were redrawn, officially diminishing tribal territory.³⁸⁹

Keeping in mind the history that has plagued Indian land rights, how those land rights have affected Indians' ability to

³⁸² See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 452 (1997).

³⁸³ *Montana*, 450 U.S. 544.

³⁸⁴ Robert Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 921 (2012).

³⁸⁵ Patents to be held in trust; descent and partition, 25 USC § 348 (1940).

³⁸⁶ See Pommersheim, *supra* note 20, at 255-56 (citing Charles F. Wilkinson, *American Indians, Time, and the Law* 20 (1987)). Monroe Price and Robert Clinton estimate a 90 -million-acre loss over the period. See Monroe E. Price & Robert N. Clinton, *LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES* 629 (2d ed. 1983).

³⁸⁷ L. Scott Gould, *The Consent Paradigm: Tribe Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 830, n. 130 (1996).

³⁸⁸ *Id.*

³⁸⁹ *Id.*

adjudicate, is complex. Nonetheless, the *Montana* rule, which permits tribes civil jurisdiction outside of Indian trust land, gives tribes the ability to enforce civil laws within a checkerboard jurisdiction.

B. *Civil Regulatory and Adjudicatory Authority Over Non-Members*

The Supreme Court has found that Indians have the legal authority to adjudicate non-member Indians³⁹⁰ when the Indian tribe has regulatory power over those same people, whether they are on or off tribal land.³⁹¹ If the tribe has the authority to regulate, then it has the power to adjudicate said regulation.³⁹² That being said, the power to adjudicate does not exceed the tribe's authority to regulate.³⁹³

C. *The Montana Rule*

The United States Supreme Court decided the issue of whether Indians had civil regulatory power over non-Indian people in *Montana v. U.S.*³⁹⁴ The Supreme Court had previously recognized that Indian nations are “domestic dependent nations”³⁹⁵ that retain all inherent sovereign powers “not withdrawn by treaty or [federal] statute, or by implication as a necessary result of their dependent status.”³⁹⁶ Therefore, Indian nations should maintain civil regulatory power over non-Indian people; however, by the time of *Montana*, the Supreme Court had to reconcile contradictory precedents.³⁹⁷ In doing so, the Supreme Court created the *Montana* Rule, which states that Indian tribes may not exercise civil regulatory authority over

³⁹⁰ A non-member Indian, is an Indian that is a member of another tribe.

³⁹¹ *Water Wheel Camp Recreational Area, Inc v. LaRance*, 642 F.3d 802, 814 (9th Cir. R. 2011).

³⁹² Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1213 (2010).

³⁹³ *Id.* (citing *A-1 Contractors*, 520 U.S. at 452).

³⁹⁴ *Montana v. U.S.*, 450 U.S. 544 (1981).

³⁹⁵ *Cherokee Nation*, 30 U.S. 1, 17.

³⁹⁶ *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).

³⁹⁷ Dean B. Suagee, *The Supreme Court's “Whack-a-mole” Game Theory in Federal Indian Law, a Theory that has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 97 (2002).

non-Indians, except in two circumstances.³⁹⁸ First, a tribe may regulate the “activities of nonmembers who enter [into] consensual relationships with the tribes or its members.”³⁹⁹ Second, a tribe may regulate the conduct of non-Indians “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁴⁰⁰

Focusing on the first exception, in a recent decision, the Fifth Circuit has delineated clear rules on when a person or entity “consents” to tribal jurisdiction.⁴⁰¹ *DolgenCorp Inc.*, better known as *Dollar General Store*, had operated a business within the boundaries of tribal land.⁴⁰² As a part of the agreement to operate on tribal land, there was a lease agreement that mandated Dollar General Store to participate in the “Youth Opportunity Program” (YOP), which requires the hiring of young tribal members.⁴⁰³ Subsequently, the manager molested his employee and was sued in tribal court.⁴⁰⁴ The manager argued tribal courts have no jurisdiction over non-Indians, the Fifth Circuit did not agree.⁴⁰⁵ The court ruled that by doing business on the reservation he had consented to tribal jurisdiction.⁴⁰⁶

The Fifth Circuit, affirmed by a four-four split by the U.S. Supreme Court, stated that while a suit against a non-Indian creates issues of subject-matter jurisdiction, “a federal court has no independent obligation to ‘correct’ a tribal court’s lack of subject-matter jurisdiction” except for in “extraordinary circumstances.”⁴⁰⁷ Therefore, an Indian nation is presumed to have civil jurisdiction over non-Indians except in special circumstances. There have been no cases, as of yet, which define those special circumstances that may eliminate the presumption of civil jurisdiction.

³⁹⁸ 450 U.S. at 565.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 566; In the 34 years since *Montana*, courts have steadily narrowed both exceptions to the rule. See AMERICAN INDIAN LAW DESKBOOK 191–210 (Claw Smith ed., 4th ed. 2008).

⁴⁰¹ *DolgenCorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (2014) (Affirmed by an equally divided Supreme Court. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (June 23, 2016).

⁴⁰² 746 F.3d at 169.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 170.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 176–77.

1. The Montana Rule Applied

As stated, Indians are presumed to have civil jurisdiction on Indian trust land. The *Montana* exceptions specifically apply to a person that is not a member of a tribe, and not on tribal fee land, but still within Indian Country.⁴⁰⁸ However, later cases have muddied the previous clear rule stating that the *Montana* rule applies both on and off Indian fee land.⁴⁰⁹ For instance, in *Nevada v. Hicks*, the Supreme Court looked at whether a tribe may assert jurisdiction over civil claims against a state official who entered tribal land to execute a search warrant against a tribe member.⁴¹⁰ The court ruled that because the tribe lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear the respondent's claims that those officials who violated tribal law in the performance of their duties.⁴¹¹

In applying *Hicks*, lower courts have diverged into separate camps. For instance, the Eighth and Tenth Circuit Court of Appeals has expressly held that *Hicks* extended the *Montana* analysis to all reservation lands, regardless of ownership.⁴¹² On the other hand, the Ninth Circuit has adopted a far narrower interpretation of *Hicks*. Specifically, 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*.”⁴¹³ The Ninth Circuit recognized that Indians, even when they “lack criminal jurisdiction over a non-Indian defendant, [] ‘possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.’”⁴¹⁴ The Ninth Circuit went further and stated that the “authority to exclude non-Indians” of entry inherently gives a tribe

⁴⁰⁸ See generally, *Montana*, 450 U.S. 544.

⁴⁰⁹ 533 U.S. 353 at 375-376 (2001).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate Nonmember Conduct in Indian Country*, 50 TULSA L. REV. 193, 201–02 (2014).

⁴¹³ *Water Wheel Camp Recreational Area, Inc v. LaRance*, 642 F.3d 802, 810 (9th Cir. R. 2011 (hereinafter *Water Wheel*)).

⁴¹⁴ *Id.* (citing *Duro v. Reina*, 495 U.S. 676, 696–97 (1990)).

the power to regulate, specifically “place conditions on entry, on continued presence, or on reservation conduct.”⁴¹⁵

Therefore, given that Indian tribes have regulatory and adjudicative authority tribes should be able to have jurisdiction when a forum selection clause or other contractual relationship exists as a condition to enter.

III. RESTORATIVE JUSTICE PRACTICES AND THE NEED FOR TRADITIONAL JUSTICE SYSTEMS IN INDIAN COUNTRY

The traditional legal system for Indians is typically very different from Euro-American law.⁴¹⁶ For that reason, when European settlers came to America, they did not recognize Indian legal systems.⁴¹⁷ As discussed above, that trend has continued to this day. Nonetheless, it is useful to contrast Euro-American crime and punishment with rehabilitative practices traditionally and currently used in Indian Country.

Euro-American law splits types of wrongs into two categories, harm to society and harm to an individual.⁴¹⁸ Courts are divided into two systems to deal with each type of harm either having a criminal case or a civil case.⁴¹⁹ The difference between these two systems are demonstrated in several ways. For example, in a criminal case the prosecutors are titled as “The People,” “The State,” or “The United States” compared to the individual’s name in a civil case.⁴²⁰ Another example between criminal and civil cases is the punishment. In criminal cases,, criminal defendants are often imprisoned, while in a civil matter the harm is repaired with a monetary gain.⁴²¹ Legal scholars have several policies for differentiating and employing civil and criminal punishments.⁴²² Additionally, criminal law has four theories of punishment—retribution, incapacitation, deterrence, and rehabilitation.⁴²³

⁴¹⁵ *Id.* at 811 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982)).

⁴¹⁶ *Id.* at 9.

⁴¹⁷ *Id.* at 10.

⁴¹⁸ *Garrow*, *supra* note 43, at 3.

⁴¹⁹ *Id.* at 4.

⁴²⁰ *Id.* at 3.

⁴²¹ *Id.* at 5.

⁴²² *Id.* at 13.

⁴²³ *Id.* at 16.

Unlike Euro-American justice systems, traditional Indian legal systems often times did not differentiate between actions that harmed an individual and actions that harmed a community.⁴²⁴ In fact, tribal tradition would often times consider any harm done to an individual to be a harm to the whole.⁴²⁵ Another difference is that Indian legal systems are usually entirely oral, spiritual, and intertwined with stories that teach both children and adults social norms.⁴²⁶ Their belief system fuels and informs their legal system. For instance, tribal law tended to focus on communities rather than the individual because their belief system highlighted “duties and responsibilities to families, clans, and the tribe.”⁴²⁷ In Euro-American law, unlike traditional tribal law, the law focuses on individual rights, like those enumerated in the U.S. Constitution.⁴²⁸

Of course, not all tribes are the same. There are 562 federally recognized tribes⁴²⁹ in North America with cultures that expand the distance of 9.54 million square miles.⁴³⁰ Many people of Indian tribes did have individual rights and those rights were often considered necessary to fulfill responsibilities to the larger community.⁴³¹ For instance, the Yurok believed justice for every wrong could be dealt with through negotiation or compensation.⁴³²

Not only is Euro-American and traditional Indian philosophy different, but so is their implementation of punishment. Traditional Indian culture focused on “restoring peace and harmony to the individual and community.”⁴³³ While there are limitless amounts of traditional forms of justice, the Navajo tradition of Peacemaking have had the most extensive information due to the

⁴²⁴ *Id.* at 4.

⁴²⁵ *Id.* at 9.

⁴²⁶ *Id.* at 10.

⁴²⁷ *Id.* at 13.

⁴²⁸ *Id.* at 13.

⁴²⁹ *An Introduction to Indian Nations in the United States*, NATIONAL CONGRESS OF AMERICAN INDIANS, available at <http://www.ncai.org/about-tribes> [<https://perma.cc/G2M5-VURP>]. This number only includes federally recognized tribes and does not include the tribes that have been demolished, killed, or have not yet or will not be federally recognized. *Id.* Indian history is complex in America and should not be limited. *Id.*

⁴³⁰ U.S. State Dep’t, *Common Core Document to U.N. Committee on Human Rights* (Nov. 1997) <https://www.gao.gov/archive/1998/og98005.pdf> [<https://perma.cc/EG5T-FZ4H>].

⁴³¹ Garrow, *supra* note 43, at 14.

⁴³² *Id.*

⁴³³ *Id.* at 16.

years of implementation and research compared to the recent revitalization of traditional forms of justice in other tribes.

A. Introduction to the Process and Purpose of Traditional Forms of Justice

Peacemaking is a traditional form of justice from the Navajo Tribe.⁴³⁴ This form of justice has gained traction with other Indian nations throughout the United States.⁴³⁵ In fact, a small number of counties throughout the United States have started to use traditional forms of justice on a trial basis.⁴³⁶

Peacemaking is considered “horizontal,” form of justice, which means that the system is non-hierarchical.⁴³⁷ For instance, the victim, offender, and all those affected by the crime discuss the issue, and express their feelings to get to the underlying problems.⁴³⁸ The purpose of this practice is to restore harmony to everyone included in the proceedings and the community at large.⁴³⁹ This is done by both discussing the problem and participating in lessons that teach the values of the community.⁴⁴⁰ In contrast, the model in the United States is “vertical”— which rely on hierarchies. For example, the judge controls the courtroom, the attorneys are adversarial, and only one-party wins.⁴⁴¹

The philosophy of peacemaking has two core principles— *hozho* and *hoxcho*.⁴⁴² *Hozho* means “means harmony in the environment,” while its opposite, *hoxcho*, means “an imbalance of harmony.”⁴⁴³ The purpose of the peacemaking justice system is to look at the core of the disruption and bring it to balance. Therefore, the courts look to “heal, not punish.”⁴⁴⁴

⁴³⁴ See Wanda D. McCaslin, *JUSTICE AS HEALING: INDIGENOUS WAYS* (Wanda McCaslin, 1st ed. 2005).

⁴³⁵ Xiaobing Xu, *Different Mediation Traditions: A Comparison Between China and the U.S.*, *AMERICAN REVIEW OF INTERNATIONAL ARBITRATION* 542 (2005).

⁴³⁶ See, e.g., Janine Geske & India McCanse, *Neighborhoods Healed Through Restorative Justice*, 15 NO. 1 DISP. RESOL. MAG 16 (2008).

⁴³⁷ Marilyn Holly, *Navajo Criminal Justice: A Jungian Perspective*, *NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM* 17 (2006).

⁴³⁸ *Id.* at 17–18.

⁴³⁹ *Id.* at 18.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 17.

⁴⁴² *Id.* at 18.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 23.

The procedure of the peacemaking court is specific to the Navajo nation—beginning with a prayer and asking for help to the creator for a successful ceremony.⁴⁴⁵ The purpose of the prayer is to bring an energy to the room that arouses focus and energizes people’s intention so that they can identify the disharmony.⁴⁴⁶ Those who are present are encouraged to express their feelings and state what they think caused the problem.⁴⁴⁷ After the attitudes and feelings of the participants have been expressed and acknowledged, an elder or peacemaker gives their guidance in a form of a lecture to the disputants.⁴⁴⁸ When each person knows each other’s feelings, and has heard the values and traditions of their people, they are ready to begin discussing how to resolve the dispute.⁴⁴⁹ The resolution plan should compensate and sufficiently restore good feelings to all those who are concerned.⁴⁵⁰

B. How Similar Methods of Justice has been Implemented in Non-Indian Country

Some counties in the United States have begun using Peacemaking—for example, in Milwaukee, Wisconsin, Judges have begun experimenting with using Native-American inspired justice systems.⁴⁵¹ The retributive system of justice in Milwaukee has created a revolving door of incarceration that continues from one-generation to the next.⁴⁵² Milwaukee has one of the highest incarceration rates of African-Americans in the country.⁴⁵³ Like many large cities, there is daily violent crime and prisons are filled.⁴⁵⁴ Milwaukee, recognizing this issue, is attempting methods of justice other than the Euro-American system.

Justice Janine P. Geske, a Milwaukee Supreme Court Justice, has shared her experience and results of implementing this experimental justice system.⁴⁵⁵ According to Justice Geske,

⁴⁴⁵ *Id.* at 25.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ Geske, *supra* note 155, at 527.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

Milwaukee's implementation is based on Navajo Peacemaking.⁴⁵⁶ Like in Navajo Peacemaking courts, the victim, the perpetrator, and the community are all invited.⁴⁵⁷ She states, that the main difference between Navajo Peacemaking and traditional forms of Euro-American justice systems, is the person leading the discussion. In Milwaukee's restorative justice program, the "Restorative Justice Initiative" leads the community engagement section and operates a restorative justice model for achieving new outcomes.⁴⁵⁸

Milwaukee implemented restorative justice concepts to "decrease crime by implementing alternative means of law enforcement, increased community engagement, and new practices."⁴⁵⁹ The justice system University strives toward these goals by "developing relationships, strengthening community ties, and holding talking circles for a variety of constituencies."⁴⁶⁰ Marquette's restorative justice practice is highlighted as being "victim-driven" and "seek to place harm in the middle of the equation."⁴⁶¹ The highlighting difference between the two justice philosophies is punishment versus healing.

In Milwaukee, there are two different kinds of Peacemaking courts. The first type of Peacemaking Court is for offenders returning from prison. The second is for first-time offenders using restorative justice as an alternative to a jail sentence.⁴⁶² For those returning from prison there are two steps in the process— the first step is the pre-meeting, and the second step is the talking circle.⁴⁶³ In the pre-meeting, law enforcement talks to the offender to let the offender know that sending them to prison is not the goal of the state; however, they also alert the offender that they are being observed for the safety of the community.⁴⁶⁴ The offender then goes into the Peacemaking circle, where the community is there to support the offender, but also to notify the offender they will not put up with the violence in their community anymore.⁴⁶⁵ The community, victim, and offender talk—for many this is the first time any of them get to

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

tell their story.⁴⁶⁶ Support is given to everyone on an individualized manner depending on how the discussion progresses.⁴⁶⁷ One of the keys of Peacemaking is to get the victim to describe their life before the crime, what they experienced during the offense, and how the event has affected them.⁴⁶⁸ The more the victim shares, the more powerful the experience and the better chance for a positive experience for those involved—healing for the victim, decreased chance of recidivism for the offender, and feeling safe for the community.

With such a different purpose, also came starkly different results. Justice Geske shared several stories of her experience with the peacemaking court. These stories were highly emotional and moved the participants in ways that will change their lives—two stories specifically demonstrate the spectrum of community-wide benefits. In the first story, there was a member of the Latin Kings gang, who had just been released from jail. The ex-gang member shared his story with the community, one of which was an officer who had a lengthy, but compassionate, story he shared with the ex-gang member. After the meeting, the ex-gang member “approached [the] compassionate officer after the circle” and told him that he had never had a discussion with an officer like that before.⁴⁶⁹ The police officer and gang member shared their contact information and they have stayed in contact since.⁴⁷⁰ In another similar story, a mother of a police officer shared her story of losing her son.⁴⁷¹ The officer went into a gas station to buy a cup of coffee, when he exited, he was stopped by two men at gunpoint wanting to rob him.⁴⁷² The two men patted down the police officer for a wallet, and when the robbers felt his gun they shot and killed him.⁴⁷³

These two stories share how people felt before and after these criminal acts were committed. Often times, offenders are isolated from the community and do not feel the victims’ or the communities’ sorrow, pain, and loss. Furthermore, the victim is able to talk to the offender, which victims have stated have helped in the

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 7.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

healing process. Justice Geske believes that “restorative justice circles work because they create a safe place for everyone at the table, while removing boundaries that keep people separated.”⁴⁷⁴

C. The Benefits of Having Traditional Forms of Justice in Indian Country

Restorative justice works in both Indian communities and non-Indian communities.⁴⁷⁵ States are allowed to use restorative justice on people of all races; however, Indians are not able to practice criminal jurisdiction over non-Indians.⁴⁷⁶ This inability to practice criminal jurisdiction over non-Indians hurts tribal sovereignty, victims of crimes, the community, and the offenders. Using restorative justice to deal with crime could help Indian communities overcome high crime rates and heal community-wide trauma by empowering victims and strengthening the communities. To show the benefits of traditional forms of justice, this section begins with how traditional forms of justice have failed Indians. Next, this section discusses how traditional forms of justice may heal and empower Indian people and communities in ways that Euro-American justice has failed.. (Create a roadmap. Lay out your subsections.)

1. Indians Suffer from High Crime Rates in their Communities

Indians experience violent crimes at a far higher than the general population.⁴⁷⁷ In fact, Native Americans are more than two times as likely to be a victim of a crime than all other races combined, or any race individually.⁴⁷⁸ Of those crimes committed against Indians thirty percent of murders of Indians people were

⁴⁷⁴ *Id.*

⁴⁷⁵ *See supra* Section II.

⁴⁷⁶ *See supra* Section II.

⁴⁷⁷ National Institute of Justice, *Tribal Crime and Justice*, OFFICE OF JUSTICE PROGRAMS, <https://www.nij.gov/topics/tribal-justice/Pages/welcome.aspx#noteReferrer2> [https://perma.cc/M489-XLYT] (last visited Dec. 15, 2017).

⁴⁷⁸ Bureau of Justice Statistics, *American Indians and Crime*, U.S. DEP'T OF JUSTICE (Feb. 1999) <https://www.bjs.gov/content/pub/pdf/aic.pdf> [https://perma.cc/SU56-84BF].

committed by non-Indians.⁴⁷⁹ In sixty-six percent of assaults against Indians, the perpetrators were described as white.⁴⁸⁰ In total, sixty percent of Indian victims surveyed described their assailant as white.⁴⁸¹

Indian women specifically suffer “the highest rates of domestic violence, sexual violence, and sex trafficking” of any other group in the United States.⁴⁸² Native American women are three times more likely to experience domestic violence than any other racial group.⁴⁸³ And seventy-five percent of all Native American women experience some form of sexual assault in their lives.⁴⁸⁴ Human traffickers have been known to “recruit” at Native American schools, group homes, youth centers, and powwows.⁴⁸⁵ Even though Indian women are victims at a rate beyond other groups, Native American men are still more likely to be crime-victims, than their female counterparts.⁴⁸⁶

Despite the high crime rate, Native American people are less likely than other races to report crimes.⁴⁸⁷ Some of the reasons that Native American’s do not report crimes stem from a wide array of reasons, such as cultural barriers and high level of mistrust of “white dominated agencies.”⁴⁸⁸ The mistrust comes from calculable shortcomings within Indian Country. For instance, women who report domestic abuse continually report that “police did not provide adequate protection or follow-up services in response to the

⁴⁷⁹ *Id.* at 7.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² Kathryn Ford, *Tribal Justice and Sex Trafficking*, HUMAN TRAFFICKING AND THE STATE COURTS COLLABORATIVE (2014), http://www.htcourts.org/wp-content/uploads/Ch-8_140425_NACM_Guide_OnlineV_v04.pdf [<https://perma.cc/6CDK-P8JQ>].

⁴⁸³ Rebecca Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 188 (2008).

⁴⁸⁴ Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, J. DISP. RESOL. 517, 522 (2007).

⁴⁸⁵ Ford, *supra* note 201, at 138.

⁴⁸⁶ Bureau of Justice Statistics, *supra* note 197; *see also* Metoui, *supra* note 203, at 522 (while statistics show that Native American women are the mostly likely people to be a victim, their numbers are likely substantially higher due to distrust of police officers and cultural barriers to report).

⁴⁸⁷ Metoui, *supra* note 203, at 522.

⁴⁸⁸ Lisa Bhungalia, *Native American Women and Violence*, <https://journals.sagepub.com/doi/10.1177/1524838004269489> [<https://perma.cc/35P5-8AWT>].

women's calls." 489 Another issue is that without an investigation, police often do not believe the women who report crimes. For instance, when one woman called to report domestic violence, the police required her to undress to show them the bruises.⁴⁹⁰ The police then reported she was drunk, even contrary to hospital reports saying she was not under the influence of any intoxicants.⁴⁹¹

Abuse toward Native Americans perpetuates the issues within the Indian community, which leads to generations of abused people.⁴⁹² These high crimes rates create a wound in the community, one that would traditionally be mended through community action and restorative justice.⁴⁹³ If shut off from traditional forms of justice, which aim to restore the community, the community continues to suffer. Thus, federal laws that have created barriers to traditional forms of justice that would be better suited at healing Indian communities, inflict lasting pain on the community. For instance, the *Oliphant* decision has limited the ability of Indian court systems of holding non-Indian people in their judicial system. Since approximately sixty percent of crimes against Indians are committed by what Indian people identify as white, the *Oliphant* decision limits Indian Judicial review in nearly two-thirds of crimes against Indians.

Further, The Major Crimes Act disturbs traditional justice methods by removing criminal jurisdiction from Indian Courts into Federal Courts. Indian courts may maintain concurrent jurisdiction with federal courts; however, the federal government tends to hold defendants and criminals and not turn them over for an extended amount of time. This can keep the tribe from dealing with the suffering or loss from the victim and disorient the community for months and sometimes even years depending on how long it takes for the federal government to investigate and try a case.

⁴⁸⁹ Metoui, *supra* note 203, at 522.

⁴⁹⁰ Bhungalia, *supra* note 207.

⁴⁹¹ *Id.*

⁴⁹² Ford, *supra* note 201.

⁴⁹³ Wanda D. McCaslin, JUSTICE AS HEALING: INDIGENOUS WAYS (Wanda McCaslin, 1st ed. 2005).

2. Healing Trauma in Court

a. Re-Enforcing Power to the Victims

Allowing traditional forms of justice may lessen the affects that being a victim will have in the future. For instance, psychological studies have shown that thirty-five percent of male sexual abusers have had been sexually molested as a child.⁴⁹⁴ In fact, those who have been abused, especially sexually, are far more likely to commit crime in general.⁴⁹⁵ Beyond the cycle of criminality, those who have been abused are also more likely to suffer from alcoholism, sexual maladjustment, and multiple personality disorder.⁴⁹⁶ Although these statistics are troubling, Martha Erickson, a psychologist at the University of Minnesota, states, to fix the issue, the community “need[s] to counteract the child’s expectations that adults will be deeply uncaring.”⁴⁹⁷ Traditional forms of restorative justice involves the community, and can help counteract offenders’ antisocial behavior by recognizing that the offender may have been victimized previously.

Traditional forms of Indian justice are victim oriented, and result in a more caring culture, created with the purpose of healing.⁴⁹⁸ Peacemaking looks at a variety of ailments that “trauma” can cause including the spiritual, emotional, physical, and mental ailments that come with being a victim.⁴⁹⁹ This healing is individualized and does not focus on attempting to cure the symptoms, but the root of their affliction.⁵⁰⁰ Furthermore, because those most affected by the victimization are involved by the

⁴⁹⁴ M. Glasses, et al., *Cycle of Child Sexual Abuse: Links Between Being a Victim and Becoming a Perpetrator*, 179 J. OF PSYCHIATRY 482, 482 (2001).

⁴⁹⁵ Australian Institute of Family Studies, *The long-term effects of child sexual abuse*, AUSTRALIAN GOVERNMENT (2013), <https://aifs.gov.au/cfca/publications/long-term-effects-child-sexual-abuse/interpersonal-outcomes> [https://perma.cc/H9UN-NABM] (the study found that there were no differences between Australian aboriginal victims and non-aboriginal victims).

⁴⁹⁶ Daniel Coleman, *Sad Legacy of Abuse: The Search for Remedies*, N.Y. TIMES (Jan. 24, 1989), <http://www.nytimes.com/1989/01/24/science/sad-legacy-of-abuse-the-search-for-remedies.html?pagewanted=all> [https://perma.cc/YHG8-EBVS].

⁴⁹⁷ *Id.*

⁴⁹⁸ Gloria Lee, *Defining Traditional Healing*, JUSTICE AS HEALING: INDIGENOUS WAYS, 98 (2005).

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 99.

sentencing process and have input in the decision have shown to be able to handle mental health issues better.⁵⁰¹

b. Strengthening the Community

Another benefit of restorative justice is to heal the community. With Indian communities having some of the highest crime rates in the United States, many Indian people do not feel safe in their own neighborhoods.⁵⁰² Violence in the community affects more than just the victim it also affects the community as those members no longer feel safe in their own home. Community members are explicitly listed as a part of the participants in nearly all Indian traditional justice.⁵⁰³ Similar to a victim, participating in the circle allows the community to give transparency to the problems of the community and be a participant, not a spectator. Not only is there more transparency but traditional means of justice allows the community to hear the offender's story and participate in the healing.⁵⁰⁴ As Chief Justice Yazzie of the Navajo tribe states:

What is an offender? It is someone who shows little regard for right relationships. That person has little respect for others. Navajos say of such a person, 'He acts as if he has no relatives.' So, what do you do when someone acts as if they have no relatives? You bring in the relatives!⁵⁰⁵

This idea goes to the ideology that the community is there to help. Navajo Peacemaking court not only gives the victim a community to rely on but gives the community involvement to learn the offender and realize they are humans who hurt just like them.⁵⁰⁶

⁵⁰¹ The Hollow Water First Nations Community Holistic Circle Healing Interim Report, 1994, *The Sentencing Circle: Seeds of a Community Healing Process*, JUSTICE AS HEALING: INDIGENOUS WAYS, 195 (2005).

⁵⁰² Yvonne Boyer, *Community-Based Justice Initiatives of the Saskatoon Tribal Council*, JUSTICE AS HEALING: INDIGENOUS WAYS, 195 (2005).

⁵⁰³ The Hollow Water First Nations Community Holistic Circle Healing Interim Report, *supra* note 220215, at 192.

⁵⁰⁴ Robert Yazzie, JUSTICE AS HEALING: INDIGENOUS WAYS, 192 (2005).

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at 194.

IV. USING THE *MONTANA* RULE AND CIVIL JURISDICTION TO ENFORCE TRIBAL JUSTICE

Given current law, tribes should be able to create consensual relationships when a person enters Indian Country to allow traditional forms of justice between Indians and non-Indians. This paper has delved into whether a tribe can create a consensual contractual relationship with those entering. It appears, that a tribe can. The following section focused on the specifics of what tribes have attempted to do and where tribes have failed. Specifically, where tribes have generally failed in the past, is that tribes have attempted to extend jurisdiction through the internet, which neither stems from “the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations” nor did it stem from any “action” that related to said inherent sovereignty. However, traditional forms of justice, for healing and criminal activity stems from all of it. A person’s criminal conduct and entry onto tribal land relates to the inherent sovereignty of the tribe.

A. Contractual Agreements Creating Civil Jurisdiction for Traditional Forms of Justice

General rules of contracts would allow a contract to be formed by a sign when entering reservation land.⁵⁰⁷ For a contract to be formed, both an offer and acceptance is required.⁵⁰⁸ The reservation in making its offer may require acceptance in “performing a specified act.”⁵⁰⁹ The non-Indian’s entry would constitute acceptance. Furthermore, if an offeree does not read the sign, it does not make the offer or acceptance invalid as “no notification is necessary to make such an acceptance.”⁵¹⁰ Here, a non-Indian’s acceptance of the contract—choosing to come onto tribal property with notice that doing so will subject them to tribal

⁵⁰⁷ Although general rules of contracts are being discussed here, generally, there is no federal common law for contracts and deference to the tribal contract law would apply when a forum selection clause gives jurisdiction to the tribe.

Jackson v. Payday Loans, 764 F.3d 765, 773 (7th Cir. 2014).

⁵⁰⁸ Restatement (Second) of Contracts § 22 (1981).

⁵⁰⁹ Restatement (Second) of Contracts § 30 (1981).

⁵¹⁰ Restatement (Second) of Contracts § 54 (1981).

justice in civil disputes— demonstrates the non-Indian’s acceptance.

511

A contract also requires consideration.⁵¹² Consideration is “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”⁵¹³ In this case, there would be adequate consideration. It is a well-established rule that tribes have the power, as a sovereign, to exclude non-Indians or even non-member Indians.⁵¹⁴ In exchange, the Indian nation maintains the ability to have civil jurisdiction over the non-Indian people. Because tribes have the power, as a sovereign, to exclude people from their reserved land there is a detriment for a bargain being exchanged. Using performance contract principles, tribes could require visitors to consent to tribal justice upon entering tribal land.

Assuming a valid contract is formed, the consensual relationship—the contract—must still have a “nexus” to the regulation being imposed—here tribal justice.⁵¹⁵ As discussed in the *Dolgencorp* case, there is a nexus between the consensual relationship and regulation when the regulation’s purpose is “protecting [the tribe’s] own children on its own land.”⁵¹⁶ By this reasoning, a nexus exists when the tribe’s regulation serves to protect its own people on its own land, even when applied to non-Indians. The nexus in this proposal is no different: this consensual relationship provides a way for Indian communities to heal from the trauma inflicted by non-Indian on Indian violence. By requiring consent to tribal justice in exchange for entry, the tribe ensures tribal access to traditional justice. Although a contract may be formed, whether the contract is enforceable, specifically a forum selection clause, can be a trickier issue.

⁵¹¹ Attorney’s Process & Investigation Services, Inc. v. Sac & Fox Tribe, 609 F.3d 927, 938 (8th Cir. 2010) (explaining that courts look to the non-Indian’s conduct in determining whether there is a consensual relationship).

⁵¹² Restatement (Second) of Contracts § 71 (1981needs year).

⁵¹³ Restatement (Second) of Contracts § 81 (19811979).

⁵¹⁴ Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (hereinafter *Water Wheel*) (citing United States v. Lara, 541 U.S. 193, 200 (2004)).

⁵¹⁵ *Mississippi Band of Choctaw Indians*, 746 F.3d at 172.

⁵¹⁶ *Payday Fin., LLC* 764 F.3d at 782 (citing the Federal Arbitration Act; *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174 (5th Cir. 2014)).

B. *Application of Forum Selection Clause*

Generally, forum selection clauses are enforceable.⁵¹⁷ Specifically, Indian tribes have generally been able to enforce forum selection clauses.⁵¹⁸ However, the courts have limited the reach of forum selection clauses for tribal jurisdiction in certain circumstances.⁵¹⁹ Namely, federal courts have limited forum selection clauses made in Indian Country to the extent that a tribal court has “adjudicative jurisdiction.”⁵²⁰ Federal courts have stated that for there to be subject matter jurisdiction in tribal courts over non-Indians, is “tethered to the nonmember’s actions . . . on the tribal land.”⁵²¹ In sum, for a forum selection clause to be enforceable the court will look to the actions of the party, the non-Indian, to find whether a tribe has adjudicative jurisdiction. In *Western Sky Financial*, the court stated that declaring, over the internet, that you were physically present on tribal land was a legal fiction.⁵²² That the Defendant in that case never showed up to the reservation nor did the Defendant pay money on the reservation.⁵²³ The case implies, then, that actual presence is sufficient to create adjudicative jurisdiction.⁵²⁴

Courts have upheld arbitration clauses on non-Indian fee land.⁵²⁵ However, that decision did not discuss the issue of fee land and non-fee land.⁵²⁶ Instead, whether a forum selection clause is valid in application of Indian land depends on several factors.

⁵¹⁷ *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 32 F.Supp. 2d 497, 504 (1999) (overturned on other grounds).

⁵¹⁸ *Id.*

⁵¹⁹ *Smith v. Western Sky Fin., LLC*, 168 F.Supp.3d 788, 782–83 (E.D. Pa. 2016); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774–77 (7th Cir. 2014).

⁵²⁰ *Western Sky Fin, LLC*, 168 F.Supp.3d at 782.

⁵²¹ *Payday Fin., LLC*, 764 F.3d at 782.

⁵²² *Id.*

⁵²³ *Western Sky Fin.*, 168 F.Supp.3d at 782.

⁵²⁴ The decision further states that those “regulations may be fairly imposed on non-members only if the non-member has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.” *Id.* at 783.

⁵²⁵ *Narragansett Indian Wetuomuck Housing Authority*, 32 F.Supp. 2d at 504 (overturned on other grounds).

⁵²⁶ *See id.*

When deciding whether a forum selection clause is valid, courts apply an *Erie* choice of law inquiry.⁵²⁷ In contracts, the court applies the law of the jurisdiction whose rules will govern the rest of the dispute.⁵²⁸ In *Payday Financial*, the court was prepared to apply tribal law to the forum selection clause, however, in a supplemental brief, the tribe was “unable to locate tribal precedent addressing forum selection clauses.”⁵²⁹ Instead, the court applied federal law and looked at whether the law was “unreasonable under the circumstances.”⁵³⁰ The court noted that only three circumstances where the presumptive validity of an arbitration clause is suspect:

(1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power; (2) if the selected forum is so “gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court[]”; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.⁵³¹

In this particular circumstance, the court stated that because the Cheyenne River Sioux Tribe did not authorize arbitration, hire arbitrators, and does not have consumer dispute rules the forum selection was invalid.⁵³²

Analyzing the shortcomings of the Cheyenne River Sioux Tribe’s arbitration process may help other tribes to understand the procedural maze that is involved with federal, state, and tribal jurisdictions that all compete for jurisdiction in these manners, and to have more success. First, tribes should have tribal statutes outlining forum selection clauses, defining terms, and looking at case statute. Second, forum selection clauses should not be “unreasonable under the circumstances.” For instance, the clause should not be illusory or unconscionable—both of which is a

⁵²⁷ *Payday Fin., LLC*, 764 F.3d at 776.

⁵²⁸ *Id.* at 775.

⁵²⁹ *Id.* at 775–76.

⁵³⁰ *Id.* at 776.

⁵³¹ *Id.*

⁵³² *Id.*

generally good practice to ensure that parties participating in alternative dispute resolution come out satisfied.⁵³³

While forum selection clauses are unlikely to cover all who enter Indian Country, especially non-fee land, any expansion of jurisdiction over non-Indian and non-member Indians having accountability to the tribe and its people is a step towards healing.

V. CONCLUSION

Traditional forms of Indian justice are beneficial for Indian victims and the community, as well as non-Indian offenders.⁵³⁴ Due to the Supreme Court case *Oliphant*, Indians do not have access to traditional forms of criminal justice.⁵³⁵ While this paper proposes contracts to create a consensual relationship to extend civil jurisdiction to non-Indians, the larger idea is that Indian people need to use creativity in the legal system to access forms of justice better suited to healing Indian communities. Civil jurisdiction may be one means to erode barriers to Indian justice, but Indian communities have struggled since Euro-American law was imposed on them. Indian people need an expansion of tribal sovereignty, not a restriction that has been the pattern as of colonization, to help Indian people. Extending tribal court jurisdiction to non-Indians and reinstating traditional justice would be a powerful step toward re-empowering tribal sovereignty and Indian people.

⁵³³ See *supra* Section IV.

⁵³⁴ See *supra* Section III.B., III.C.

⁵³⁵ See *supra* Section I. B.