

**Providing Safety & Justice for Native Victims of Non-Indian Perpetrators: Creative Tribal Court Civil Remedies**

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Why is it necessary for Tribal Courts to resort to civil remedies for non-Indian perpetrators of domestic violence in Indian Country?

- ▶ The majority of perpetrators of domestic violence against Native women are non-Indian.
- ▶ Indian tribes have no authority to prosecute non-Indians who commit crimes in Indian Country.
- ▶ Tribes have limited authority over non-Indians in civil matters, but can use that power creatively.

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What must a tribal court possess before it may render a valid, enforceable judgment or order in a criminal or civil case?

- ▶ **Subject matter jurisdiction** – the power to hear and determine the subject of a case.
- ▶ **Personal jurisdiction** – the power over a person who maintains sufficient contacts with the tribe
- ▶ Comply with the **due process** clause of the Indian Civil Rights Act; 5<sup>th</sup> & 14<sup>th</sup> Amendments to U.S. Constitution

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### Example of Due Process:

- ▶ VAWA – 18 U.S.C. 2265 (b) (2) – Reasonable notice and opportunity to be heard must be given to the person against whom the protection order is sought. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by law and in any event within a reasonable time after the order is issued.

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### Basic elements of both civil and criminal subject matter jurisdiction

- ▶ Act (s) must have taken place in Indian country which is defined as:
  - all lands within the limits of any Indian reservation (except land held in fee /rights of way)
  - all dependent Indian communities within the borders of the United States;
  - all Indian allotments the Indian titles to which have not been extinguished.

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### Elements of subject matter jurisdiction

- ▶ For purposes of criminal jurisdiction the defendant must be Indian.
- ▶ The term "Indian" is not statutorily defined
- ▶ Courts have created a two-part test:
  - Whether the person has some Indian blood, **and**
  - Whether the person is a member of a federally recognized tribe (not state recognized, tribe from Canada, etc.).

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Who determines whether tribal courts have subject matter and personal jurisdiction?

- ▶ United States Congress
- ▶ Courts

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What are the sources of congressional and judicial powers over Indian tribes?

- ▶ Indian Commerce Clause – Art.1, Sec. B, Cl.3 of the United States Constitution;
- ▶ Judicial power to interpret laws – Marbury v. Madison (1803).

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The History of Federal Indian Law & Policy

- ▶ Indian tribes possess all powers of any sovereign state;
- ▶ Conquest renders a tribe subject to the legislative powers of the United States, thus terminating the external powers of the tribe but not its internal sovereignty;
- ▶ Except where expressly qualified, full powers of internal sovereignty are vested in the tribes.

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### Domestic Dependent Nations

- ▶ Johnson v. McIntosh (1823) – Indian tribes may not convey land to private parties absent consent of Congress.
- ▶ Cherokee Nation v. Georgia (1831) – Indian tribes are not separate sovereigns but are “**domestic dependent nations**” existing in a state of pupilage to the United States much like “**a ward to his guardian.**”
- ▶ Worcester v. Georgia (1832) – State laws have no effect in Indian country.

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### Tribal Criminal Jurisdiction: First Limitations

- ▶ Ex Parte Crow Dog (1883) – Federal court conviction of Indian who murdered another Indian in Indian country overturned- tribal sovereignty in situation not abrogated by Congress
- ▶ Major Crimes Act (1885) – Enacted by Congress in response to Ex Parte Crow Dog, designated major crimes committed by Indians in Indian country punishable by the federal government and Tribes.

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### Plenary Power

- ▶ U.S. v. Kagama (1886) – Major Crimes Act not within Congress’s power to regulate commerce with Indian tribes but under the trust relationship Congress has both the duty and power to regulate tribal affairs
- ▶ Lone Wolf v. Hitchcock (1903) – Congress can, by statute, abrogate the provisions of an Indian treaty due to Congress’s plenary power over Indian affairs.

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## Legislative Limitations to Criminal Jurisdiction

- ▶ U.S. v. Sandoval (1913) – Federal liquor laws upheld in Indian country – *"The United States as a superior and civilized nation" has the power and duty to care for and protect "all dependent Indian communities within its borders."*
- ▶ P.L. 280 (1953) – Extended state civil and criminal jurisdiction to Indian country to California, Nebraska, Minnesota, Oregon and Wisconsin. Alaska added in 1958.

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## States May Not Violate Sovereign Rights

- ▶ Williams v. Lee (1959) – Arizona courts have no jurisdiction in a civil case that involved a non-Indian who sued an Indian domiciled on an Indian reservation, for a breach of contract which had occurred on the reservation. *Absent acts of Congress, a state may not infringe on the right of reservation Indians to make their own laws and be governed by them.*

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## Criminal Jurisdiction Limited by Case Law

- ▶ Oliphant v. Suquamish Indian Tribe (1978) Tribes do not have **criminal** jurisdiction over non-Indians absent an affirmative delegation by Congress – tribes may not exercise powers inconsistent with their dependent status.

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### Who is an Indian?

- ▶ Duro v. Reina (1990) – Indian tribes have no criminal jurisdiction over **non-member Indians** who commit a crime on the reservation. The retained sovereignty of tribes was only broad enough to encompass the power of tribal courts to impose criminal penalties on tribal members.
- ▶ 25 U.S.C. 1302(z) – “DuroFix” : tribes have the “*inherent power*” to exercise criminal jurisdiction over **all Indians**.

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### Legislative Amendments

- ▶ U.S. v. Lara (2004) – The United States Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians by amending the ICRA (25 U.S.C. 1301 (2)).

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### Criminal Jurisdiction in Sum:

- ▶ Tribes only have criminal jurisdiction over “Indians”
- ▶ Non-Indians can be criminally prosecuted in federal court (major crimes) or in state courts (non-Indian victim, victimless crimes, or PL280)

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## A History of Preemption: Tribal Civil Jurisdiction

- ▶ McClanahan v. Arizona State Tax Commission (1973) – Arizona may not tax the income of a member Indian earned on the reservation. *"The trend has been away from the idea of inherent Indian sovereignty. . . and toward federal preemption"* of state jurisdiction.

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## Membership and Self-Government

- ▶ Washington v. Confederated Tribes of Colville Indian Reservation (1980) Although tribes may tax commercial activity of non-members within the reservation, powers of self government do not preempt the state from taxing the same activity.

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## The Meaning of Inherent...

- ▶ Montana v. U.S. (1981) – The inherent sovereign powers of Indian tribes do not extend to non-members subject to these exceptions:
  - Express Congressional delegation;
  - Taxation, licensing, or other means of regulating the activities of non-members who enter consensual relationship with the tribe or its members through commercial dealing, contracts, leases or other arrangements;
  - Conduct of non-Indians on federal lands within the reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.

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## Distinctively Tribal...

- ▶ Strate v. A-1 Contractors (1997) – Tribal courts have no jurisdiction over a civil claim involving two non-Indians as the result of a “*run of the mill highway accident*” on the reservation. The claim was “*distinctively non-tribal in nature*” and none of the Montana exceptions applied.
- ▶ “Undoubtedly, those who drive carelessly on a public highway running through the reservation endanger all in the vicinity and surely jeopardize the safety of tribal members. But if Montana’s second exception requires no more, the exception would surely shrink the rule.”

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## Integrity, Security, Health & Welfare

- ▶ Wilson v. Marchington (9<sup>th</sup> Cir. 1997) – Tribal court did not have jurisdiction over a claim arising from a traffic accident on the reservation between plaintiff member and a non-Indian. Strate’s requirement that such actions be brought in state or federal court does not imperil the political integrity, economic security, or health or welfare of the tribe.

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## No Taxation without Consent

- ▶ Atkinson v. Trading Co. Inc. (2001) – Navajo Nation has no inherent sovereignty to impose a hotel occupancy tax on non-members or non-Indian fee land within the reservation. No consensual relationship existed between the Nation and hotel guests or the trading post.

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## Limitations on Sovereign Ability to Regulate

- ▶ Nevada v. Hicks (2001) – civil action by tribal member in tribal court against state officials in their individual capacities arising from tort and civil rights violations while executing a search warrant on tribal land. Tribal court jurisdiction does not exceed tribal legislative jurisdiction. Tribes do not necessarily have regulatory authority over non-members on tribal lands.

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## Regulatory Authority over Tribal Treaty Land- Muscogee (Creek) Nation

Tribes may exercise:

- ▶ Authority over civil actions arising under the Constitution, laws or treaties when arising within Indian Country.
- ▶ General civil jurisdiction over all civil actions regardless of Indian or Non-Indian status where tribe has a significant interest.
- ▶ Right to exclude any individual from the land when the tribe is sole owner.
- ▶ Regulate Conduct and Activities "on or within" the boundaries.

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## Regulation Through Forfeiture

Muscogee (Creek) Nation v. One Thousand four Hundred Sixty Three Dollars and 14/100 (\$1463.14); Methamphetamine; and a 2004 General Motors Hummer H2, VIN# 5GRGN23U64H116688– District Court of the Muscogee (Creek) Nation

- ▶ A non-Indian was on tribal land at a casino, doing drugs in his vehicle and gambling in the casino.
- ▶ Defendant plead guilty in Tribal Court to Disorderly Conduct: Possession of Controlled Dangerous Substance, and paid the fine.
- ▶ The Tribal Court granted forfeiture of the man's vehicle, \$1,463.14, and illegal methamphetamines in violation of Tribal civil law.

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## Crossing the Criminal Line into Civil Jurisdiction

### Supreme Court of the Muscogee (Creek) Nation

Tribal jurisdiction over Non-Indian is challenged under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The Court rejects application in civil case as misapplied, distinguishing it from the criminal jurisdiction in *Oliphant*.

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### Conduct was subject to the laws of the Nation regardless of Indian or non-Indian status of the parties because:

- ▶ the Nation had authority to restrict use, possession, and distribution of illegal drugs under the authority to regulate public safety through its civil laws.
- ▶ Forfeiture is an *In Rem* civil action against property that was used on tribal property to transport or store drugs.

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### Miner Electric, Inc.; Russell E. Miner v. Muscogee (Creek) Nation (2007)

U.S. Court of Appeals, Tenth Circuit determined: Regarding Sovereign Immunity & Federal Subject Matter Jurisdiction:

- ▶ Tribes retain sovereign immunity from lawsuits unless the tribe makes an express waiver of immunity or by congressional abrogation of tribal sovereignty; and
- ▶ If there is a tribal forum and remedy, there is no need for federal jurisdiction to supersede the tribe.

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## Regulation via Voluntary Conduct

*Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al*, 491 F.3d 878 Reversed (2008)

Non-Indian bank owned fee land for 50 years and later sold it to non-Indians when the Indians leasing the land with option to purchase defaulted. Earlier courts determined the tribe had the right to regulate business conduct in voluntary dealings with the tribe.

U.S. Supreme Court reversed the decisions that were based upon *Montana*, defining that the tribe must be more than injured, it must "imperil the subsistence" of the tribal community. This standard did not apply because the fee land had been non-Indian owned for at least 50 years without disrupting tribal self-government.

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## Congressional Authorization

- ▶ Exclusive jurisdiction over foreclosure of mortgages on Indian trust land;
- ▶ Exclusive jurisdiction over non-divorce child custody proceedings involving Indian children residing in Indian country. (ICWA)

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## Civil Adjudicative Authority

- ▶ Divorce between non-Indian and Indian domiciled on reservation
- ▶ Child custody when child domiciled on reservation
- ▶ Child support when child domiciled on reservation

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## AH HA: Authority Over Non-Natives

- ▶ Congressional Authorization / Approval to Issue Protection Orders Against Non-Indians VAWA 18 U.S.C. 2265(a)(b):
  - Implies that Tribal courts have jurisdiction to issue protection orders against non-Indians provided the court has personal and subject matter jurisdiction and complies with due process.
  - **Montana:** consensual relationship with the tribe or its members through commercial dealings, contracts, leases or other arrangements; conduct of non-Indian threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.

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## But What About Enforcement?

- ▶ VAWA 18 U.S.C. 2265 (e) – Tribal courts have "*full civil jurisdiction*" to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands and "*other appropriate mechanism;*" in matters arising within the authority of the tribe.

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## Full Faith and Credit

- ▶ Full Faith and Credit 18 U.S.C. 2265 (a) – Any protection order issued that has complied with due process (issuing state or Indian tribe) shall be afforded full faith and credit by the court of another state or Indian tribe (enforcing court) as if the order were its own.

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## Criminal Jurisdiction Got You Down? BE CREATIVE!

- ▶ Contempt of Court (Civil vs. Criminal)
- ▶ Exclusion
- ▶ Fines and Fees
- ▶ Restitution
- ▶ Attorneys Fee's and Court Costs
- ▶ Completion of Batterer Re-education Program
- ▶ Community Service
- ▶ Forfeiture
- ▶ Loss of Licensure or Privileges

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## Criminal Contempt

- ▶ Occurs directly before the court.
- ▶ Improperly challenging or ignoring the court's authority.
- ▶ Interference with the ability of the court to function (e.g. yelling at the judge, threatening a witness, refusing to sit down or remain quiet when ordered).
- ▶ Proof of criminal contempt is beyond a reasonable doubt
- ▶ The accused criminal contemnor has the right to counsel (but not appointed counsel under ICRA).
- ▶ A criminal contemnor may be jailed and/or fined as punishment.
- ▶ Inherent power of the court includes ability to hold all persons before the court in criminal contempt?

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## Civil Contempt

- ▶ Willful disobedience of a court order occurring outside the court's presence (e.g. failure to pay spousal or child support, violation of custody or visitation orders).
- ▶ Proof of civil contempt is by a preponderance of the evidence.
- ▶ No right to counsel, but civil contemnor has the right to due process.
- ▶ May include incarceration until the civil contemnor performs a specific act(s) as ordered by the court to "purge" the contempt.
- ▶ Incarceration is meant to coerce the civil contemnor into compliance with the court's order, not as punishment.
- ▶ Shortage of jail space in Indian country
- ▶ Reality: tribal court judges will be hesitant to jail non-Indians.

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## Exclusion

- ▶ By tribal court order
- ▶ By resolution of tribal council
- ▶ By decree from chief executive of the tribe (governor, president, chairperson, etc.)
- ▶ What if non-Indian abuser owns fee land within the reservation?
- ▶ Remedies for violation of exclusion order?

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## Fines and Fees

- ▶ Tribal court criminal jurisdiction limits maximum penalty to \$5,000 fine and up to one year of incarceration
- ▶ Tribal court civil jurisdiction is unlimited as to monetary amount of fines
- ▶ Can use fees creatively: impounded car or seized weapon incurs significant "storage fees"

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## Restitution

- ▶ Compensation for loss from illegal activity
- ▶ Can include:
  - ▶ Medical, dental, counseling bills
  - ▶ Property damage/loss
  - ▶ Lost wages
  - ▶ Changing locks, installing alarm or other security systems,
- ▶ Reimbursement for transportation to and from court, etc.

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## Attorney's Fees and Court Costs

- ▶ Reimbursement for actual cost of counsel by victim
- ▶ Reimbursement to agency providing representation although no cost to victim (e.g. based on hourly pay to legal services attorney)
- ▶ Filing fees
- ▶ Witness fees (including experts)
- ▶ Service of process fees

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## Batterer Re-education

- ▶ Can be on-reservation, intensive program (52 weeks etc.)
- ▶ At batterer's own expense
- ▶ Can also order counseling, in-patient (enforcement issues?) or out-patient substance abuse, alcohol, or psychiatric treatment

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## Community Service

- ▶ Trash collection
- ▶ Public speaking to groups and organizations re. D.V.
- ▶ Providing labor for ceremonies (wood chopping, water hauling, etc.)
- ▶ Converting some/all of fines to community service (e.g. at an hourly rate)

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## Forfeiture

- ▶ Due process: notice and opportunity to be heard. Can't be "automatic forfeiture."
- ▶ Means of transportation used to facilitate D.V. can be forfeited
- ▶ Firearms or other weapons (Tribes can adopt own firearms' codes stricter than federal code)
- ▶ Forfeited item can be destroyed or sold by tribe (melt down guns, sell car at auction, etc.)

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## Loss of Licensure or Privilege

- ▶ Tribal business license
- ▶ Tribal employment
- ▶ Hunting or fishing licenses (if issued to non-members)
- ▶ Possession of firearm or other weapon on tribal lands privilege

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## Miscellaneous

- ▶ Garnishment of wages issues: tribal vs. state court orders, tribal vs. off-reservation employment
- ▶ Attachment of property for sale to satisfy judgment

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