

BANISHMENT OF NON-NATIVES BY ALASKA NATIVE TRIBES: A RESPONSE TO ALCOHOLISM AND DRUG ADDICTION

*Halley Petersen**

ABSTRACT

Since 2015, at least a dozen tribal court banishments have been reported in Alaska, mainly involving alleged bootleggers and drug dealers in rural communities. Rural Alaska communities, which are predominantly Alaska Native, face high rates of alcoholism, drug abuse, and related crime. Faced with these drug and alcohol issues and insufficient access to law enforcement, it is not surprising that some communities have decided to banish offenders. However, banishment is not currently legal, at least when imposed upon non-Native citizens. Tribal courts lack sufficient jurisdiction over non-Natives to banish them for bootlegging or dealing drugs. Tribal governments are sovereigns with inherent powers, but they are subject to certain restrictions under the federal government. Land-based jurisdiction is insufficient to claim jurisdiction in these cases because Alaska lacks significant Indian country and the Montana factors fail to provide definitive support. Tribal jurisdiction, however, should be expanded to allow tribal courts to banish non-Natives for violations of drug and alcohol laws to improve access to justice, decrease the burden on state law enforcement, and improve welfare in rural Alaskan communities.

I. INTRODUCTION

In March 2017, the Togiak tribal council banished Ronald Oertwich, a longtime non-Native resident of Togiak, Alaska. Oertwich's banishment followed accusations that he had attempted to import alcohol into Togiak, a dry community, to resell it.¹ Oertwich initially complied with the

Copyright © 2018 Halley Petersen.

*J.D. Candidate, Duke University School of Law, 2019; B.S.F.S. Science, Technology, and International Affairs, Georgetown University, 2014.

1. See Lisa Demer, *Tribal Banishment of Togiak Non-Native Draws State Investigation*, ANCHORAGE DAILY NEWS (Apr. 4, 2017), <https://www.adn.com/alaska-news/rural-alaska/2017/04/03/governor-state-officials-examining-recent-banishment-of-a-togiak-man-who-is-nonnative/>; see also

banishment order and boarded a flight to nearby Dillingham.² After consulting with an attorney in Anchorage, Oertwich elected to return to Togiak and challenge the banishment order's authority.³ He was subsequently jailed for several days in a small holding cell, bound with duct tape, dragged to a waiting plane, and flown back to Dillingham.⁴ Oertwich was allowed back to collect his things but now resides with family in Oregon.⁵

Since 2015, at least a dozen tribal court banishments have been reported in Alaska, mainly involving alleged bootleggers and drug dealers⁶ in rural communities facing high rates of alcoholism, drug abuse, and related crimes.⁷ While banishment remains an uncommon practice, its potentially drastic ramifications are clear. For example, Ronald Oertwich ran a bed and breakfast in Togiak before his banishment.⁸ He was forced to leave behind his business, his possessions, and his community of thirty years.⁹

Although the effects of banishment on an individual are potentially severe, they must be considered within the broader context of rural drug and alcohol issues in Alaska. Drug and alcohol abuse are substantial

Dave Bendinger, *Troubles for Togiak After Banishing Suspected Bootlegger*, KDLG (Apr. 7, 2017), <http://kdlg.org/post/troubles-togiak-after-banishing-suspected-bootlegger#stream/0>. The tribal police officer, Leroy Nanalook, obtained a tribal search warrant for a suspicious tote addressed to Ronald Oertwich, a known bootlegger in the community. *Id.* The tote had twenty bottles of R&R and two bottles of Crown Royal - a felony offense in Alaska. *Id.* He was also previously arrested on state felony charges in 2011 after state troopers seized a package with two pounds of marijuana intended for Oertwich. Margaret Bauman, *Two Pounds of Marijuana Found in Express Mail*, BRISTOL BAY TIMES (Apr. 19, 2011), http://www.thebristolbaytimes.com/article/1116two_pounds_of_marijuana_found_in_express_mail.

2. Bendinger, *supra* note 1.

3. Demer, *supra* note 1.

4. *Id.*

5. Lisa Demer, *State Won't Interfere with Tribal Banishments Despite Civil Rights Issues, AG Says*, ANCHORAGE DAILY NEWS (Oct. 7, 2017), <https://www.adn.com/alaska-news/rural-alaska/2017/10/07/state-wont-interfere-with-tribal-banishments-despite-civil-rights-issue-ag-says/>.

6. See, e.g., Teresa Cotsirilos, *Akiak Attempts to Banish Former VPO, Alleged Bootlegger*, KYUK (Aug. 23, 2017), <https://www.alaskapublic.org/2017/08/23/akiak-attempts-to-banish-former-vpo-alleged-bootlegger/>.

7. See, e.g., Sari Horwitz, *In Rural Villages, Little Protection for Alaska Natives*, WASHINGTON POST (Aug. 2, 2014), http://www.washingtonpost.com/sf/national/2014/08/02/in-rural-villages-%E2%80%8A-little-protection-%E2%80%8A-for-alaska-natives/?utm_term=.f83ed21c7b69 (stating that the Alaska Native

city of Kake struggles with alcoholism, drug abuse, and domestic violence).

8. Demer, *supra* note 1.

9. Bendinger, *supra* note 1.

problems in rural Alaskan communities.¹⁰ Given that rural Alaskan communities are 80% Alaska Native,¹¹ drug and alcohol abuse are substantial problems for Alaska Natives as well. Indeed, Alaska sees 50% more heroin-related deaths and twice as many deaths from prescription opioids than the national average.¹² Alcohol leads to even more deaths, injuries, and arrests than heroin and prescription opioids.¹³ Alaska Natives die from alcohol abuse at a rate 7.1 times higher than U.S. whites.¹⁴

These Alaska Native communities also face some of the worst crime rates in the United States—domestic violence at ten times the national average, physical assault of women twelve times, and rape three times.¹⁵ According to the Alaska Bureau of Investigation 2014 Annual Drug Report, “the greatest contributing factor to violent crimes – including domestic violence and sexual assault – is drug and alcohol abuse.”¹⁶ In fact, 97% of crimes Alaska Natives committed, in rural and urban areas, involved alcohol or drugs.¹⁷

Elsewhere in the United States, local, state, and federal law enforcement agencies typically handle drug- and alcohol-related violations.¹⁸ However, Alaska Natives often lack adequate access to law enforcement resources.¹⁹ At least seventy-five remote Alaskan villages

10. Horwitz, *supra* note 7.

11. SCOTT GOLDSMITH, UNIV. OF ALASKA ANCHORAGE – INSTITUTE OF SOC. AND ECON. RESEARCH, UNDERSTANDING ALASKA’S REMOTE RURAL ECONOMY, UA RESEARCH SUMMARY NO. 10 (2008).

12. Lisa Demer, *Alaska’s Heroin Problem Brings Together State, Local and Federal Leaders in Search of a Solution*, ANCHORAGE DAILY NEWS (Sept. 20, 2016), <https://www.adn.com/alaska-news/rural-alaska/2016/09/20/federal-state-local-leaders-put-attention-on-alaskas-heroin-problem/>.

13. *Id.*

14. Ian Blake et al., ALASKA NATIVE MORTALITY UPDATE: 2009-2013, at 14 (Alaska Native Tribal Health Consortium, June 2016), <http://www.anthctoday.org/epicenter/publications/Mortality/Alaska-Native-Mortality-Update-2009-2013.pdf>.

15. Horwitz, *supra* note 7.

16. ALASKA STATE TROOPERS, ALASKA BUREAU OF INVESTIGATION STATEWIDE DRUG ENFORCEMENT UNIT 2014 ANNUAL DRUG REPORT 4 (2014), <https://dps.alaska.gov/getmedia/e69d3457-f666-49d9-a6cd-d4320b911a34/2014-annual-drug-report.aspx>.

17. ALASKA RURAL JUSTICE & LAW ENF’T COMM’N, INITIAL REPORT AND RECOMMENDATIONS OF THE ALASKA RURAL JUSTICE AND LAW ENFORCEMENT COMMISSION, 54 n.102 (2006), <http://www.law.state.ak.us/pdf/press/040606-ARJLEC-report.pdf>.

18. See BUREAU OF JUSTICE STATISTICS, DRUGS AND CRIME FACTS: ENFORCEMENT, <https://www.bjs.gov/content/dcf/enforce.cfm> (last visited Sept. 30, 2018) (“[F]ederal, state, and local agencies share responsibility for enforcing the Nation’s drug laws.”).

19. INDIAN LAW AND ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER (2013).

have no law enforcement presence at all.²⁰ These villages, and those that depend on minimally-trained village public safety officers, rely on Alaska State Troopers for their law enforcement needs—a force with only one trooper per million acres of land.²¹ It can often take more than a day for law enforcement to arrive in a village due to limited personnel, vast distances, and unpredictable weather—if they are able to come at all.²² In a recent incident in Quinhagak, villagers contacted state troopers over the course of several months to report their suspicions about local drug dealers.²³ Troopers did not fly to the community to investigate until after a young woman died from a drug overdose.²⁴ Faced with these drug and alcohol issues and insufficient access to law enforcement, it is not surprising that some communities have turned to banishment as a response.²⁵

The State of Alaska has elected to maintain a hands-off approach to banishment thus far—somewhat understandably given the competing community and individual interests.²⁶ Alaska Attorney General Jahna Lindemuth has stated that banishment is a traditional form of tribal justice that is processed as a private civil action over which the state has no authority.²⁷ While this approach is more understandable when banished individuals are Alaska Natives living in Alaska Native communities, its justification becomes strained when banishment is enforced against non-Natives like Ronald Oertwich.²⁸

20. *Id.*

21. Horwitz, *supra* note 7.

22. *Id.*

23. Lisa Demer, *After a Young Woman's Death From a Heroin Overdose, an Alaska Village Looks Inward*, ANCHORAGE DAILY NEWS (Sept. 20, 2016), <https://www.adn.com/alaska-news/rural-alaska/2016/09/18/after-a-young-womans-heroin-death-an-alaska-village-looks-inward/>.

24. *Id.*

25. See Rachel D'Oro, *Alaska AG Outlines State Position on Tribal Banishment*, SEATTLE TIMES (Oct. 17, 2017), <https://www.seattletimes.com/nation-world/alaska-ag-outlines-state-position-on-tribal-banishment/>. Alaska Attorney General Jahna Lindemuth has said that “[b]anishment is a very extreme remedy even under tribal law - and it's very much, I think, the community feeling that there's no law enforcement in their community,” and that people may feel banishment is the only option. *Id.*

26. *Id.*

27. *Id.*

28. Demer, *supra* note 1. Oertwich was a non-Native resident of Togiak when he was banished for alcohol importation. *Id.* And at least one other tribal court has banished a non-Native for bootlegging and drug-related offenses. See Lisa Demer, *Man Banished from Alaska Indigenous Community for Bootlegging*, RADIO CANADA INT'L (Aug. 24, 2017), <http://www.rcinet.ca/eye-on-the-arctic/2017/08/24/man-banished-from-alaska-indigenous-community-for-bootlegging/> (discussing the case of Jacques Cooper, a non-Native banished from the village of Akiak until 2040 for alleged bootlegging and selling of marijuana to minors).

The question of whether tribes can banish non-Natives for alcohol and drug violations depends on tribal jurisdiction over these issues and individuals. Tribes throughout the United States are recognized as sovereign governments with specific, defined powers.²⁹ Tribes have inherent power to determine tribal membership, regulate domestic relations among members, prescribe rules of inheritance, and create tribal governments and courts.³⁰ These tribal courts have limited jurisdiction over certain individuals and types of cases.³¹ Specifically, tribes in Alaska clearly have subject matter jurisdiction over cases involving the possession of alcohol, bootlegging, drunk and disorderly conduct, driving under the influence, the sale and possession of drugs, juvenile matters, and domestic relations.³² Additionally, while tribal courts cannot exercise criminal jurisdiction over non-Natives without congressional authorization,³³ criminal cases are often handled as civil or “quasi-criminal” cases in Alaskan tribal courts, circumventing this restriction to some extent.³⁴

In other U.S. States, tribal jurisdiction is often defined by the boundaries of Indian reservations.³⁵ However, Alaska only has one reservation in Metlakatla.³⁶ Alaska Native allotments and restricted townsites may qualify as Indian country, but no concrete determination has been made.³⁷ Thus, Alaska Native tribes must look beyond land-based jurisdiction to claim broader jurisdiction over non-Natives. Additionally, even when tribal courts have subject matter jurisdiction, non-Natives generally must consent to the tribal court’s authority, either explicitly or implicitly, for the tribal court to claim jurisdiction.³⁸

29. See ALASKA LEGAL SERVS. CORP., TRIBAL JURISDICTION IN ALASKA: CHILD PROTECTION, ADOPTION, JUVENILE JUSTICE, FAMILY VIOLENCE AND COMMUNITY SAFETY (2012), <http://www.ajc.state.ak.us/acjc/alaska%20natives/trjur12.pdf>.

30. *Id.* at 18 (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)).

31. *Id.*

32. *Id.*

33. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208 (1978).

34. See *infra* Section III(A).

35. *Frequently Asked Questions*, U.S. DEPT. OF THE INTERIOR: INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Sept. 30, 2018).

36. Krista Langlois, *Tribes Now Prosecute Non-Native Offenders, Alaska Scrambles to Catch Up*, HIGH COUNTRY NEWS (May 21, 2014), <https://www.hcn.org/blogs/goat/tribes-move-to-prosecute-non-native-offenders-alaska-scrambles-to-catch-up>.

37. ALASKA LEGAL SERVS. CORP., *supra* note 29, at 16. In general, Indian country is “the territorial area over which a tribe can make and enforce laws.” LISA JAEGAR, TRIBAL COURT DEVELOPMENT: ALASKA TRIBES at ch. 1 (3d ed. 2002), http://thorpe.ou.edu/AKtribalct/chapter_one.html. Indian country includes all land within an Indian reservation, all dependent Indian communities, and Indian allotments with non-extinguished Indian titles. 18 U.S.C. § 1151 (2012).

38. See *infra* Section III(B)(ii).

This Note will first provide background information on current tribal sovereignty and tribal court jurisdiction in Alaska. This Note will then argue that, outside Alaska's limited Indian Country, tribal courts currently lack the authority to banish non-Native Alaskans because they have not consented to the tribal court's authority. This Note will argue that tribal jurisdiction and authority should be expanded to allow tribal banishments to protect the welfare of rural Alaska Native communities. Alaska's expansive size, limited rural law enforcement, and drug and alcohol issues justify this unique response of expanding tribal jurisdiction over non-Natives. Granting tribal courts this jurisdiction would empower rural Alaska Natives to address the high rates of alcohol and drug-related crime in their communities while simultaneously decreasing the burdens on the Alaska State Troopers. Thus, the State of Alaska should work with the United States federal government to grant tribal courts the authority to banish non-Natives in specific, limited situations.

II. BACKGROUND

Before discussing whether Alaska Native tribes have the power to banish non-Natives from rural Alaskan villages, this Section will discuss tribal sovereignty, how federal and state governments regulate Alaska Native tribes, the structure and authority of tribal courts, and the basics of banishment.

A. Tribal Sovereignty

Tribes have the power to create tribal courts, enact laws on matters within their jurisdiction, and enforce those laws.³⁹ Under the Indian Tribal Justice Act, "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems."⁴⁰ This authority comes from the sovereign power of the tribe that functions in conjunction with the sovereign power of the United States.⁴¹

Tribes functioned as sovereign nations long before the arrival of Europeans in the Americas.⁴² By the time European-American settlers

39. *Federal Recognition of Alaska Tribes and Relations with the State of Alaska*, UNIV. OF ALASKA FAIRBANKS, <http://tribalmgmt.uaf.edu/tm112/Unit-4/Federal-Recognition-of-Alaska-Tribes-and-Relations-with-the-State-of-Alaska> (last visited Sept. 30, 2018) [hereinafter *Federal Recognition of Alaska Tribes*].

40. Indian Tribal Justice Act, 25 U.S.C. § 3601(4) (2012).

41. *Federal Recognition of Alaska Tribes*, *supra* note 39.

42. See generally Thomas E. Gillispie, *An Overview of Alaskan's Prehistoric Cultures*, ALASKA DEPT. OF NAT. RES., <http://dnr.alaska.gov/parks/oha/publications/oha173overviewofalaskaprehistory.pdf> (last visited Oct. 20, 2018); see also ERNEST S. BURCH, *ALLIANCE AND CONFLICT: THE WORLD SYSTEM OF THE*

reached Alaska in the 1700s, Alaska Native tribes including “the Tlingits, Haidas, Athabaskans, Eskimos, and Aleuts had defined territorial boundaries.”⁴³ “Their citizens thought of themselves as being separate peoples and they engaged one another in war and in trade.”⁴⁴

The sovereignty of these tribes was never extinguished after the United States was formed and Alaska became a state, and tribal governments continue to have specific sovereign powers.⁴⁵ “Perhaps the most basic principle of all Indian law . . . is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers of a limited sovereignty which have [sic] never been extinguished.’”⁴⁶ Congress limited or terminated all sovereign powers that were inconsistent with tribal dependence on the United States when tribes were incorporated into the United States, namely the powers to declare war, control currency, and form treaties.⁴⁷ But tribes retained the power to determine their own membership, form of government, justice system, and internal affairs.⁴⁸

A 1993 Department of the Interior opinion officially recognized Alaska Native tribes, ascribing them “all the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.”⁴⁹ Despite this, the sovereign status of Alaska Native tribes remained unclear until the Alaska Supreme Court acknowledged the sovereignty of Alaska Natives in *John v. Baker*.⁵⁰ With this recognized sovereignty, Alaska Native tribes can have tribal governments and courts that function separately from the State of Alaska and the United States federal

INUPIAQ ESKIMOS 3 (2005) (stating that early-nineteenth century tribes were analogous to modern nations).

43. See *Alaska’s Prehistoric and Protohistoric Past*, ALASKA HUMANITIES FORUM, <http://www.akhistorycourse.org/alaskas-cultures/alaskas-heritage/chapter-2-1-alaskas-prehistoric-and-protohistoric-past> (last visited Apr. 27, 2018).

44. BÜRCH, *supra* note 42, at 3.

45. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 438 (3d ed. 2012).

46. *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978).

47. *Frequently Asked Questions*, U.S. DEPT. OF THE INTERIOR: INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Sept. 30, 2018).

48. CASE & VOLUCK, *supra* note 45, at 380.

49. U.S. DEPT. OF THE INTERIOR, *GOVERNMENTAL JURISDICTION OF ALASKA NATIVE VILLAGES OVER LAND AND NON-MEMBERS* (1993).

50. See 982 P.2d 738, 752 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000) (identifying and following Congressional intent that “tribal sovereignty with respect to issues of tribal self-governance exists unless divested” by treaty or statute).

government.⁵¹ Without sovereign power, tribes would be unable to control who has membership in their tribe, who receives tribal benefits, and who receives custody of a child in an internal dispute. Absent these powers, the question of whether tribes could banish even tribal members from a village would be a clear no.

B. Federal and State Regulation of Tribes

Alaska Native sovereign nations existed long before the United States Constitution.⁵² This pre-constitutional status “places them firmly beyond the scope of the U.S. Constitution and the Bill of Rights.”⁵³ However, this does not mean that tribes are left unregulated by federal and state governments. Because of the tribes’ incorporation into the United States, Congress does have plenary power to regulate Indian affairs and can “limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”⁵⁴ This federal power to regulate is “explicitly and implicitly rooted in the Constitution,”⁵⁵ and also found in the federal government’s guardianship responsibility to the tribes.⁵⁶

The power to regulate Indian affairs is exclusive to the federal government.⁵⁷ States only become directly involved when Congress delegates specific powers to them.⁵⁸ However, State support of tribes’ governmental and judicial activities remains important and state-tribe cooperation facilitates tribal sovereignty.⁵⁹ As will be discussed later in this Note, this state cooperation is especially important in Alaska because of the lack of Indian country, the associated absence of broad federal jurisdiction, and the resultant coextensive jurisdiction with state courts.⁶⁰

51. CASE & VOLUCK, *supra* note 45, at 380.

52. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1055 (2007).

53. *Id.*

54. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

55. *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974).

56. *Id.* at 551.

57. U.S. DEPT. OF THE INTERIOR: INDIAN AFFAIRS, *supra* note 47; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 237 (1984).

58. *Id.*

59. See *Federal Recognition of Alaska Tribes*, *supra* note 39 (explaining the history of state government opposition to tribal sovereignty and the importance of state control of agencies that interact with tribes).

60. See *infra* Section III.

C. Tribal Courts

Tribal sovereignty includes the power to create tribal courts to enforce tribal laws.⁶¹ More than half of the 229 recognized tribes in Alaska are developing or have created active tribal courts.⁶² These tribal courts are intended to improve access to a court system in rural Alaska Native communities while incorporating tribal culture into the justice system.⁶³

Tribal court structures differ from tribe to tribe.⁶⁴ As sovereigns, individual tribes can choose a structure that best fits their cultural history and community needs.⁶⁵ While tribal courts in the Lower 48 tend to mirror the adversarial nature of U.S. state and federal courts, Alaska tribal courts focus more on healing than punishment.⁶⁶ For example, informal hearing styles and justice circles are common in Alaska's tribal courts.⁶⁷

Tribal courts are typically comprised of respected members of a tribe, including members of the tribal council and tribal elders—but not attorneys.⁶⁸ Judges can be “appointed by the council, elected by the tribal membership, or a combination of elected and appointed judges may be used.”⁶⁹ In smaller villages, the tribal council typically also serves as the tribal court.⁷⁰ Consensus decision-making is common in Alaska Native tribal courts, with panels of judges making decisions as a group and in consultation with the broader community.⁷¹

Tribal courts deal with civil and criminal matters.⁷² They typically hear a wide variety of cases, including child custody, adoptions and guardianships, child protection, domestic violence, probate, alcohol violations, juvenile delinquency, misdemeanor offenses, and fish/game/marine mammal protection.⁷³ State and tribal courts have concurrent jurisdiction over these matters—whichever court hears a case

61. CASE & VOLUCK, *supra* note 45, at 437.

62. *Modern Tribal Governments in Alaska*, UNIV. OF ALASKA FAIRBANKS, <http://tribalmgmt.uaf.edu/tm112/Unit-4/Modern-Tribal-Governments-in-Alaska> (last visited Sept. 30, 2018) [hereinafter *Modern Tribal Governments*].

63. Geoffrey Wildridge, *President's Column: Access to Justice: The Continuing Debate over the Role of Tribal Courts in Rural Alaska*, 38 ALASKA BAR RAG 2, 3 (2014).

64. JAEGAR, *supra* note 37, at ch. 4.

65. *Id.*

66. ALASKA LEGAL SERVS. CORP., *supra* note 29, at 27.

67. JAEGAR, *supra* note 37, at ch. 3.

68. *Modern Tribal Governments*, *supra* note 62.

69. JAEGAR, *supra* note 37, at ch. 3.

70. *Id.*

71. *Id.*

72. *Id.*

73. See ALASKA LEGAL SERVS. CORP., *supra* note 29; *Federal Recognition of Alaska Tribes and Relations with the State of Alaska*, UNIV. OF ALASKA FAIRBANKS, <http://tribalmgmt.uaf.edu/tm112/Unit-4/Federal-Recognition-of-Alaska-Tribes-and-Relations-with-the-State-of-Alaska> (last visited Apr. 27, 2018).

first generally assumes jurisdiction over that matter.⁷⁴ However, tribal court decisions are subject to habeas corpus review in federal court.⁷⁵

Tribal courts are regulated under the Indian Civil Rights Act (ICRA),⁷⁶ which guarantees certain rights to parties brought before the court. These rights include: protection from double jeopardy,⁷⁷ self-incrimination,⁷⁸ cruel and unusual punishment,⁷⁹ equal protection of the law,⁸⁰ and due process.⁸¹ The ICRA also limits tribal court punishments to three years imprisonment or a \$15,000 fine.⁸²

D. Banishment

Several tribal courts in Alaska have recently banished tribal members and non-members from their communities.⁸³ Banishment is a traditional form of punishment indigenous communities, including Alaska Native tribes, use to prevent an undesirable person from remaining in a specific village or other tribal area.⁸⁴ The punishment can be broad or limited in scope, preventing a person's access to a specific part of a community or an entire village, for a short or extended period of time.⁸⁵ Banishment has made a resurgence recently as isolated rural communities try to deal with increasing drug and alcohol related crime.⁸⁶

Traditionally, banishment was intended to serve a rehabilitative purpose, with the banished person returning to and reintegrating with the community at the end of the banishment period.⁸⁷ For example, in 1994, two Alaskan teenage boys, members of the Tlingit tribe, committed

74. *Alaska Tribal Sovereignty and Jurisdiction: Major Case Law Affecting Alaska Tribal Jurisdiction*, UNIV. OF ALASKA FAIRBANKS, <http://tribalmgmt.uaf.edu/tm112/Unit-4/Alaska-Tribal-Sovereignty-and-Jurisdiction-Major-case-law-affecting-Alaska-tribal-jurisdiction> (last visited May 2, 2018).

75. JAEGAR, *supra* note 37, at ch. 1.

76. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03 (2012).

77. *Id.* § 1302(a)(3).

78. *Id.* § 1302(a)(4).

79. *Id.* § 1302(a)(7)(A).

80. *Id.* § 1302(a)(8).

81. *Id.*

82. *Id.* § 1302(b).

83. *See, e.g.,* Cotsirilos, *supra* note 6. Although the validity of banishment as a punishment can be debated, this issue falls beyond the scope of this Note. At least one court has indicated that tribal courts have the authority to banish individuals from their communities, at least in limited circumstances. *See* Village of Perryville v. Tague, No. 3AN-00-12245 CI, 2003 WL 25446105 (Alaska Super. Ct. 2003) (holding that Alaska Native tribes have the right to banish tribal members from their villages, at least as a response to violent behavior).

84. Riley, *supra* note 52, at 1103.

85. *Id.* at 1106.

86. *Id.* at 1104.

87. *Id.* at 1103-04.

an armed robbery in Washington State.⁸⁸ The charges were ultimately transferred to a Tlingit tribal court that imposed a sentence of one year of banishment to uninhabited islands in the Gulf of Alaska, plus restitution to the victim.⁸⁹ The banishment was intended to serve a rehabilitative purpose, “requir[ing] these young men to improve themselves and to ruminate upon their crime.”⁹⁰ The banishment was for a limited period of time and provided for the teenagers’ future return to and reintegration with Tlingit tribal society.⁹¹

II. BANISHMENT AND TRIBAL JURISDICTION OVER NON-NATIVES

To claim jurisdiction over a person, a Native or non-Native, an Alaska Native tribal court must satisfy three requirements:

- (A) Jurisdiction over the matter (subject matter jurisdiction)⁹²
- (B) Jurisdiction over the parties (personal jurisdiction)⁹³
- (C) Reasonable notice and opportunity to be heard for the defendant (due process protections)⁹⁴

A. Subject Matter Jurisdiction

Tribal courts in Alaska, and throughout the Lower 48, cannot exercise criminal jurisdiction over non-Natives absent specific congressional authorization.⁹⁵ In *Oliphant v. Suquamish Indian Tribe*, the United States Supreme Court stated that “[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”⁹⁶ Thus, tribal jurisdiction over non-Natives arises almost exclusively over civil matters.

However, some cases typically considered criminal are often handled as civil cases or quasi-criminal cases in tribal courts throughout

88. John Balzar, *Two Alaska Indian Youths Banished to Islands for Robbery*, L.A. TIMES (July 15, 1994), http://articles.latimes.com/1994-07-15/news/mn-158401_alaska-indians.

89. *Id.*

90. *Id.*

91. *Id.*

92. ALASKA LEGAL SERVS. CORP., *supra* note 29, at 14.

93. *Id.*

94. *Id.*

95. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that Indian tribes do not have the inherent power to assert criminal jurisdiction over non-Indians).

96. *Id.* at 210.

Alaska, including alcohol importation, vandalism, and driving under the influence.⁹⁷ Quasi-criminal cases are civil cases that result in punitive sanctions—a sanction that is “so ‘divorced’ from any remedial or compensatory goal that [it] constitute[s] punishment that invokes constitutional limits not implicated in ordinary civil process.”⁹⁸ Quasi-criminal cases are defined by their associated “significant loss of liberty, often coupled with stigmatic harm”—such as with their use to prevent sex offenders from residing in certain areas.⁹⁹ This classification applies to tribal banishment of non-Native Alaskans and indicates that such banishment is likely quasi-criminal and not exclusively a civil matter. It is not clear whether Alaska Native tribal courts have jurisdiction over quasi-criminal matters involving non-Natives. More clarification from the state government, federal government, or the courts is necessary.¹⁰⁰

Alaska Native tribal courts have jurisdiction over limited types of cases. Federal law has recognized broad tribal jurisdiction in domestic relations cases, including marriage, divorce, custody, paternity, child support, adoption, and family violence.¹⁰¹ Tribes in Alaska also have jurisdiction over cases involving the possession of alcohol, bootlegging, drunk and disorderly conduct, driving under the influence, sale and possession of drugs, juvenile cases, and domestic relations.¹⁰²

Because Alaska Native tribes have jurisdiction over cases involving the possession of alcohol, bootlegging, and the sale and possession of drugs, tribal courts can assert subject matter jurisdiction over the types of cases considered in this Note. These cases must be brought as quasi-criminal cases when banishment is a punishment option because tribal courts cannot exercise criminal jurisdiction over non-members and banishment is more severe than traditional civil penalties.

B. Personal Jurisdiction

Subject matter jurisdiction alone is insufficient for tribal courts to claim jurisdiction over non-Native defendants like Ronald Oertwich. The court must also have personal jurisdiction over the parties involved in the case. The existence of personal jurisdiction differs depending on what

97. ALASKA LEGAL SERVS. CORP., *supra* note 29, at 27.

98. Gregory Porter, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 521 (1997).

99. John Kip Cornwell, *The Quasi-Criminality Revolution*, 85 UMKC L. REV. 311, 312 (2017).

100. ALASKA LEGAL SERVS. CORP., *supra* note 29, at 27.

101. *Id.* at 18–19, 22–23.

102. *Id.*

type of land the incident happened on and whether the parties involved are tribal members or non-members.

i. Land-Based Jurisdiction

Tribal jurisdiction based on physical territory is a more difficult proposition in Alaska than in the Lower 48 because of the absence of reservations in Alaska.¹⁰³ With reservations, the borders of their land-based jurisdiction are more clearly defined and the tribes are empowered to make judgments on issues that arise within those borders as long as the issue is an appropriate topic for the tribal court and involves covered parties.¹⁰⁴

However, most Alaska tribes lack the clear borders reservation lands provide. Before the Alaska Native Claims Settlement Act of 1971 (ANCSA), some 150 reservations existed in the state.¹⁰⁵ Today, the state has only one recognized Native reservation, the Annette Island Reserve for Metlakatla Indians¹⁰⁶—designated as a reservation by the Secretary of the Interior on August 23, 1944.¹⁰⁷ As a reservation, Metlakatla is able to claim land-based jurisdiction over incidents that happen within the reservation's borders.¹⁰⁸

Outside of Metlakatla, the majority of traditional Alaska Native lands were distributed through ANCSA.¹⁰⁹ Land titles granted under ANCSA were vested in tribal corporations, not tribal governments.¹¹⁰ ANCSA did not create a formal reservation system and the lands distributed through it do not qualify as Indian country under federal law.¹¹¹ Some commentators assert that Alaska Native Allotments¹¹² and

103. U.S. DEPT. OF THE INTERIOR: INDIAN AFFAIRS, *supra* note 47.

104. *See* *Montana v. United States*, 450 U.S. 544, 566 (1981) (holding that tribes have the inherent authority to exercise civil jurisdiction on non-Indians within the tribe's 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").

105. CASE & VOLUCK, *supra* note 45, at 27.

106. U.S. DEPT. OF THE INTERIOR: INDIAN AFFAIRS, *supra* note 47.

107. U.S. DEPT. OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE METLAKATLA INDIAN COMMUNITY ANNETTE ISLANDS RESERVE, ALASKA (1944).

108. In Indian country, the *Montana* factors discussed below will apply. The tribe would be able to regulate non-Natives on their land when the non-Native has a consensual relationship with the tribe or a tribal member, *Montana v. United States*, 450 U.S. 544, 565 (1981), or when the non-Native threatens "the political integrity, the economic security, or the health and welfare of the Tribe," *id.* at 566.

109. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 524 (1998).

110. *Id.*

111. *Id.* at 531-32.

112. Alaska Native Allotments were established by the Alaska Native Allotment Act of 1906, 34 Stat. 197 (1906). The Act passed land from federal ownership to individual Alaska Native owners.

Alaska Native Townsites¹¹³ qualify as Indian Country, potentially creating some land-based jurisdiction in Alaska outside of the Metlakatla Reservation.¹¹⁴

While the expansion of Indian country and land-based tribal jurisdiction will broaden jurisdiction over tribal members, it is unlikely to significantly expand jurisdiction over non-members. Tribal courts must still show that one of the exceptions in *Montana v. United States* applies to exercise jurisdiction over non-members.¹¹⁵ The *Montana* exceptions allow tribes to impose jurisdiction over non-members within Indian country when either (1) the non-member consents to tribal jurisdiction or (2) when the non-member's actions "impact [the] health or welfare of the tribe" or its political integrity or economic security.¹¹⁶

Regarding non-member consent, non-members of tribes regularly choose to participate in tribal courts in Alaska due to lack of access to state court judicial officers, thus consenting to tribal jurisdiction.¹¹⁷ Here, consent means "a voluntary acceptance, whether explicit or implicit, by a non-Indian of tribal [] jurisdiction."¹¹⁸ A non-member can consent by filing a suit in tribal court, by filing a cross-claim, or by waiving their right to challenge tribal jurisdiction.¹¹⁹ For example, in *John v. Baker*, the Alaska Supreme Court recognized a tribal court custody order between one parent who was a tribal member and one parent who was a non-member

113. Alaska Native Townsites were created under the Alaska Native Townsite Act of 1926, 44 Stat. 629 (1926). These Townsites are restricted lots that have federal oversight.

114. *Relationships Between Alaska and Lower 48 Tribes*, UNIV. OF ALASKA FAIRBANKS, <https://web.archive.org/web/20170514071521/http://tribalmgmt.uaf.edu:80/tm112/Unit-4/Relationships-between-Alaska-and-Lower-48-Tribes> (last visited Apr. 27, 2018) [hereinafter *Relationships Between Tribes*].

115. See *Montana v. United States*, 450 U.S. 544, 566 (1981) ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

116. *Id.* at 565, 566.

117. See ALASKA LEGAL SERVS. CORP., *supra* note 29, at 19 ("Non-members choosing to participate in tribal court is relatively common in Alaska."); CASE & VOLUCK, *supra* note 45, at 438 (noting that "the great majority of communities lack a resident magistrate or other state court judicial officer").

118. Paul Spruhan, "Indians, in a Jurisdictional Sense": *Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79, 81 (2012). This source discusses consent to tribal criminal jurisdiction, but the same principles apply to tribal civil jurisdiction as well. See CASE & VOLUCK, *supra* note 45, at 438.

119. See Spruhan, *supra* note 118, at 82 n.23 (stating that "[t]he U.S. Supreme Court in *Duro v. Reina* believed that acquiescence to tribal jurisdiction may be why there were, in its view, few federal challenges to tribal court jurisdiction").

because the non-member parent expressly consented to tribal jurisdiction.¹²⁰ Express consent is not the only way to consent to tribal jurisdiction. Non-members can also consent to tribal jurisdiction implicitly by forming ongoing consensual relationships with tribes “through commercial dealing, contracts, leases, and other arrangements.”¹²¹

Additionally, under *Montana*, the tribal court can assert its jurisdiction when the non-member’s actions have “some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹²² However, this impact-based factor only definitively applies when the non-member acted on lands within a reservation.¹²³ Even on reservation lands, it is a difficult standard to meet, requiring that the alleged action must “do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.”¹²⁴ If reservations are expanded in Alaska, this factor could become a valuable tool for asserting tribal jurisdiction over drug- and alcohol-related cases. Drug abuse and alcoholism are substantially damaging the health and economic security of Alaska Native communities.¹²⁵ But whether the harm is significant enough to trigger tribal jurisdiction is yet to be seen. Because of the current lack of substantial Indian country in Alaska, however, tribal courts will not be able to exercise jurisdiction over non-members based solely on a theory of land-based jurisdiction.

ii. Tribal Membership-Based Jurisdiction

This Note is focused on banishment of non-Natives and will not include an expansive discussion of tribal jurisdiction over members. It is important to recognize that tribal jurisdiction over tribal members is much broader than it is over non-members.¹²⁶ Tribal members have an ongoing consensual relationship with the tribe and it is therefore appropriate to subject them to the laws that tribe enacted.¹²⁷ As long as a

120. 982 P.2d 738, 743 (Alaska 1999).

121. *Montana v. United States*, 450 U.S. 544, 565 (1981). For example, the Supreme Court allowed taxes to be applied to non-members that accepted “privileges of trade, residence, etc., to which taxes may be attached as conditions.” *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

122. *Montana*, 450 U.S. at 566.

123. *Id.*

124. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

125. Horwitz, *supra* note 7.

126. Jane M. Smith, *Tribal Jurisdiction Over Nonmembers: A Legal Overview, Summary*, CONG. RESEARCH SERV. (2013), fas.org/sgp/crs/misc/R43324.pdf.

127. *See Duro v. Reina*, 495 U.S. 676, 677 (1989) (tying together broad

tribe has jurisdiction over the subject matter at issue, the tribe will likely be able to assert jurisdiction over the matter.¹²⁸ One exception is that tribal courts do not have jurisdiction to hear certain felonies¹²⁹ even when committed by and against members of that tribe because of specific limitations enacted by Congress.¹³⁰

iii. Jurisdiction Over Non-Members Outside Indian Country

Tribal courts have very limited jurisdiction over non-members of a tribe.¹³¹ As discussed above, non-members do become subject to tribal jurisdiction if they meet either of two *Montana* factors.¹³² While *Montana* itself dealt with an issue in Indian country, *Montana* factors could potentially be applied to non-Natives whose activities outside Indian country adversely affected tribal internal matters.¹³³

Tribes can also exercise jurisdiction over non-members with congressional authorization.¹³⁴ For example, the Violence Against Women Act (VAWA) recognized a special tribal domestic violence criminal jurisdiction in specific cases, regardless of the Native or non-Native status of the perpetrator.¹³⁵ This special jurisdiction is limited, and only attaches if the non-Native has sufficient ties with the tribe—living or working in Indian country or having a current or former partner who is Native and resides in Indian country.¹³⁶ The VAWA's application in Alaska remains unclear because of the Act's reliance on land-based

jurisdiction over tribal members with the ongoing consensual relationship).

128. See *id.* (noting that tribal jurisdiction generally allows sovereignty to control internal relations).

129. Under the Major Crimes Act, federal courts have exclusive jurisdiction over its listed offenses and tribal courts cannot exercise jurisdiction over these case types. 18 U.S.C. § 1153 (2012). The listed offenses include “murder, manslaughter, kidnapping, maiming, sexual abuse under Ch. 109-A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault on a person less than 16 years old, felony child abuse or neglect, arson, burglary, robbery, theft under 18 U.S.C. § 661.” *Id.*

130. *Id.*

131. Smith, *supra* note 126, at 1.

132. See discussion *supra* Section III(B)(i).

133. See *John v. Baker*, 982 P.2d 738, 758 (Alaska 1999) (“[T]he existence of Indian country is not a dispositive factor in determining jurisdiction.”); see also Violence Against Women Act, 18 U.S.C. § 2265 (2012); Indian Child Welfare Act, 25 U.S.C. § 1911 (mandating full faith and credit for Tribal Court decisions potentially affecting non-members).

134. Smith, *supra* note 126, at 2.

135. 25 U.S.C. § 1304(a)(6) (2012).

136. Rebecca Howlett, *The Need to Preserve and Expand Tribal VAWA Jurisdiction and Federal Resources*, KILPATRICK TOWNSEND & STOCKTON LLP (June 15, 2017), <https://www.lexology.com/library/detail.aspx?g=55028e5a-5418-4f22-9046-9dd30970f7d5>.

jurisdiction, but it does provide an example of Congress authorizing expanded tribal jurisdiction.¹³⁷

C. Due Process

In 1968, Congress recognized the need to extend a portion of the Bill of Rights to tribal jurisdictions and elected to do so through the Indian Civil Rights Act of 1968 (ICRA).¹³⁸ The ICRA parallels the Bill of Rights in many respects, most importantly by placing due process requirements on tribal justice.¹³⁹ The Act also bars tribal courts from sentencing offenders to more than three years or a fine of more than \$15,000.¹⁴⁰

Due process requires notice, an opportunity to be heard, an impartial judge, and fairness in the proceedings.¹⁴¹ An Alaskan state court will not interfere with a tribal court decision so long as the court has jurisdiction and follows due process procedures.¹⁴²

In *Nevada v. Hicks*,¹⁴³ Justice Souter expressed concerns about the potential effects of tribal court jurisdiction over non-members.¹⁴⁴ Justice Souter was specifically concerned that tribal courts were not interpreting the ICRA as imposing the same due process requirements upon them as the federal Bill of Rights.¹⁴⁵ He also worried that tribal law is often unwritten, meaning that non-members often lack notice that a law exists until they have violated it and are brought before the tribal court.¹⁴⁶

However, tribal courts are perfectly capable of meeting the due process standards required to legitimize their jurisdiction over a case when provided with the necessary resources. There is nothing inherent in tribal courts' structure that makes their processes inconsistent with basic notions of due process. Tribal courts are often under-resourced, and some say they have a history of failing to provide legal protections to defendants and that they are racially exclusive.¹⁴⁷ These are issues that

137. *Id.*

138. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03 (2012).

139. Peter W. Birkett, *Indian Tribal Courts and Procedural Due Process: A Different Standard*, 49 IND. L.J. 721, 721 (1974).

140. § 1302.

141. See Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 131 (2015).

142. *Id.*

143. 533 U.S. 353 (2001) (Souter, J., concurring).

144. *Id.* at 375-86.

145. *Id.* at 384.

146. See *id.* at 384-85 (“[T]here is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA’s due process and equal protection clauses and need not follow the U.S. Supreme Court precedents jot-for-jot.”) (internal quotations omitted).

147. Jill Elizabeth Tompkins, *Defining the Indian Civil Rights Act’s “Sufficiently*

will need to be addressed while expanding tribal court jurisdiction, but suggested solutions go beyond the scope of this Note.

Where proper due process procedures are not in place, the matter can be appealed and those discrepancies can be addressed.¹⁴⁸ Expressing concern about due process issues does not negate the validity of tribal court jurisdiction or banishment as a whole; it simply indicates standards that must be met within the existing system.

III. BANISHMENT CAN BE A VALUABLE TOOL FOR ALASKA NATIVE TRIBES

The Indian Law and Order Commission, empowered by Congress, concluded that devolving authority to Alaska Native communities is essential for addressing local issues.¹⁴⁹ The Commission found that the current centralized systems of law enforcement and justice consistently fail to address the needs of the 229 federally recognized Alaska Native tribes.¹⁵⁰ High rates of alcoholism, drug abuse, and attendant crime¹⁵¹ indicate the importance of addressing bootlegging and the sale or possession of drugs. It is abundantly clear that something needs to be done to allow Alaska Native communities to better address these issues; whether banishment provides a valid strategy is less clear.

Alaska Native tribes do not imprison individuals because they lack the necessary resources to comply with Indian Civil Rights Act requirements or fund an incarceration system.¹⁵² Incarceration is expensive and rural communities lack the infrastructure and resources to impose this punishment.¹⁵³ Thus, banishment provides a more feasible alternative. Banishment allows Alaska Native communities to prevent the people who are illegally providing alcohol and drugs from residing in or entering the communities.¹⁵⁴ In rural areas where law enforcement is days away by plane and may only be dispatched when death or serious injury occurs, restricting the entrance of individuals bringing in drugs and

Trained Tribal Court Judge, 4 AM. INDIAN L.J. 53, 58 (2015).

148. See Fortson, *supra* note 141, at 142 (“Where due process is not followed in tribal court, Alaska courts will not recognize the tribal court decision . . . [D]ue process may be different in tribal courts than state courts.”).

149. INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER xii (2013).

150. *Id.* at 35.

151. See *id.* at 151 (noting early, unexpected, and traumatic death rates among Native people exceeds the all-races rate by seven times).

152. ALASKA LEGAL SERVS. CORP., *supra* note 29, at 27.

153. See *id.* (“Most tribes lack the resources to consider funding a full western-style system of incarceration, with correctional centers, prosecutors, and public defenders.”).

154. See *supra* Section II(D).

alcohol can be an effective way to protect the community from further harm.¹⁵⁵

Banishment also has deterrent effects for some perpetrators if they are aware of the potential for banishment.¹⁵⁶ The thought of losing one's community, home, and job has the potential to deter many community members from bootlegging or drug importation.¹⁵⁷ While this will not necessarily deter people who come from outside the community with no intent to remain in that community, it could reduce the sale, possession, and use of drugs and alcohol to some extent.

However, if the potential punishment is simply a fine or other minor imposition, then people may not be adequately disincentivized. Bootleggers and drug dealers can make significant amounts of money by breaking the law,¹⁵⁸ which becomes especially enticing in communities with high rates of unemployment—like rural Alaska.¹⁵⁹

Banishment also removes offenders from the environments that they found most tempting. The sale of alcohol or drugs requires a network to sell to. Removing a bootlegger or drug dealer from their community removes them from this network and restricts their ability to continue their sales. However, an argument against banishment is that these bootleggers and drug dealers can simply rebuild their network in the next village they land in. In this sense, banishment allows a community to pass its problems onto another community, fixing their own problem but creating a problem for others.¹⁶⁰

155. See *supra* Section I.

156. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 117–18 (2007).

157. See *id.* at 117 (“[T]hese banishment and expulsion laws further serve as a social contract between the community and the individual tribal members.”); see also Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. TIMES (Jan. 18, 2004), <https://www.nytimes.com/2004/01/18/us/plagued-by-drugs-tribes-revive-ancient-penalty.html> (discussing banishment’s potential deterrent effects).

158. See Dan Barry, *Bootleggers Playing Hide-and-Seek on the Tundra*, N.Y. TIMES (Oct. 12, 2008), <https://www.nytimes.com/2008/10/13/us/13land.html> (noting that a bottle of R&R whiskey that sells for \$10 in Anchorage can sell for \$300 in a dry rural village).

159. Unemployment rates in rural Alaska reached 12% by 2006, much higher than the 5.3% unemployment seen in Anchorage. Goldsmith, *supra* note 11, at 9. In 120 Alaska Native villages, more than half of the adult population did not have jobs (entire population, not just those that actually wanted work). *Id.*

160. See Brian Palmer, *Can States Exile People?*, SLATE (Jan. 24, 2013), http://www.slate.com/articles/news_and_politics/explainer/2013/01/banishment_as_punishment_is_it_constitutional_for_states_to_exile_criminals.html (“[Banishment] could lead to a dance of the lemons, as each state tries to turn its neighbor into a prison colony, thereby avoiding the expense of imprisonment.”).

The argument that banishment just transfers the problem to another village raises the question of what the alternative is. Allowing bootleggers and drug dealers to continue residing in the communities that they are harming does nothing to solve the problem. One solution would be for the state of Alaska to expand access to the state court system, but this would likely be a slow, expensive, and difficult process. Banishment can provide a more immediate means of countering drug and alcohol issues in rural Alaska Native villages and the state government should do what it can to facilitate its use. In rural villages, access to state courts is poor.¹⁶¹ Giving local tribes the power to adjudicate their own issues independently from the state improves access to justice and can help these communities address their high levels of drug abuse and alcoholism.¹⁶²

However, because of the potentially drastic effects of banishment, tribal courts should only be empowered to use it in limited circumstances. First, tribal courts need to be given expanded jurisdiction to cover alcohol and drug-related offenses committed by non-Natives in their communities.¹⁶³ Alcohol and drug-related offenses and abuse are major issues in rural Alaska Native communities, justifying expanded jurisdiction similar to that provided under the Violence Against Women Act.¹⁶⁴ As mentioned previously, VAWA's applicability in Alaska is limited by its reliance on land-based jurisdiction, a problem that should be avoided in future legislation.¹⁶⁵ Parties can either work to expand Indian country in Alaska or Congress can rely on more than land-based jurisdiction when crafting this alcohol and drug law. Applying the *Montana* exceptions outside of Indian country would be one way to do this—allowing jurisdiction over non-Natives when there is express or implied consent to tribal jurisdiction or significant impacts on the tribe's welfare. Once tribal jurisdiction over non-Native drug and alcohol issues has been established, tribes must determine appropriate strategies for using banishment to address these issues.

One of the strongest arguments in favor of banishment is its status as a traditional tribal response.¹⁶⁶ The tribal courts are intended to incorporate tribal culture into the tribal justice system.¹⁶⁷ Banishment is simply an extension of that ideal. Following logically from this justification, banishment should be implemented in the traditional manner. Banishment traditionally served a rehabilitative purpose, to

161. See *supra* Section I.

162. *Id.*

163. See *supra* Section III.

164. See *supra* Section I.

165. Howlett, *supra* note 136.

166. See *supra* Section II(C).

167. *Id.*

force an individual to consider the effects of his actions by separating him from his community and to work to reintegrate him at the end of his banishment period.¹⁶⁸ This is how Alaska Native tribal courts should use banishment.

Banishments should be for a defined, limited period of time—enough time for the perpetrator to consider his actions but not so long that reintegration becomes difficult. After the banishment, the community should work to actively reincorporate the individual. Permanent banishment is certainly a simpler solution from the perspective of the village being harmed, but it fails to follow the contours of tradition. These principles apply to both Native and non-Native banishments.

Additionally, banishment should only be used when all other avenues have failed. Banishment is a harsh punishment that can separate an individual from their community, family, and livelihood. Its benefits outweigh its harms only when less harsh alternatives have already failed. This means that expanded tribal jurisdiction allowing banishment of non-Natives for drug and alcohol offenses should also provide for lesser sentences including fines and community service. Only when these strategies have proven ineffective is escalation to banishment appropriate.

Lastly, the State of Alaska should work with tribal courts to expand tribal jurisdiction to cover non-Native drug and alcohol offenses and to facilitate banishment in the limited circumstances discussed above. Alaska has a history of opposing tribal recognition, tribal sovereignty, and tribal court jurisdiction.¹⁶⁹ While the State of Alaska cannot implement these reforms without congressional action, the state can certainly slow down or prevent implementation as it did with VAWA.¹⁷⁰ Alaska needs to recognize the potential benefits of expanded tribal jurisdiction and banishment and should work with tribes to convince Congress to provide these powers. The State of Alaska should then help tribes implement due process protections in tribal courts, publish tribal laws, and enforce the limited banishment orders discussed above.

168. See *supra* Section II(D).

169. See *Federal Recognition of Alaska Tribes*, *supra* note 39 (stating that several Alaska governors have acted to diminish tribal sovereignty and jurisdiction).

170. Shannyn Moore, *VAWA Not a Victory for Alaskan Native Women*, HUFFINGTON POST (Mar. 12, 2013), https://www.huffingtonpost.com/shannyn-moore/vawa-native-women_b_2856326.html (claiming that Alaska state officials actively attempt to stop tribes from asserting jurisdiction over various issues).

IV. CONCLUSION

Alaska Native tribal courts currently lack the power to banish non-Natives from their communities for drug and alcohol offenses. Tribal courts do have subject matter jurisdiction over cases involving sale and possession of drugs, alcohol possession, and bootlegging, but they lack personal jurisdiction over non-Natives. The absence of substantial Indian country in Alaska means that tribes are unable to claim land-based jurisdiction and must rely almost exclusively on membership-based jurisdiction. This significantly limits tribal jurisdiction over non-Natives, meaning that tribes cannot punish non-Native violators of alcohol and drug laws.

Congress should expand tribal jurisdiction to cover non-Native violators of these laws because of the significant alcohol and drug abuse issues in rural Alaska Native communities. This expanded jurisdiction should include the power to banish non-Native violators in limited circumstances—when all other options have failed, for a limited banishment period, and with the intention of rehabilitating and reintegrating the offender. The State of Alaska should facilitate this Congressional expansion of jurisdiction and power to banish non-Natives in order to address issues of rural access to justice and alcohol and drug abuse in rural communities.