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THE JURISDICTIONAL "HAZE": AN EXAMINATION OF TRIBAL COURT CONTEMPT POWERS OVER NON-INDIANS*

INTRODUCTION

Consider the following hypothetical scenario. Two brothers in Swain County, North Carolina, each fail to pay money judgments entered against them in two different local courts. Both men are ordered to appear in court on contempt charges. They hire the same lawyer and receive identical sentences: thirty days in jail as punishment for not making the payments, as well as 150-day imprisonments that can be purged if they meet a payment schedule. Short tempers run in the family, and both brothers respond to their sentences by cursing the judge and are summarily prosecuted and convicted of contempt for their outbursts as well. Their lawyer counsels the first brother to appeal his convictions because the law is hazy regarding cases like his but tells the other brother that an appeal would be futile. At first glance, it would appear as if the attorney acted negligently toward one of his clients. However, if the first brother was convicted in the Eastern Band of Cherokee Indians' Tribal Court ("Cherokee Tribal Court") and the other was convicted in state court and neither brother is Indian, the advice becomes justifiable, as this Recent Development will explain.

The above scenario raises pressing questions about the extent of tribal sovereignty in contempt cases in light of *Oliphant v. Suquamish Indian Tribe*,[1] in which the Supreme Court held that when Indian tribes acquiesced to the "overriding sovereignty of the United States," they lost criminal jurisdiction over non-Indians.[2] Justice Rehnquist, writing for the majority, noted that it is not for the courts, but for Congress, to confer such jurisdiction.[3] In the years following the *Oliphant* decision, the Indian Gaming Regulatory Act of 1988[4] changed tribal economies dramatically, drawing waves of non-Indians

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1. 435 U.S. 191 (1978).

2. *Id.* at 210.

3. *See id.* at 212 (noting that "prevalence of non-Indian crime" on reservations and the protections of the Indian Civil Rights Act are "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians").

4. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166–1168 (2006) and 25 U.S.C. §§ 2701–2721 (2006)).

onto reservations;[5] as a result, domestic violence against Indian women has reached epidemic levels in Indian country, with many of the abusers identified as non-Indians.[6] In recognition of these challenges, some tribes are proactively seeking expansion of their criminal jurisdiction, probing gray areas of *Oliphant* and seeking sovereignty in its ambiguity.[7]

Recently, in the case of *In re Russell*,[8] the Cherokee Tribal Court confronted the thorny issue of criminal contempt. The court ruled that because all courts' criminal contempt powers are inherent, they fall outside the scope of *Oliphant*.[9] This Recent Development argues, however, that while imprecise facets of *Oliphant* and contempt law would make it appropriate for the Cherokee Tribal Court to claim power over summary criminal contempt prosecutions of non-Indians in some circumstances, the court's blanket decree that criminal contempt is always within a tribal court's jurisdiction runs counter to current law.

Part I presents the facts of the Cherokee Tribal Court's order in *In re Russell* as the backdrop for a discussion of the interplay between contempt law and tribal court jurisdiction. Part II provides a brief overview of tribal criminal court jurisdiction under the Supreme Court's ruling in *Oliphant*. Part III surveys the history of contempt law, explaining the sometimes subtle differences between the types of contempt proceedings and how they are jurisdictionally determinative in tribal courts. Part IV applies the principles of *Oliphant* and

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5. For instance, the Harrah's Cherokee Casino in North Carolina is visited by 3.6 million people each year. JAMES H. JOHNSON, JR. ET AL., FRANK HAWKINS KENAN INST. OF PRIVATE ENTER., ASSESSING THE ECONOMIC AND NON-ECONOMIC IMPACTS OF HARRAH'S CHEROKEE CASINO, NORTH CAROLINA ii (2011), *available at* http://www.kenan-flagler.unc.edu/~/media/Files/kenaninstitute/UNC_KenanInstitute_Cherokee.ashx.

6. In 2010, Congress found that "domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions" and that 39% of American Indian and Alaska Native women will be subjected to domestic violence during their lifetimes. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A), (C), 124 Stat. 2258, 2262. According to another recent study, 66% of Indians who are victims of violent crime identify their attacker as non-Indian. *See* Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 567 (2009).

7. *See* Hallie Bongar White, Kelly Gaines Stoner & The Honorable James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 427, 440–45 (2008) ("Lack of criminal jurisdiction over non-Indians often dictates that tribes must look to new and innovative civil legal strategies to address safety and security for their citizens and members, residents, and visitors.").

8. No. SC-11-1 (N.C. Cherokee Ct. Aug. 15, 2011), *available at* http://turtletalk.files.wordpress.com/2011/08/in-re-russell.pdf.

9. *See id.* at 4.

contempt law to *In re Russell*, explaining why the Cherokee Tribal Court stepped beyond its jurisdictional limitations in the case. Part IV concludes by setting forth ways in which tribal courts can, consistent with *Oliphant*, enforce their authority through their contempt powers.

I. *IN RE RUSSELL*

The Eastern Band of Cherokee Indians ("EBCI") has approximately 14,500 members, mostly descendants of those who avoided being forced on the Trail of Tears in the early nineteenth century.[10] The tribe is located on the 56,000-acre Qualla Boundary, a land trust located in several counties in North Carolina's western tip.[11] Though not an enrolled member of the tribe,[12] Dawn Russell has immersed herself in the community. She performed as an "Eagle Dancer" in a 2009 production of the outdoor drama *Unto These Hills* on the reservation,[13] organized a 2010 community forum meeting on tribal legal issues,[14] and, at the time of writing, managed a Family Dollar store on the Qualla Boundary in Cherokee, North Carolina.

While working at the Family Dollar Store on November 10, 2010, Russell became suspicious of two women in her store.[15] She watched as they meandered through the aisles with an empty shopping cart and left without making a purchase.[16] As they exited, Russell observed that the women's purses, which had been empty when they entered the store, were bulging.[17] After watching the women put

10. JOHNSON ET AL., *supra* note 5, at Introduction.

11. *Id.*

12. In the EBCI, all direct lineal descendants of those whose names appear on the 1924 Baker Roll of tribal membership and who possess at least 1/16 Eastern Cherokee blood are eligible for enrollment. *See* CHEROKEE CODE § 49 (2010), *available at* http://www.narf.org/nill/Codes/ebcicode/49enrollment.pdf. Dual enrollment with other tribes is not allowed. §§ 49-2(c), 49-3. Those who feel they meet the requirements for enrollment in the tribe may submit an application to the EBCI's six-member Enrollment Committee, which rules as to whether the applicant has the qualifications for enrollment. § 49-4.

13. *2009 Cast and Crew*, CHEROKEE, N.C., http://www.cherokee-nc.com/index.php?page=295 (last visited Apr. 9, 2012).

14. Ironically, the year before the Cherokee Tribal Court held her in contempt, Russell helped organize a community forum on "Tribal Law and Jurisdiction." *See* Scott McKie, *Tribal Jurisdiction Discussed in Forum*, CHEROKEE ONE FEATHER, March 25, 2010, at 4, *available at* http://www.nc-cherokee.com/theonefeather/files/2011/01/March-25.pdf. At the forum, Russell asked the forum's six-person panel of lawyers, law enforcement officials, and community members, "Can you prosecute non-enrolled members in Tribal Court?" *Id.*

15. Criminal Complaint at 2, E. Band of Cherokee Indians v. Hernandez, No. CR 10-1428 (N.C. Cherokee Ct. June 29, 2011) (on file with the North Carolina Law Review).

16. *Id.*

17. *Id.*

items into their truck and walk to another store in the shopping center, Russell called the Cherokee Tribal Police.[18]

Russell filed a complaint in Cherokee Tribal Court, alleging that the two women, Loreina Hernandez and Krystal Watty, shoplifted approximately twenty-one dollars worth of merchandise from Family Dollar.[19] As courts nationwide are increasingly doing in cases involving misdemeanor or "low impact" crimes,[20] Cherokee Tribal Court Judge Saunooke ordered the case to mediation on February 9, 2011.[21] When a worker from Mountain Mediation Services contacted Russell to arrange the mediation, "Russell was belligerent, uncooperative, and insulted Judge Saunooke."[22] Russell promised she would contact her district manager regarding the mediation and then call back, but she did not.[23] On February 28, Mountain Mediation Services mailed a letter to Russell informing her that her case was being referred back to court because of her refusal to cooperate with the mediation and that her court date was March 30. Russell did not respond to the letter, and was ordered to appear in Cherokee Tribal Court on June 29 to face criminal contempt charges.[24] Hernandez and Watty were sentenced on their larceny charges in Cherokee Tribal Court on April 13,[25] and Russell was sentenced to one day in jail and given a $250 fine on June 29.[26]

At her hearing, "[t]he parties stipulated that, for the purposes of this hearing, [Russell] was a non-Indian person."[27] She was given full criminal process, and moved to dismiss the contempt citation, arguing

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18. *Id.*

19. Criminal Complaint at 2, E. Band of Cherokee Indians v. Watty, No. CR 10-1429 (N.C. Cherokee Ct. Apr. 13, 2011) (on file with the North Carolina Law Review).

20. *See* Larysa Simms, Note, *Criminal Mediation Is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Judicial Adjudication, Just Making It Better*, 22 OHIO ST. J. ON DISP. RESOL. 797, 802–05 (2007). Simms notes that the use of mediation as a remedy in criminal cases has increased dramatically in recent years because "minor crimes mediation reduces the prosecutorial and court caseload of low-impact crimes that are serious enough to warrant state intervention, thereby saving time, court resources, and tax dollars.... [M]ediation alleviates overcrowded criminal dockets while effectively addressing the issues underlying minor crimes." *Id.* at 803–05 (footnote omitted).

21. *See In re* Russell, No. SC-11-1, slip op. at 1 (N.C. Cherokee Ct. Aug. 15, 2011), *available at* http://turtletalk.files.wordpress.com/2011/08/in-re-russell.pdf.

22. *Id.*

23. *Id.*

24. *Id.* at 2.

25. E. Band of Cherokee Indians v. Hernandez, No. CR 10-1428 (N.C. Cherokee Ct. Apr. 13, 2011) (on file with the North Carolina Law Review); E. Band of Cherokee Indians v. Watty, No. CR 10-1429 (N.C. Cherokee Ct. Apr. 13, 2011) (on file with the North Carolina Law Review).

26. *Russell*, slip op. at 5.

27. *Id.* at 1.

that, as a non-Indian, she is not subject to criminal jurisdiction in tribal court under *Oliphant*.[28] Cherokee Tribal Court Judge Martin rejected her argument, ruling that because contempt is not a "crime" in the traditional sense and because contempt powers are inherent and necessary for the maintenance of a judicial system's integrity, *Oliphant* does not extend to contempt.[29]

II. TRIBAL COURT CRIMINAL JURISDICTION UNDER *OLIPHANT*

Due to the complex tripartite balance of power among state, federal, and tribal authorities, commentators often refer to jurisdiction in Indian country as a "jurisdictional maze."[30] Criminal jurisdiction in tribal court hinges on labyrinthine tests controlling which court (state, federal, or tribal) has jurisdiction over which ethnic group (Indian or non-Indian) for the prosecution of which crimes.[31] As far as tribal courts are concerned, the threshold issue for entering the jurisdictional maze is the race of the accused. If the defendant is not Indian, the Supreme Court's ruling in *Oliphant* prevents prosecution.

Oliphant involved a sequence of events stemming from the Suquamish Indian Tribe's efforts to assert its sovereignty on the Port Madison Reservation.[32] In the 1855 Treaty of Point Elliott, "the Suquamish Indian Tribe relinquished all rights it might have had in the lands of the State of Washington and agreed to settle" on a 7,276-acre reservation across the Puget Sound from Seattle.[33] By the 1970s, the reservation had become "a checkerboard" of tribal lands and property held in fee simple by non-Indians with roads maintained by

28. *Id.* at 2.

29. *Id.* at 4.

30. *See, e.g.*, DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 483 (6th ed. 2011) ("The jurisdictional maze can be walked with some confidence if a step-by-step approach is followed."); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) ("Jurisdiction over Indian land is often complicated by the conflicting claims of three sovereigns to law enforcement authority.").

31. *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 153–80 (4th ed. 2004) (describing which crimes may be tried in Indian tribunals, which ethnic groups are subject to Indian tribunals, and which court has jurisdiction in each instance). In general, and with some exceptions, state courts have exclusive jurisdiction over crimes by non-Indians against non-Indians on reservations, federal courts have jurisdiction over crimes by non-Indians against Indians and "major" crimes committed by Indians, and tribal courts have jurisdiction over minor crimes committed by Indians. *See id.* at 181.

32. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 (1978).

33. *Id.* at 192–93.

Kitsap County.[34] Approximately fifty members of the Suquamish Indian Tribe still lived on the reservation, along with 2,928 non-Indians.[35] In 1973, the Suquamish adopted a Law and Order Code that gave the tribe criminal jurisdiction over both Indians and non-Indians.[36]

Soon after the passage of the Law and Order Code, Mark Oliphant assaulted a tribal police officer at 4:30 a.m. while drunk at the Suquamish tribe's Chief Seattle Day festival.[37] He was charged with assault and resisting arrest.[38] Later that year, Daniel Belgrade, who would become Oliphant's fellow petitioner, led tribal authorities on a high-speed chase through the reservation that ended when he crashed into a tribal police vehicle.[39] The incident resulted in the Suquamish Tribe charging Belgrade with reckless endangerment and injuring tribal property.[40]

Both men applied for writs of habeas corpus, arguing that the Suquamish Indian Provisional Court did not have criminal jurisdiction over them because they were non-Indians.[41] Although Oliphant and Belgrade were unsuccessful in the lower courts, the Supreme Court granted certiorari and decreed that tribal courts do not have criminal jurisdiction over non-Indians.[42]

According to Justice Rehnquist's opinion, an examination of various historical sources indicates a longstanding "unspoken assumption" that Indian tribes can only prosecute other Indians.[43] The Court recognized that procedural guarantees in the Indian Civil Rights Act of 1968 and other factors had caused tribal courts to "resemble in many respects their state counterparts,"[44] but the Court also turned on its head the 1883 case, *Ex parte Crow Dog*,[45] which held that Indians should be tried according to their own "customs and

34. *Id.* at 193.
35. *Id.* at 193 n.1.
36. *Id.* at 193.
37. Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty? The Story of* Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 270 (Carole Goldbert et al. eds., 2011).
38. *Oliphant*, 435 U.S. at 194.
39. *See* Krakoff, *supra* note 37, at 271. Interestingly, one of Belgrade's passengers during the chase was Mark Oliphant. *Id.*
40. *Oliphant*, 435 U.S. at 194.
41. *Id.*
42. *Id.* at 194–95.
43. *See id.* at 198–206.
44. *Id.* at 211–12.
45. 109 U.S. 556 (1883).

procedure."[46] Finally, the Court held that "[b]y submitting to the overriding sovereignty of the United States, Indian Tribes necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[47]

The Court's opinion in *Oliphant*—especially the validity of the evidence backing the unspoken assumption theory—has been widely criticized.[48] In effect, Justice Rehnquist's dubious historical interpretation of implicit limitations to tribal courts' territorial authority took an axe to Indian tribes' retained sovereignty.[49] The stump of sovereignty remaining was further whittled away twelve years later in *Duro v. Reina*,[50] when the Supreme Court ruled that individual tribal courts lack jurisdiction over Indians who are not enrolled in their tribes.[51] Fortunately for tribes, Congress abrogated that decision with what is commonly called the "*Duro* Fix,"[52] whereby Congress amended the Indian Civil Rights Act's definition of "powers of self-government" to include the "exercise [of] criminal jurisdiction over all Indians."[53] Although *Duro*'s central holding is no longer pertinent, dicta from the opinion adequately sums up what was

46. *Oliphant*, 435 U.S. at 211. In *Ex parte Crow Dog*, a Sioux man killed a member of his own tribe and was tried by the tribal council. *Crow Dog*, 109 U.S. at 557. The Supreme Court ruled that it would be inappropriate for a federal court to also exercise jurisdiction over the matter because the federal court would try the man in a manner contrary to the customs of his people and "according to the law of a social state of which [he has] an imperfect conception." *Id.* at 571. Congress quickly abrogated the decision by passing the Major Crimes Act two years later, giving federal courts exclusive jurisdiction over specific crimes committed on Indian reservations, including murder. *See* Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153 (2006)).

47. *Oliphant*, 435 U.S. at 210.

48. *See, e.g.*, Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) ("A close examination of the court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal."); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 631 (2011) ("In light of the Indian canons' clear directive for interpreting historical sources, Justice Rehnquist's treatment of this material verges on fraudulence.").

49. *See, e.g.*, Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 393 (1993) ("Since 1977, the United States Supreme Court has embarked on a course that has virtually eviscerated the sovereignty of Indian tribes.").

50. 495 U.S. 676 (1990).

51. *Id.* at 693 ("A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.").

52. *See, e.g.*, Benjamin J. Cordiano, Note, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades After* Duro v. Reina, 41 CONN. L. REV. 265, 268 (2008).

53. *See* 25 U.S.C. § 1301(2) (2006).

taken from tribes in *Oliphant*: "A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes no longer can be described as sovereigns in this sense."[54] Instead, thanks to the unspoken assumption theory, tribes are sovereign subject to the mandates of Congress and what can be inferred through its inaction, retaining only what is expressly authorized by legislation.[55]

III. A SURVEY OF CONTEMPT LAW, AND ITS RELATION TO *OLIPHANT*

A. Inherency of the Contempt Powers

Dawn Russell's criminal contempt conviction hinged on the Cherokee Tribal Court's conclusion that criminal contempt powers are inherent and, as such, are not diminished by *Oliphant*. It has long been accepted that the power to punish contempt—defined as "an act of disobedience or disrespect toward a judicial or legislative body of government"[56]—is "inherent in all courts" because "its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts."[57]

While inherent, contempt powers are not limitless. The potential for abuse of discretion is also inherent in the judiciary and is especially present in the context of punishing contemnors.[58] Because contempts "often [strike] at the most vulnerable and human qualities of a judge's temperament"[59] and contempt proceedings can "leave the offended judge solely responsible for identifying, prosecuting,

54. *Duro*, 495 U.S. at 685.

55. *See* Geoffrey C. Heisey, Comment, Oliphant *and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power To Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1063 (1998) (noting that while historically tribes could only be divested of their territorial sovereignty by express congressional action, *Oliphant* allows sovereignty to be taken away if a court finds implicit congressional intent to do so).

56. RONALD L. GOLDFARB, THE CONTEMPT POWER 1 (1963).

57. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

58. *See, e.g.*, *Ex parte* Terry, 128 U.S. 289, 313 (1888) ("[A]lthough arbitrary in its nature and liable to abuse," the contempt power is nonetheless "absolutely essential to the protection of the courts."); Paul A. Grote, Note, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1248 (2011) ("The potential for abuse of the contempt power is readily apparent.").

59. Bloom v. Illinois, 391 U.S. 194, 202 (1968).

adjudicating, and sanctioning the contumacious conduct,"[60] the contempt power "uniquely is liable to abuse."[61]

These concerns are not recent phenomena; rather, courts and Congress have attempted to curb these "inherent" contempt powers for centuries. For example, in *Ex parte Robinson*[62] the Supreme Court ruled that because the Judiciary Act of 1789 limited the types of punishments available in contempt cases to fines and jail time, disbarment was an abuse of the contempt power.[63] In reaching this conclusion, Justice Field's majority opinion held that while "[t]he power to punish for contempts is inherent," it is not an unbridled grant of authority and can be limited and defined by acts of Congress.[64]

B. Classifications of Contempt

In an effort to curb abuse of discretion, contempt law is divided into criminal and civil contempt, and each of those categories is further subdivided into "direct" and "indirect" contempt.[65] The difference between civil and criminal contempt is nebulous, and courts often apply the wrong label to their contempt orders.[66] Some confusion stems from the fact that whether contempt is civil or criminal has no relation to whether the underlying litigation is civil or criminal.[67] As a result, acts in criminal proceedings can lead to participants being held in civil contempt,[68] and civil trials can produce

60. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994).

61. *See id.* (noting that contempt power's "fusion of legislative, executive, and judicial powers 'summons forth ... the prospect of "the most tyrannical licentiousness" ' " (quoting Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 822 (1987))).

62. 86 U.S. (19 Wall.) 505 (1873).

63. *Id.* at 512.

64. *Id.* at 510.

65. *See* Grote, *supra* note 58, at 1248.

66. *See* Wayne R. Johnson, Note, *North Dakota's New Contempt Law: Will It Mean Order in the Court?*, 70 N.D. L. REV. 1027, 1037 (1994).

67. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 792–93 (1987) (involving violators of an injunction prosecuted and found guilty of criminal contempt); Stilley v. Fort Smith Sch. Dist., 238 S.W.3d 902, 911 (Ark. 2006) ("In determining whether a particular action by a judge constitutes criminal or civil contempt, the focus is on the character of relief rather than the nature of the proceeding." (citations omitted)).

68. *See* Shillitani v. United States, 384 U.S. 364, 365 (1966) (holding that two-year jail terms imposed on men who refused to testify in front of a grand jury under the Narcotics Control Act of 1956 constituted civil remedies due to the "conditional nature" of the sentences, which could be purged if the men testified).

criminal contempt prosecutions.[69] Furthermore, trial courts often look to statutes that separately define the disobedient acts constituting civil and criminal contempt when deciding whether to hold somebody in civil or criminal contempt, but reviewing courts do not actually define contempt by whether the trial court termed their proceeding as being for civil or criminal contempt. Instead, appellate courts classify a contempt as civil or criminal based on the nature of the sentence imposed on the contemnor, regardless of the label given to the sentence in the lower court.[70]

It is sometimes difficult to discern what "type" of action the court has taken. As a general rule, civil contemnors are punished in a remedial nature, intended to coerce them into doing something they had refused to do,[71] while criminal contempt involves a punitive sanction.[72] These principles seem basic but are complicated by corollary penalties designed to coerce and punitive measures that have the side effect of coercing future adherence to a court's authority.[73] Consider the following anecdote from the "Philosophy of Law" chapter of the *New York Times* best-selling book *Plato and a Platypus Walk into a Bar . . . .*[74] in which Thomas Cathcart and Daniel Klein use jokes to illustrate basic philosophical concepts:

> A man waits all day in traffic court for his case to be heard. At long last it's his turn to stand before the judge, but the judge only tells him he will have to come back tomorrow, as court is being adjourned for the day. In exasperation, the man snaps, "What the Hell for?"
>
> The judge snaps back, "Twenty dollars for contempt of court!"
>
> The man pulls out his wallet. The judge says, "You don't have to pay today."

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69. *See* Hicks v. Feiock, 485 U.S. 624, 641 (1988) (remanding a contempt conviction for failure to pay child support so that the lower courts could determine whether the defendant had been held in civil or criminal contempt).

70. *See, e.g., id.* at 631 ("[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling."); *Shillitani*, 384 U.S. at 369 ("The fact that both the District Court and the Court of Appeals called petitioners' conduct 'criminal contempt' does not disturb our conclusion" that the contempt was actually civil).

71. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911) (noting that a civil contemnor can "discharge himself at any moment by doing what he had previously refused to do").

72. *See id.* at 443.

73. *Id.* ("It is true that either form of imprisonment has also an incidental effect.").

74. THOMAS CATHCART & DANIEL KLEIN, PLATO AND A PLATYPUS WALK INTO A BAR . . .: UNDERSTANDING PHILOSOPHY THROUGH JOKES (Penguin Books 2008) (2006).

> The man says, "I'm just checking to see if I have enough for two more words."[75]

The book is not exactly a dense philosophical treatise, but the joke effectively explains the overlaps between the types of contempt. The judge levied a fine directly following the man's courtroom outburst, so the contempt sanction seems punitive in nature, which is indicative of criminal contempt. But the fine also caused a pause before further disturbance of the courtroom, a "remedial" effect characteristic of civil contempt.

In response to this "characterization" problem, and since it is important for courts "to understand in advance the tools that are available to them in ensuring swift and certain compliance with valid court orders,"[76] reviewing courts do not attempt to discern the subjective intent of a lower court judge. Instead, they focus on the objective characteristics of a trial court order that create a "clear dividing line" between sanctions that are *primarily* coercive and those that are *primarily* punitive.[77]

The common catchphrase characterizing the remedial nature of civil contempt is that the contemnors "carry the keys" to their jail cell.[78] Imprisonment is remedial if "the defendant stand[s] committed unless and until he performs the affirmative act required by the court's order,"[79] and a fine is remedial if it is paid to the complainant or if the defendant can avoid paying a fine to the court through an affirmative act.[80] Alternatively, criminal contempt sanctions are those in which "the disobedience is a thing accomplished" and the punishment "cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience."[81] Therefore, at the most basic level, civil contempt involves punishment imposed *until* an act occurs, while criminal

75. *Id.* at 166–67.

76. Hicks v. Feiock, 485 U.S. 624, 636 (1988).

77. *See id.* at 636–37; *see also* Shillitani v. United States, 384 U.S. 364, 370 (1966) ("The test may be stated as: what does the court *primarily* seek to accomplish by imposing [this] sentence?" (emphasis added)).

78. *See, e.g.*, *Gompers*, 221 U.S. at 442.

79. *Id.*; *see also Shillitani*, 384 U.S. at 365 (holding that two-year contempt sentences accompanied by a purge clause allowing defendants to be released before their sentences were completed if they agreed to answer questions posed to them by a grand jury constituted civil contempt).

80. *Hicks*, 485 U.S. at 632.

81. *Gompers*, 221 U.S. at 442.

contempt entails punishment that is inflicted *because* an act occurred.[82]

The distinction between direct and indirect contempt is easier to define. Direct contempts have long been identified as "those which are committed within the presence of the court, while in session, or so near to the court as to interrupt its proceedings," while indirect contempts are those "arising from matters not transpiring in court, but by refusing to comply with its orders and decrees which are to be performed elsewhere."[83] For example, in the hypothetical scenario presented in this Recent Development's Introduction, the brothers committed indirect contempt by shirking their responsibilities under money judgments entered against them. By contrast, they committed direct contempt when they cursed the judges after being sentenced.

These four distinctions are important because they have a direct impact on the due process rights of those charged with contempt.[84] Few procedural protections are afforded civil contemnors because those sanctions are seen as avoidable and remedial.[85] Criminal contempt, though, is "a crime in the ordinary sense,"[86] so those charged with criminal contempt "are entitled to full criminal process."[87] Nevertheless, the Supreme Court has provided that summary prosecutions of direct criminal contempts constitute an exception to this requirement because the defiant conduct occurred

82. *See* Grote, *supra* note 58, at 1258. Grote notes that one basic test applied by some courts to classify contempt is that "[c]ivil contempt is prospective, while criminal contempt is retrospective." *Id.* The distinction here may be best illustrated through a pop culture example. On November 2, 2011, actress Lindsay Lohan was sentenced for violating the terms of her probation by skipping therapy sessions and arriving late for community service. Alan Duke, *Lindsay Lohan Gets Jail Time for Probation Violations*, CNN (Nov. 2, 2011), http://articles.cnn.com/2011-11-02/entertainment/showbiz_lohan-probation-hearing_1_necklace-theft-judge-stephanie-sautner-probation?_s=PM:SHOWBIZ. Her sentence included a 30-day jail term, plus an additional 270-day sentence that could be purged through the completion of community service and psychotherapy. *Id.* In this instance, the 30-day sentence was considered criminal contempt, punishing her past violations, while the 270-day sentence was considered civil contempt, coercing her compliance with court stipulations in the future. *Id.* When she received the sentence, the judge told Lohan that she was "putting the keys to the jail in the defendant's hands." *Id.*

83. STEWART RAPALJE, A TREATISE ON CONTEMPT INCLUDING CIVIL AND CRIMINAL CONTEMPTS 26–27 (Fred B. Rothman & Co. 1981) (1890).

84. *See* Grote, *supra* note 58, at 1280 ("The distinction between civil and criminal contempt . . . serves only to provide fewer rights to civil contemnors, even though there is nothing substantively different about the conduct."); Johnson, *supra* note 66, at 1033.

85. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994).

86. Bloom v. Illinois, 391 U.S. 194, 201 (1968).

87. *Bagwell*, 512 U.S. at 833.

before the court, and therefore, fewer safeguards are necessary in order to secure an accurate factual finding.[88]

C. Oliphant, *Contempt, and Indian Country*

The application of these concepts to tribal courts is extremely complex. On a purely theoretical level, *Oliphant* did not leave Indian reservations as outposts for non-Indian outlaws,[89] since non-Indians are still accountable for their acts on the reservation in federal and state courts.[90] The same is not true for direct contempt.[91] Even if a state court had the resources and incentive to prosecute non-Indian tribal court criminal contemnors, a longstanding principle of contempt law is that "[n]o court can punish a contempt of another court."[92] For indirect contempts, though, courts can give full faith and credit to orders of other courts, but the measures Congress has crafted to achieve this purpose actually further impede tribal courts seeking to enforce their authority.[93] In the 2000 amendments to the Violence Against Women Act,[94] Congress decreed that any protection order issued by a state, tribe, or territory will receive full faith and credit by courts of other states, tribes, or territories, and that courts and law enforcement must enforce those orders as if they were the state, tribe, or territory that issued them.[95] However, Congress singled out tribal court jurisdiction, limiting their means of enforcement of the Act to "civil contempt proceedings, exclusion of

88. *Id.* at 832.

89. Krakoff, *supra* note 37, at 284 ("In theory, *Oliphant* does not result in a legal vacuum for criminal behavior by non-Indians in Indian country."). As a practical matter, the "federal court system is far too encumbered to prosecute the numerous minor crimes associated with life on the reservation," and "[s]tates receive little or no revenue from tribal sources and are reluctant to allocate scarce funds to enforce tribal laws on the reservation." Heisey, *supra* note 55, at 1054.

90. *See* Heisey, *supra* note 55, at 1053 ("Federal, state, and tribal courts claim varying degrees of criminal jurisdiction based on different concepts of sovereignty.").

91. *See* CANBY, *supra* note 31, at 177.

92. RAPALJE, *supra* note 83, at 15 ("Notwithstanding the fact that contempts are regarded as offences against the state [and] it would seem to follow that any tribunal having criminal jurisdiction should have power to punish them when committed anywhere within the territory over which that jurisdiction extends, yet it is a well-settled rule that that court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it . . . .").

93. *See* Melissa L. Tatum, *Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need To Know*, 13 KAN. J.L. & PUB. POL'Y, no. 1, 2003–2004 at 125, 130.

94. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified as amended in scattered sections of 18, 20, 28, and 42 U.S.C.).

95. *Id.* §§ 1101(b), 1494.

violators from Indian lands, and other appropriate mechanisms."[96] By specifically addressing civil remedies while omitting criminal sanctions,[97] Congress seemingly reinforced the unspoken assumption regarding criminal jurisdiction in tribal courts,[98] thus preventing tribal courts from exercising criminal contempt powers against non-Indians as a general proposition.

Several commentators indicate (in language suggesting varying levels of confidence) that tribal courts may retain sovereignty to use criminal sanctions to summarily punish direct contempt by non-Indians.[99] This assertion is based on the principle that contempt powers are at their "pinnacle ... where contumacious conduct threatens a court's immediate ability to conduct its proceedings."[100] The Supreme Court has indicated that despite its label, criminal contempt is only as "criminal" as the process it warrants, and contemnors need not be afforded criminal process in summary prosecutions of direct contempt.[101] Still, for this theory to be legally sound, *Oliphant* cannot stand for circumscription of criminal punishment of non-Indians but rather for a ban on criminal process. Such a conclusion is logical because most court remedies are punitive to some degree. If tribal courts were prevented from using any punitive measures against non-Indians, they would have essentially no power over non-Indians at all, even in civil cases where their jurisdiction over non-Indians has been upheld in certain circumstances.[102] Furthermore, Justice Rehnquist specifically stated in the conclusion of the *Oliphant* opinion that tribal courts "do not have

96. 18 U.S.C. § 2265(e).

97. *See* Tatum, *supra* note 93, at 130.

98. *See id.* ("[I]t is only logical to conclude that Congress did not intend to alter the existing rules for tribal criminal jurisdiction.").

99. *See* CANBY, *supra* note 31, at 177 ("One small area of criminal jurisdiction over non-Indians may survive *Oliphant*. It seems likely that a tribal court would still have power to enforce decorum in its courtroom by the use of criminal contempt power against disruptive non-Indians. The exercise of such power may be essential to the very existence of a tribal court, and is therefore not inconsistent with the status of a tribe as a dependent sovereign."); Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 19 (2006) ("[T]ribal courts potentially retain criminal contempt power over non-Indians."); White et al., *supra* note 7, at 438–39 ("[A] tribal court judge could summarily (i.e., immediately) detain a non-Indian contemnor to preserve the safety, integrity, and order of the court.").

100. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 832 (1994).

101. *See supra* note 88 and accompanying text.

102. *See* Montana v. United States, 450 U.S. 544, 566 (1981) (holding that tribes retain civil jurisdiction "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").

inherent jurisdiction to try and to punish non-Indians" in the absence of congressional grant.[103] That language could be interpreted to indicate that the power to try non-Indians and the power to punish them are severable concepts, with punishment only barred if following a criminal trial. Furthermore, because it is well-established that even civil contempt remedies are somewhat punitive,[104] Congress's authorization of tribal courts' use of civil contempt powers on non-Indians demonstrates that Congress is tolerant of tribal courts' *punishment* of non-Indians, as long as it occurs separately from *criminal prosecution* of them. Therefore, it should be unequivocally accepted that summary prosecution of direct criminal contempt in tribal courts is appropriate, regardless of who is being punished. Under this rule, if Dawn Russell had insulted Judge Saunooke during Hernandez and Watty's larceny proceedings instead of over the phone several days later, a summary proceeding for criminal contempt would have been appropriate. Because her contemptuous act occurred out of court, though, and Russell had to be afforded full criminal process, a different analytical framework for the tribal court's powers applies.

IV. MEANS BY WHICH TRIBAL COURTS CAN VINDICATE THEIR AUTHORITY

A. *The Outer Limits of Quasi-Sovereignty*

In *Oliphant*, the Court noted that Congress should weigh the competency of tribal courts and the prevalence of crime by non-Indians on reservations in the future when deciding if it is appropriate to grant criminal jurisdiction over non-Indians to tribal courts.[105] Given the difficulties federal and state authorities have policing reservations, the shifting realities of reservation economies and demographics in the wake of the Indian Gaming Regulatory Act, as well as the due process protections secured to tribal court defendants

103. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). In the preceding sentence, Justice Rehnquist lent additional credence to the notion that *Oliphant* deals with criminal trials separate from punishment of non-Indians by only mentioning criminal trials when discussing the process for potential restoration of sovereignty to tribes. *See id.* ("[T]hese are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.").

104. *See, e.g.*, Hicks v. Feiock, 485 U.S. 624, 635 (1988) ("In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both . . . .").

105. *Oliphant*, 435 U.S. at 211–12.

by the Indian Civil Rights Act of 1968, many commentators have suggested it is time to do so.[106]

But while the EBCI waits for that congressional grant of power, it has unearthed potsherds of sovereignty left in the crevices of the *Oliphant* decision. Under the EBCI's tribal code, "[t]he Judicial Branch shall not have jurisdiction over matters in which the exercise of jurisdiction has been *specifically prohibited* by a binding decision of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit or by an Act of Congress."[107] The tribal code gives the tribal court some room to be creative, as it does not seem to acknowledge any "unspoken assumptions"[108] regarding the court's power. As a result, the tribal court must abstain from exercising its jurisdiction only where doing so has been expressly precluded.

One of the EBCI's most empowering interpretations of the scope of its authority under the statute is that the tribe views *Oliphant* as applicable only to citizens of the United States. In 2005, the Cherokee Supreme Court of North Carolina upheld a decision by the Cherokee Tribal Court to exercise criminal jurisdiction over a Mexican citizen who committed second-degree child abuse while living with a Cherokee woman on the Qualla Boundary.[109] Relying on *Oliphant*, the appellant challenged his prosecution, but the Cherokee Supreme Court held that "[i]n nine separate places in the majority opinion in *Oliphant*, Justice . . . Rehnquist refers to 'non-Indian citizens of the United States' "; because Justice Rehnquist never addressed the issue of non-citizens of the United States directly,[110] the tribe's exercise of jurisdiction was proper.[111]

The EBCI's statutory definition of who is "Indian" also expands the breadth of the tribal court's criminal jurisdiction to include some

106. *See, e.g.*, Ennis, *supra* note 6, at 572 ("For these reasons, Congress should abrogate the *Oliphant* decision and reaffirm inherent tribal jurisdiction over reservation crimes."); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant *Fix*, 93 MINN. L. REV. 1902, 1925 (2009) (arguing that because of sexual violence problems on Indian reservations, the Indian Civil Rights Act "must be amended, as it was for the *Duro*-fix, to include 'all persons,' " which "would enable tribes to extend their criminal jurisdiction to include non-Indians").

107. CHEROKEE CODE § 7-2(c) (2010) (emphasis added), *available at* http://www.narf.org/nill/Codes/ebcicode/7judicial.pdf.

108. *See supra* Part II.

109. *See* E. Band of Cherokee Indians v. Torres, No. CR 03-1443, 2005 N.C. Cherokee Sup. Ct. LEXIS 6, at *18 (N.C. Cherokee Sup. Ct. Apr. 12, 2005).

110. *Id.* at *7–8 (quoting *Oliphant*, 435 U.S. at 210–11).

111. *Id.*

people who are not technically members of any tribe.[112] Federal courts generally use a two-pronged analysis to determine Indian status, looking to whether the defendant has "some Indian blood" and is recognized as an Indian by a tribe or the federal government.[113] The "recognition" prong of this test is open to various interpretations, and some federal courts have ruled that "recognized" does not necessarily mean enrolled.[114] EBCI magistrates use a test under which members of federally recognized tribes and EBCI "first descendants" (those who have a parent who is a tribal member but who do not have the requisite blood quantum for membership) are automatically considered Indians for the purposes of the court system.[115] However, under the EBCI test, a member of a state-recognized tribe or a person who "holds [him or] herself out as an Indian" can also be considered Indian at the discretion of the magistrate.[116]

The EBCI also interprets *Oliphant*'s proscription of "criminal jurisdiction" as pertaining to personal jurisdiction over non-Indian defendants, rather than subject matter jurisdiction over criminal matters involving non-Indian perpetrators.[117] Because personal

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112. *See* N.C. CHEROKEE R. CRIM. P. 6(b)(1), *available at* http://www.narf.org/nill/Codes/ebcicode/15criminalpro.pdf.

113. *See* United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) ("[T]he generally accepted test ... asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."), *cert. denied*, 130 S. Ct. 2364 (2010); *see also* United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (stating that courts generally rely on the two-prong *Stymiest* test to determine Indian status); Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 186 (2006) (describing the prevalence of the two-prong test).

114. *See* Meyring, *supra* note 113, at 193–207 (attempting to identify and explain the "various methods adopted by courts in construing the meaning of recognition"). Under the prominent "*St. Cloud* Test," laid out by a South Dakota federal court in 1988, "recognition" should be guided by weighing four factors. St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988). The court acknowledged that "a person may still be an Indian though not enrolled with a recognized tribe" and ruled that

> [i]n declining order of importance, these factors [to determine 'recognition'] are: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

Id.

115. *See* N.C. CHEROKEE R. CRIM. P. 6(b)(1)(B), *available at* http://www.narf.org/nill/Codes/ebcicode/15criminalpro.pdf.

116. *See id.* at 6(b)(1)(E).

117. *See id.* at 6(b)(2).

/Codes/ebcicode/15criminalpro.pdf ("A non-Indian may waive the issue of personal jurisdiction and consent to proceeding in the Cherokee Court."). *But see* 2 CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 99 (2004)

jurisdiction is waivable but subject matter jurisdiction is not, the EBCI's stance allows non-Indian defendants to consent to a proceeding in Cherokee Tribal Court.[118] Finally, since a "nonmember's presence and conduct on Indian lands are conditioned by the limitations a tribe may choose to impose,"[119] there are civil remedies—most notably banishment from the reservation—uniquely available to the EBCI and other tribes that can be used to punish those who cannot be brought to tribal criminal court.[120]

B. In re Russell *and the Limits of Contempt's Inherency*

Dawn Russell was prosecuted for an indirect contempt because her actions occurred away from the court. The Cherokee Tribal Court imposed a criminal sanction because Russell's sentence could not be purged through compliance with the tribal court's mediation order and, therefore, was primarily punitive in nature. The crux of the Cherokee Tribal Court's reasoning for having the power to punish Russell in this manner was that "[t]he inherent power of the Court to punish contempt is separate and distinct from the power of the Court to adjudicate criminal cases in which the EBCI alleges that a particular defendant has violated the law."[121] Through this language, the Cherokee Tribal Court attempted another creative circumvention of *Oliphant*, but in doing so turned a blind eye to multiple Supreme Court decisions speaking directly to the nature of criminal contempt as an offense.

The tribal court's conclusion relies on language from the 1895 case *In re Debs*,[122] which states that "[i]n order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof."[123] However, the tribal court took this language out of context. The *Debs* decision stated that criminal procedure protections are unwarranted in contempt proceedings,[124] with an argument predicated on the

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(warning that this interpretation of *Oliphant* is "controversial" and that "it may be unlikely that a federal court would uphold the idea of criminal jurisdiction" through consent).

118. N.C. CHEROKEE R. CRIM. P. 6(b)(2), *available at* http://www.narf.org/nill/Codes/ebcicode/15criminalpro.pdf.

119. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982).

120. *See* White et al., *supra* note 7, at 440–45.

121. *In re* Russell, No. SC-11-1, slip op. at 4 (N.C. Cherokee Ct. Aug. 15, 2011), *available at* http://turtletalk.files.wordpress.com/2011/08/in-re-russell.pdf.

122. 158 U.S. 564 (1895).

123. *Russell*, slip op. at 4 (quoting *Debs*, 158 U.S. at 595).

124. *Debs*, 158 U.S. at 594.

principle that contempt is not a crime.[125] The Supreme Court renounced that interpretation in *Bloom v. Illinois*,[126] which "specifically rejected *Debs*' rationale that courts must have self-contained power to punish disobedience of their judgments."[127] After *Bloom*, criminal contemnors are treated no differently from other criminal defendants, since "convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same."[128]

One of the few federal court cases dealing with contempt powers in tribal courts took this stance when discussing whether a Cherokee woman could be held in contempt in a Ute Indian court.[129] The distinction between civil and criminal contempt was not essential to the court's ruling because the defendant had not exhausted all tribal court remedies.[130] But the decision pointed out that if the contempt was considered criminal, the Ute court still could punish the Cherokee woman despite *Duro*'s divestiture of tribal courts' criminal jurisdiction over non-tribe member Indians because of the *Duro* Fix.[131] The court's logic features an implicit recognition of the inherent limitations of contempt powers and the necessity for conferred jurisdiction to punish criminal contempt in tribal court.

The Cherokee Tribal Court's other rationale for its decision is that "[t]he Supreme Court has never expanded *Oliphant* into the contempt arena, and nor would such an expansion be expected."[132] While the Supreme Court may not have directly tackled the contempt issue, the 2000 amendments to the Violence Against Women Act expanded *Oliphant* to cover criminal contempt of court through the type of "unspoken assumption" that served as the foundation of *Oliphant*.[133] The contrary construction of *Oliphant* suggested by the tribal court in *In re Russell* is far too narrow, reducing the Supreme Court's ruling to a bright-line procedural rule rather than a complex concept of sovereignty.

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125. *Id.* at 596.

126. 391 U.S. 194 (1968).

127. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 823 (1987) (Scalia, J., concurring).

128. *Bloom*, 391 U.S. at 201.

129. *See* Lyda v. Tah-Bone, 962 F. Supp. 1434 (D. Utah 1997).

130. *Id.* at 1435.

131. *Id.*; *see supra* notes 48–55 and accompanying text.

132. *In re* Russell, No. SC-11-1, slip op. at 4 (N.C. Cherokee Ct. Aug. 15, 2011), *available at* http://turtletalk.files.wordpress.com/2011/08/in-re-russell.pdf.

133. *See supra* text accompanying notes 94–98.

The Cherokee Tribal Court seemed to take exception with the fact that Russell had only come before the court in the first place because she filed a criminal complaint in the court, and emphasized that "[i]t would be a curious result indeed if a non-Indian person could initiate the finding of probable cause on a criminal defendant and not be subject to the power and processes of the Court."[134] Apparently exasperated by the perceived unfairness and absurdity of the situation, the court simply wrote, "[t]hat cannot be the law,"[135] with no other explanation as to why it could not be. The concept that somebody could initiate an action in a court and then abandon it at his whim is indeed counterintuitive, but the EBCI might not have been as helpless as the tribal court's opinion lets on. The Supreme Court has held that a "judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate."[136] It became clear to the Cherokee Tribal Court sometime between February 28 and March 30 that Russell would not comply with the mediation order.[137] The court did not sentence the shoplifters from Russell's store until April 13.[138] Because the EBCI's laws only require five days' notice prior to civil contempt proceedings,[139] the court had ample time prior to sentencing the shoplifters to coerce Russell's compliance through remedial civil contempt sanctions if mediation of this issue was of such importance to the court.[140]

C. Alternative Means of Enforcing Authority

Advocates for change in tribal court jurisdiction favor one of two avenues: the legislative branch or the judicial branch. Judge Martin, who issued the *In re Russell* decision, has made it clear through his legal scholarship that he believes *Oliphant* was an ill-informed

134. *Russell*, slip op. at 5.

135. *Id.*

136. Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966).

137. *Russell*, slip op. at 2.

138. *Shillitani*, 384 U.S. at 372. If mediation was of such importance to the court, it had ample time prior to sentencing the shoplifters to coerce Russell's compliance through remedial civil contempt sanctions. *See* CHEROKEE CODE § 1-27 (2010), *available at* http://www.narf.org/nill/Codes/ebcicode/1civilpro.pdf (authorizing imprisonment of those who fail to comply with an order of the court as long as that person is able to comply with the order and the purpose of the order "may still be served by compliance with the order").

139. *See* CHEROKEE CODE § 1-29(a) (2010), *available at* http://www.narf.org/nill/Codes/ebcicode/1civilpro.pdf.

140. *See id.* § 1-27.

decision that should be re-examined judicially.[141] In Judge Martin's view, Justice Rehnquist relied on an assumption that had gone unspoken because it did not exist, especially in relation to the Cherokee, who exercised criminal jurisdiction with the government's approval as far back as the 1820s.[142] Specifically, Judge Martin believes that "[t]he following question should be presented to the Supreme Court of the United States: Consistent with their dependent status, do the Cherokee Indians retain the sovereign power, which they previously exercised, to try and punish non-Indian citizens of the United States for violations of their laws?"[143] For this to happen, the Cherokee Tribal Court would have to push the boundaries of its criminal jurisdiction in hopes that a live controversy reaches the Supreme Court on appeal.[144]

There are critics of this approach who instead advocate for a more conservative means for effecting change. First, some commentators argue that to push the envelope risks cultivating further disrespect for the reservation communities by those who see them as operating beyond their lawful bounds.[145] This concept is especially relevant to contempt, where respect forms the core of the issue because, as the Supreme Court stated in one of its most influential contempt cases, "[g]enuine respect, which alone can lend true dignity to our judicial establishment, will be engendered . . . by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."[146] Therefore, if a tribal court attempts to use its criminal contempt powers to instill respect among non-Indians, the court's actions can actually have the opposite effect. To complicate matters further, tribal courts are already unfairly scrutinized as to their legitimacy.[147] As a

141. *See generally* J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823–1835*, 32 N.C. CENT. L. REV. 27 (2009) (arguing for a re-evaluation of *Oliphant*'s "bedrock assumptions" in light of the historical record of the Cherokee Supreme Court).

142. *Id.* at 39.

143. *Id.* at 63.

144. *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 356 (1911) ("[T]he exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.").

145. *See* Heisey, *supra* note 55, at 1055 (arguing that tribal entities who use "self-help" methods to "stem the tide of non-Indian offenders" are using tactics "repugnant to both the interests of the United States and the tribal judicial systems, and can be highly destructive to the local communities").

146. Bloom v. Illinois, 391 U.S. 194, 208 (1968).

147. *See* Ennis, *supra* note 6, at 589 ("Considering the opportunity for habeas review, the safeguards inherent in the ICRA . . . and the demonstrated reliability of tribal

result, some argue that if they are ever to regain criminal jurisdiction over non-Indians through congressional grant, they must first erase doubts regarding their overall fairness.[148] Under this view, tribal courts should take a cautious stance in hopes that Congress will come to view them as appropriate forums for all disputes and restore their criminal jurisdiction over non-Indians in the near future.

This approach does not leave a court powerless to foster respect. Tribal courts should take care to nest any punitive measures within the civil remedies they impose on contemnors. For example, tribal courts can incarcerate those who violate court orders by requiring restitution, and imposing jail time as a means of coercing compliance with the restitution.[149] In doing so, tribal court orders should specifically state that the purpose of an incarceration is to encourage compliance with a previously issued order and explain what the contemnor must do to comply.[150]

There is some evidence that the more cautious approach is working. The Tribal Law and Order Act, passed in 2010, recognized the domestic abuse and drug-related problems facing Indian Country in its findings and took action to combat those issues.[151] Still, the Act also made it clear that "[n]othing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians."[152] However, a bill introduced in the Senate by Hawaii Senator Daniel Akaka, the SAVE Native Women Act,[153] goes much further. That bill would allow tribes "special domestic violence criminal jurisdiction," which can be exercised over those who violate domestic violence protective orders if the victim is Indian.[154]

Even with improvements to their situation potentially on the horizon, it is understandable that anything less than the return of full territorial jurisdiction is offensive to those tribes that had exercised criminal jurisdiction over non-Indians prior to 1978. And it is possible that by exercising jurisdiction in borderline cases, like the Cherokee Tribal Court did in *In re Russell*, the Supreme Court may someday

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judiciaries, criticisms about fundamental tribal court fairness and competence appear exaggerated at best.").

148. *See* Tatum, *supra* note 93, at 135 (stating that tribal courts must "reduce questions about their authority to deal fairly with non-members," and that "[o]nly then will tribal court[s] regain the jurisdiction so wrongfully limited by the Supreme Court").

149. White et al., *supra* note 7, at 441–42.

150. *Id.*

151. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

152. *Id.* § 206.

153. *See* SAVE Native Women Act, S. 1763, 112th Cong. (2011).

154. *Id.* § 204(b).

revisit *Oliphant*.[155] However, because the Cherokee Tribal Court's ruling regarding Dawn Russell is based on overruled precedent, and because the case can potentially be decided on procedural grounds without addressing *Oliphant*, the Cherokee Supreme Court should overrule the tribal court's decision before the case reaches the federal courts.

CONCLUSION

If the Cherokee Tribal Court had attempted in *In re Russell* to clarify the jurisdictional haze surrounding criminal contempt by declaring that it could summarily punish a non-Indian contemnor for a direct contempt, it would have been correct in elucidating a previously unclear proposition. However, because that case involved an indirect criminal contempt and the Cherokee Tribal Court failed to acknowledge the ability of legislatures to limit the inherency of contempt powers, the court went beyond what is permissible under even a liberal reading of *Oliphant*. The inability of tribal courts to use criminal contempt as a remedy against non-Indians is undoubtedly troubling. However, until the tribal courts are conferred criminal jurisdiction over non-Indians, they risk tainting their legitimacy if they do not recognize the delineation between direct and indirect contempt. In the absence of criminal jurisdiction, tribal courts must be proactive in capitalizing on the effectual similarities of criminal and civil contempt sanctions, tailoring contempt remedies to the realities of Indian country, and including punitive sanctions within remedial measures.

JOSEPH CHILTON

155. Professor Matthew L.M. Fletcher of Michigan State University College of Law has noted that because of a continually shrinking docket size and other factors, it would logically follow that the current Supreme Court "likely is not going to accept an appeal on an Indian law matter unless there is a circuit split," yet "the Court always accepts more Indian cases for review than the field would appear to justify." *See* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 604–05 (2008).