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A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts

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A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts

BY MELISSA L. TATUM

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INTRODUCTION

If the three rules of real estate are "location, location, location," the three rules of law are "jurisdiction, jurisdiction, jurisdiction." Jurisdiction comes in a number of different forms: civil jurisdiction, criminal jurisdiction, legislative jurisdiction, adjudicative jurisdiction, personal jurisdiction, and subject matter jurisdiction. Without jurisdiction, a legislature's rules are useless, as they cannot govern a person's conduct. Without jurisdiction, a court cannot hear a particular case or issue a ruling that governs the parties' conduct.

American courts have developed a wide variety of rules explaining and exploring the concepts of jurisdiction, and both court rules and statutes have been promulgated to further define these concepts. Most civil procedure, conflicts, and federal courts classes discuss these concepts, at least insofar as they affect the federal and state governments. Rather fewer of these classes mention the fact that a third category of sovereigns, tribal governments, exist within the boundaries of the United States. A com-

1 Occasional mentions of Indian law do surface. See, e.g., Cynthia Ford, Integrating Indian Law into a Traditional Civil Procedure Course, 46 SYRACUSE L. REV. 1243 (1996); Wendy Collins Perdue, Conflicts and Dependent Sovereigns:
pletely different set of jurisdictional rules has developed to govern this third set of sovereigns.

This Article will explore the basic jurisdictional rules for state governments and how those rules differ from the jurisdictional rules binding tribal governments. The Article will then illustrate the impact of these differences, and ignorance of these differences, by exploring the full faith and credit requirements of the Violence Against Women Acts ("VAWA") of 1994\(^2\) and 2000,\(^3\) particularly as those rules apply to tribal govern-ments.

To help set the stage for the jurisdiction discussion, Part I of the Article looks briefly at the background of domestic violence and protection orders and at the full faith and credit requirements of the Violence Against Women Acts. Part II takes a step back and looks at basic jurisdictional rules, examining both the rules for state governments and those that apply to tribal governments. Finally, Part III explores the issues faced by tribes who must now implement the federal requirements.\(^4\)

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\(^3\) Id. (2000).

\(^4\) In the Fall of 1999, I was invited to participate in the Michigan Working Group on Full Faith and Credit, a joint federal/state/tribal working group charged with developing and proposing the statutes, regulations and training procedures needed to implement the VAWA’s full faith and credit provisions in Michigan. The Working Group consisted of attorneys, police officers, judges, and domestic violence advocates from all the involved governments—the federal government, the state of Michigan, and the tribal governments located within Michigan’s geographic borders. I was invited to participate in the group in my role as a law professor specializing in federal Indian law (at the time, I was a visiting professor at Wayne State University Law School in Detroit). My primary role within the Working Group was as co-chair of the tribal jurisdiction subcommittee. The tribal jurisdiction subcommittee explored several possible courses of action, but decided that the primary need was for us to draft a model tribal code, which could then be adapted and adopted by the various tribes in Michigan. This Article arises out of that work. The full model code is set out in the appendix infra.
Domestic violence is a pervasive problem that invades all aspects of society, a problem that society has only relatively recently begun to recognize and take seriously. It is only in the last one hundred years that our culture has stopped actively condoning a husband’s use of physical force, and it is only in the last thirty years that society has stopped viewing such actions as “private family matters.”

The statistics are staggering. Although both men and women are the victims of domestic violence, women suffer in greatly disproportionate numbers. In 1998, almost “one million violent crimes were committed against persons by their current or former spouses, boyfriends, or girlfriends. . . . About 85% of victimizations by intimate partners . . . were against women.” Domestic violence occurs in all ethnic and socioeconomic groups and is the leading cause of injury to women in this country,

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5 Domestic violence “cuts across all economic, cultural, religious, geographic, educational and vocational lines . . . [and] is not a problem restricted to any one socio-economic group or area.” Christopher Shu-Bin Woo, Comment, Familial Violence and the American Criminal Justice System, 20 U. HAW. L. REV. 375, 380 (1998) (footnote omitted).


8 This summary just touches the surface. For a more detailed look at the history and current status of domestic violence law, see DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE (Patricia G. Barnes ed., 1998).


10 See VIOLENCE AGAINST WOMEN GRANTS OFFICE, U.S. DEP’T OF JUSTICE, DOMESTIC VIOLENCE AND STALKING: THE SECOND ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 1, 5-6 (1997) [hereinafter VIOLENCE AGAINST WOMEN GRANTS OFFICE]; Kathleen Waits, Battered Women and Family
accounting for more injuries than auto accidents, stranger rapes, and muggings combined. \(^\text{11}\) "At any given time, at least 10% of women are being abused by a current or former husband or boyfriend. . . \(^\text{12}\)"

Twenty-five percent of all marriages have included physical abuse, \(^\text{13}\) one-third of all women who seek treatment from hospital emergency rooms do so because of domestic violence, \(^\text{14}\) and approximately one-third of all female homicide victims are killed by their husbands or boyfriends. \(^\text{15}\)

The consequences carry far beyond the women who are the immediate victims—children exposed to domestic violence are also its victims, in a number of respects. First, children suffer the shock and trauma of actually witnessing the violence. \(^\text{16}\) In addition, however, children exposed to domestic violence can suffer more long term effects, as they are more likely to become both batterers and victims of batterers. \(^\text{17}\)


\(^\text{13}\) Epstein, \textit{supra} note 6, at 3; Woo, \textit{supra} note 5, at 380. \textit{See also} Karp & Belleau, \textit{supra} note 11, at 174 (putting the figure at fifty percent).

\(^\text{14}\) Epstein, \textit{supra} note 6, at 8; Woo, \textit{supra} note 5, at 381.


\(^\text{17}\) S. REP. NO. 103-138, at 41. \textit{See also} Barry, \textit{supra} note 16, at 342-43; Epstein, \textit{supra} note 6, at 8-9; Woo, \textit{supra} note 5, at 389. For further discussions of the impact of domestic violence on children, see the materials compiled in \textit{3 DOMESTIC VIOLENCE}, \textit{supra} note 8, at 149-240.
eleven and twenty who are imprisoned for homicide have killed their mother’s batterers. These boys also have higher rates of suicide, violent assault, sexual assault, and alcohol and drug use.”

Domestic violence is a problem among American Indians just as it is among other groups within the United States. The causes of domestic violence among Indians are similar to those for the rest of American society, although they are complicated by the often dismal social and economic conditions on reservations, as well as by the disruption of traditional cultures. American Indians are in a unique position, however, in that tribal governments are just that—governments, possessing sovereignty and the ability to govern their territory. Tribal government efforts in this area, however, are hampered by the limitations that have been imposed upon their sovereignty. These limitations, and their consequences, will be the focus of later sections of this Article.

One of the methods used by both states and tribes to combat domestic violence is the protection order, also known as the personal protection order or PPO. Protection orders are injunctive remedies and can be either civil

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18 Epstein, supra note 6, at 8.
19 Schmidt & Beeler, supra note 15, at 159. See also S. REP. NO. 103-138, at 41 (putting the estimate even higher, at between $5 and $10 billion).
21 See, e.g., Donna Coker, Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking, 47 UCLA L. REV. 1, 16-32 (1999); Zion & Zion, supra note 20, at 416-17 (“Statistical measures of social conditions show that Indians fall at the very bottom of every indicator of well-being . . . . Crime on Indian reservations is the product of an environment created by the disruption of traditional lifestyles and economies.”); see also Valencia-Weber & Zuni, supra note 20, at 83-96. Not all Indians live on reservations. For a brief look at domestic violence and urban Indians, see id. at 130-32. For a historical look, see Murray, supra note 7, at 443-46.
22 See Barry, supra note 16, at 348-61; Epstein, supra note 6, at 11; Woo, supra note 5, at 382, 392-93. See also NAT’L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 1 (1990) [hereinafter NAT’L INST. OF JUSTICE]. For an example of a model code for civil protection orders, see Civil Orders for Protection in 3 DOMESTIC VIOLENCE, supra note 8, at 1-17. For a look at the process used by some tribal courts who issue protection orders, see THE N.W. TRIBAL COURT JUDGES ASS’N, TRIBAL COURT BENCH BOOK FOR DOMESTIC VIOLENCE CASES (1999); see also Valencia-Weber
or criminal. They can be ex parte, temporary, or permanent, and they can direct a respondent to cease threatening or harassing the petitioner, to stay away from the petitioner, and can alter custody and/or visitation arrangements, among other things. Most states allow individuals to directly petition the court for a protection order, but these orders may also be issued as part of a divorce or child custody action, any other civil proceeding, or even as part of a criminal case. In this last situation, the court may include the protection order or keep away provisions as part of pretrial release or bond conditions, as part of an anti-stalking case, as part of a probation order, or even as part of parole conditions.

While protection orders have proven quite effective and useful, they are only as effective as the enforcement mechanisms that are in

& Zuni, supra note 20, at 122-23.


There is no central collection of information about tribal protection order codes. More than 550 tribes exist within the United States, and approximately half of those have tribal courts. Thus, there is potentially a great deal of diversity among the tribes with respect to protection order laws. For an overview of selected tribal domestic violence laws, see Valencia-Weber & Zuni, supra note 20, at 96-132.

24 See Barry, supra note 16, at 348; Epstein, supra note 6, at 11; Woo, supra note 5, at 392-94. See also NAT'L INST. OF JUSTICE, supra note 22, at 1-3, 33-47. For a discussion of the types of behaviors that can be the subject of a protection order, see Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law 21 HOFSTRA L. REV. 801 (1993); see also LEHRMAN, supra note 23, §§ 4:11-4:17 (civil) and §§ 8:2-8:3 (criminal). For a discussion of the terms and conditions of civil protection orders, see id. §§ 4:19-4:31. For a state by state break down of civil protection order laws, see id. at app. 4A.


26 For an overview of the terms and conditions of criminal protection orders, see LEHRMAN, supra note 23, § 8:3.

27 S. REP. No. 103-138, at 111 n.23 (1993) ("Several studies suggest that two-thirds to three-quarters of perpetrators subject to protective orders do not repeat their violent behavior during the period of the order.")
place. Enforcement has two, and often three, parts: police officers, the courts, and prosecutors. The police and the courts are almost always involved in the enforcement of protection orders, but prosecutors may not be involved in the typical protection order case. If the violation of a protection order leads to separate charges, or if the protection order was issued as part of criminal proceedings, the prosecutor may be involved in the efforts to impose sanctions upon the violator. In other cases, however, enforcement may rest on the shoulders of the police called to the scene of an altercation and the court confronted with a petitioner's allegations that the respondent has violated the protection order. Depending on the state, the penalties for violating a protection order can range from civil contempt to criminal contempt to a misdemeanor and even occasionally to a felony.

Traditionally, protection orders were good only within the jurisdiction that issued the order. Most jurisdictions did not provide full faith and credit to other jurisdictions' protection orders. This limitation created a number of problems for many individuals with protection orders, ranging from bureaucratic hassles and inconvenience to much more serious consequences. A woman may live in one jurisdiction, work in another, take a vacation, change jobs, or move to flee her attacker. At a minimum, she

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28 Woo, supra note 5, at 394. For a discussion of enforcement problems, and some suggested reforms, see Epstein, supra note 6. For an examination of victims' perceptions of the effectiveness of protection orders, see VIOLENCE AGAINST WOMEN GRANTS OFFICE, supra note 10, at 37-44.

29 For an examination and comparison of different states' enforcement procedures, see NAT'L INST. OF JUSTICE, supra note 22, at 49-64.

30 See VIOLENCE AGAINST WOMEN GRANTS OFFICE, supra note 10, at 37. See also Barry, supra note 16, at 348, 356-60; Epstein, supra note 6, at 12-13. For an overview of the different types of sanctions for violating protection orders, see LEHRMAN, supra note 23, §§ 4:33-4:40 (civil protection orders) and § 8:4 (criminal protection orders). For a state by state break down of the possible penalties for violating a civil protection order, see id., app. 4A.


32 See Klein, supra note 31, at 255.

33 See Lutz & Bonomolo, supra note 31, at 20-21. Attorney General Janet Reno declared that "victims of domestic abuse frequently have to flee to another state, and batterers often try to come after them. If a protective order can't follow them, it is worthless." Janet Reno, Address to the Kentucky Legislature (Feb. 21, 1996), quoted in Pamela A. Paziotopoulos, Violence Against Women Act: Federal Relief
would often have to apply for a second (or sometimes a third or fourth) protection order, show up in court, and sometimes even pay additional fees. These additional proceedings will also, for due process reasons, mean that the respondent will be given notice of the petitioner's current location and attempt to obtain an additional protection order. For the woman who has fled her attacker, this notification could prove deadly. It is well documented that the most dangerous time for an abused woman is when she attempts to terminate the relationship.

All these hassles presuppose that the petitioner will be able to obtain an additional protection order. The new jurisdiction, however, may not have the authority to issue a new protection order, for a number of reasons ranging from lack of jurisdiction over the respondent to lack of jurisdiction over the case, either for statutory or factual reasons. Each jurisdiction's protection order laws contain some variations regarding who is eligible for an order and what types of relationships are covered. These can range from married parties to cohabitants to dating relationships, and may vary depending on whether the relationship is heterosexual or homosexual.

In addition, some courts may lack jurisdiction if no threat or harassment has occurred within its borders.

In 1994, the federal government addressed these concerns with the full faith and credit requirements of the Violence Against Women Act. The
Violence Against Women Act was one section of an Omnibus Crime Bill. The VAWA itself is a diverse statute, containing a number of provisions targeted at reducing all aspects of violence against women. Among other things, the Act created new crimes for interstate domestic violence and interstate violation of a protection order, required all states and all tribes to give full faith and credit to valid protection orders, created a civil rights remedy for gender-motivated violence, and created a number of grants for education and training to combat violence against women. For purposes of this Article, the most important sections of the VAWA are its full faith and credit provisions. These provisions are among the least controversial.

The most controversial provision, and the one most associated with the VAWA, was the civil rights remedy. The civil rights remedy allowed women who had been subjected to gender motivated violence to file a civil suit in federal court. In 2000, the Supreme Court ruled that Congress exceeded its power under the Commerce Clause when it enacted the civil rights remedy portion of the VAWA. The Supreme Court did not, however, strike down all of the VAWA.

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44 See id. § 13981.
46 Those provisions were amended by the Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. Unless specifically mentioned otherwise, this article discusses the currently existing version of the VAWA's full faith and credit requirements.
49 For an analysis of the constitutionality of the various parts of the VAWA, see Fine, supra note 11, at 259-89. See also Gamrath, supra note 25, at 452-55; Karp & Belleau, supra note 11, at 183-90; Renee M. Landers, Prosecutorial Limits on Overlapping Federal and State Jurisdiction, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 64 (1996).
The full faith and credit requirements are still valid law and are much less controversial, largely because they were enacted pursuant to the Full Faith and Credit Clause of the Constitution, rather than the Commerce Clause. The Full Faith and Credit Clause declares that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Obviously, this provision explicitly gives Congress the authority to prescribe methods for implementing the clause. Arguably, the pertinent portions of the VAWA are an exercise of that authority. The key section of the VAWA declares that

[a]ny protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

Since a protection order would in all likelihood qualify as a "judicial proceeding," and this statute instructs states and tribes to treat other jurisdictions' protection orders as if they were issued by the enforcing jurisdiction, Congress has stayed within the Full Faith and Credit Clause's provision that "Congress may by general Laws prescribe the Manner in

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[51] Id. at art. I, § 8, cl. 3.
[52] Id. at art. IV, § 1. There has been some question as to whether this clause is limited to final orders or whether it can also apply to temporary or interim orders. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 963 (2d ed. 1992). See also DAVID D. SIEGEL, CONFLICTS IN A NUTSHELL 345 (2d ed. 1994). A protection order may qualify as any or all of the above, depending on the context in which the order was issued. A full resolution of this issue is beyond the scope of this Article. The constitutional clause, however, speaks of "judicial proceedings," not of "final orders." U.S. CONST. art. IV, § 1. Accordingly, this Article will proceed on the assumption that the federal statute is constitutional under this clause. Even if the clause is limited to final orders, however, the VAWA's full faith and credit requirements are likely constitutional under the Commerce Clause, as discussed in the text. See infra notes 57-59 and accompanying text. In addition, the statute could be viewed as a protection of the right to travel, which is in turn protected by the Equal Protection and Privileges and Immunities Clauses. See, e.g., Saenz v. Roe, 526 U.S. 489 (1999).

[53] See Gamrath, supra note 25, at 454.
which such . . . [judicial] Proceedings shall be proved, and the Effect thereof."\(^5\) The only possible question would be Congress's authority to include Indian Tribes within this provision, in addition to states. The Supreme Court has routinely held, however, that Congress possesses plenary authority over Indian Tribes and has upheld statutes that are rationally related to this authority.\(^6\)

Even if the Supreme Court were to analyze the VAWA's full faith and credit requirements under the Commerce Clause, they would likely pass constitutional muster. In *United States v. Lopez*,\(^7\) the Supreme Court ruled that the Commerce Clause gives Congress the authority to regulate three categories of activities: the use of channels of interstate commerce, the instrumentalities of interstate commerce or persons or things in interstate commerce (even if the threat is from purely intrastate activities), and activities that substantially affect interstate commerce.\(^8\) The full faith and credit requirements of the VAWA are intended to protect those people who possess a valid protection order and move from one jurisdiction to another.\(^9\) Thus, the statute should fall squarely within the Court's second category, protecting persons in interstate commerce.

To summarize, then, states and tribes must enforce all valid protection orders issued by any other state or any other tribe.\(^6\) The statute defines "protection order" as:

any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and

\(^{55}\) U.S. CONST. art. IV, § 1.


\(^{58}\) Id. at 558-59.

\(^{59}\) See Klein, *supra* note 31, at 254-57.

\(^{60}\) For information about the methods used by the various states to implement these requirements, as well as other documents related to the VAWA's full faith and credit requirements, see *Violence Against Women Online Resources*, at http://www.vaw.umn.edu (last modified Sept. 13, 2001).
credit under other Federal law) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.61

A valid protection order is one for which the issuing court possessed jurisdiction and provided due process to the respondent.62 The VAWA’s full faith and credit requirements also put limitations on the enforcement of mutual protection orders,63 prohibit requiring registration of foreign protection orders as a prerequisite to enforcement,64 and if a foreign protection order is registered, prohibit the enforcing state from notifying the respondent that the protection order was registered.65

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62 See id. § 2265(b), which reads:
PROTECTION ORDER.—A protection order issued by a State or tribal court is consistent with this subsection if—
(1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.
63 Mutual protection orders are sometimes issued by courts. Some courts issue them virtually automatically. A mutual protection order commands both parties to stay away from each other and cease harassment. A mutual protection order is entitled to full faith and credit when enforced against the respondent. It is not entitled to full faith and credit when enforced against the petitioner unless the respondent petitioned for a protection order and the court explicitly found that both parties were entitled to such an order. See id. § 2265(c). For a discussion of mutual protection orders and their problems, see Jennifer Paige Hanft, What’s Really the Problem With Mutual Protection Orders?, 22 WYO. LAW. 22 (Oct. 1999); Klein, supra note 31, at 266-68; Topliffe, supra note 23, at 1053-64.
64 See 18 U.S.C. § 2265(d)(2) (“Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State or tribal jurisdiction.”).
65 See id. § 2265(d)(1) (“A State or Indian tribe according full faith and credit to an order by a court of another State or Indian tribe shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State or tribal jurisdiction unless requested to do so by the party protected under such order.”).
The language of the VAWA’s full faith and credit requirements appear, on their face, to be straightforward mandates. These mandates, however, conceal a wealth of complexity. First and foremost, the general command “give a valid protection order full faith and credit” leaves a great many details regarding the procedures and methods of enforcement to each state and each tribe. In addition, states and tribes are not equally situated when it comes to enforcing protection orders, due to different jurisdictional rules developed by the Supreme Court. The next part of the Article explores the differences in those jurisdictional rules.

II. JURISDICTIONAL RULES

Each jurisdiction, state and tribe alike, must now take steps to implement the VAWA’s full faith and credit requirements. As in all legal matters, however, a given government must first possess jurisdiction before it can enforce a foreign protection order—“jurisdiction” both in the legislative and the adjudicative sense. “Legislative jurisdiction” is the ability of a given government to pass laws regulating an individual’s conduct, and “adjudicative jurisdiction,” or “judicial jurisdiction,” is the ability of a court to hear a given case and issue a ruling that binds the parties. Both aspects are important to implementing the VAWA’s full faith and credit requirements.

Most governments who have enacted a statute to implement these requirements have generally made violation of a foreign protection order an offense punishable by an established set of sanctions. A government must possess legislative jurisdiction over a specific person before the government can require that person to comply with these laws. In addition, that government’s courts must possess adjudicative jurisdiction in order to find an individual guilty of violating that law and impose one of the possible sanctions.

This part of the Article explores the legislative and adjudicative jurisdiction rules governing both states and tribes. In doing so, it focuses on

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66 See BLACK’S LAW DICTIONARY 856 (7th ed. 1999) (defining “legislative jurisdiction” as “A legislature’s general sphere of authority to enact laws and conduct business related to that authority, such as holding hearings”).

67 See id. (defining “judicial jurisdiction” as “The legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it”).

68 For the most current look at state actions to implement the VAWA’s full faith and credit requirements, see Violence Against Women Online Resources, supra note 60.
the situation where both parties, the person holding the order and the person restrained by the order, are physically located in the same jurisdiction. Not all violations of a protection order occur face to face; much depends on the terms of the protection order itself. If the order prohibits certain types of telephone or internet harassment, clearly a violation of the order can occur from a remote location. But most violations of a protection order occur when both parties are physically present, and these are certainly the most dangerous violations. In addition, these types of situations highlight the most crippling differences in the jurisdictional rules governing states and tribes.

A. Jurisdiction Rules for States

State legislative and adjudicative jurisdiction rules can be complex, particularly when a state is pushing the boundaries to extend its jurisdiction as far as possible. As the following discussion will demonstrate, when both parties are physically present in the same jurisdiction, the relevant state legislative and adjudicative jurisdiction rules are straightforward and simple. To illustrate the basic nature of these rules, each section will discuss the impact of the jurisdictional rule by applying it within the context of the VAWA’s full faith and credit requirements.

1. Criminal Jurisdiction

State criminal jurisdiction is essentially very basic and is centered around a territorial principle. A state may apply its criminal laws to any activities for which there is a significant local element, that is, when some significant portion of the crime occurs within the state’s boundaries. By longstanding tradition and custom, no state court will hear a criminal case prosecuted by another sovereign. Thus, the question of a state’s judicial and legislative jurisdiction tend to collapse into one inquiry—did a significant portion of the crime occur within the state’s territory? If so, then the state may punish the offender in a criminal proceeding, and once

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70 LEFLAR, supra note 69, at 308.
71 See, e.g., BRILMAYER, supra note 69, at 152 ("[S]tates customarily decline to adjudicate criminal . . . cases arising under other states’ laws.") (footnote omitted); see also LEFLAR, supra note 69, at 307-08.
72 See LEFLAR, supra note 69, at 309.
a criminal proceeding begins, the state conducting the prosecution will apply its own laws during the proceeding. As will be demonstrated in a moment, this unitary approach is not followed in civil proceedings. In civil matters, a state may possess judicial, but not legislative, jurisdiction and visa versa.

Within the context of the VAWA, these basic rules have two consequences. Remember, when we discuss the VAWA’s full faith and credit requirements, we are talking about one jurisdiction enforcing another jurisdiction’s protection order. The plain language of the federal statute directs the enforcing jurisdiction to enforce the protection order “as if it were the order of the enforcing State or tribe.” Each jurisdiction may have a different method of enforcing protection orders, including a different set of sanctions. One state may treat the violation of a protection order as civil contempt and another may treat it as a misdemeanor. What matters is how the enforcing jurisdiction chooses to handle violations of protection orders; the approach of the issuing jurisdiction is irrelevant. Even if both the issuing and enforcing jurisdiction treat violations as a misdemeanor, the enforcing jurisdiction is prosecuting a criminal action occurring within its own borders according to its own laws. It is not enforcing the issuing state’s criminal laws. Within the context of a typical (civil) protection order, then, the rules of state criminal jurisdiction are easily applied.

But what if the protection order was issued as part of a criminal proceeding? What if, for example, the issuing jurisdiction included the protection order as part of the conditions of pretrial release? The issuing jurisdiction is likely to treat a violation of those conditions as a separate crime and/or as grounds for revocation of pretrial release. All of these actions, including the original issuance of the protection order in these circumstances, are part of the issuing jurisdiction’s criminal laws. And has just been discussed, one state will generally not enforce another state’s criminal law.

There has been a great deal of dispute about the interstate enforceability of a criminal protection order. The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has taken the position that the Constitution does not permit one state to enforce another’s criminal laws. I address this issue much more fully below, but the short

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73 See infra notes 77-109 and accompanying text.
This issue is discussed more fully below. See infra notes 288-90 and accompanying text.
response is that NCCUSL misunderstands the nature of criminal protection orders, leading it to recommend a position that is contrary to federal law. A state can enforce another state’s criminal protection orders without enforcing another jurisdiction’s criminal laws. Rather, the enforcing jurisdiction will be enforcing a combination of its own laws and federal law.

2. Civil Jurisdiction

The principles of civil jurisdiction are more complicated than those for criminal jurisdiction, and the discussion must be broken into two major parts: judicial or adjudicative jurisdiction and legislative jurisdiction. Generally speaking, the first issue to arise will be whether a particular state’s court possesses jurisdiction to hear the dispute at bar. Once it is determined that the state court can hear the case, attention turns to which state’s law will be applied to resolve the dispute. Both of these questions are standard issues for constitutional law and conflicts of law scholars, as well as for courts. As is discussed below, the test for each issue can be rather vague, but the answers are well accepted when the case involves parties physically present in one state’s territory.

a. Judicial or Adjudicative Jurisdiction

Judicial jurisdiction, also called “adjudicative” or “adjudicatory” jurisdiction, concerns a court’s power to hear a particular case and breaks into two subparts: subject matter jurisdiction and personal jurisdiction. Each will be addressed separately.

i. Subject Matter Jurisdiction

Subject matter jurisdiction means essentially what it says—whether the court possesses the power to hear the subject matter of the case. When dealing with states, the answer is fairly straightforward, as state courts are typically deemed to be courts of general jurisdiction. That is, they can hear cases involving virtually any topic. I say “virtually,” as there are two potential sources of limitations. First, federal law may reserve a given subject, such as patent infringement litigation, exclusively to federal
courts. Second, state law itself may limit a particular court's jurisdiction, either by designating a given court to hear particular types of cases (such as a probate or family court) or by setting limitations based on the dollar amount in controversy (such as a small claims court). When it comes to enforcing protection orders, however, the only potential hazard for subject matter jurisdiction lies in making sure that the action is filed in the proper state court. There is no question that some state court will be empowered to hear these types of cases.

**ii. Personal Jurisdiction**

Personal jurisdiction examines the court's power to make rulings and issue a judgment that is binding upon the parties. There is generally no problem with the court's personal jurisdiction over a plaintiff or petitioner, as that person is typically said to have consented to personal jurisdiction by filing suit with the court. Determining whether a court possesses personal jurisdiction over a particular defendant requires an examination of both the U.S. Constitution and of state law.

The Due Process Clause of the Constitution sets limits on state attempts to exercise personal jurisdiction over particular parties. It is standard canon that due process means notice and an opportunity to be heard. The Due Process Clause, however, also has a third component—basis of jurisdiction. In other words, a state must have a legitimate basis for extending its jurisdiction over this particular defendant. That basis can take one of two possible forms.

The first basis for personal jurisdiction harkens back to the territorial rule and has been criticized as lacking a theoretical basis. Under this

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82 Id. at 35; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 116 (4th ed. 2001).
83 LEFLAR, supra note 69, at 5, 59; SEIGEL, supra note 52, at 33-37; WEINTRAUB, supra note 82, at 115-16.
84 BRILMAYER, supra note 69, at 267; SEIGEL, supra note 52, at 40.
85 SIEGEL, supra note 52, at 40.
86 Id. at 41-43. Other clauses of the Constitution, such as the Full Faith and Credit Clause and the Privileges and Immunities Clause, can also play a role in personal jurisdiction inquiries. The U.S. Supreme Court, however, has made the Due Process Clause of paramount importance in this area. See, e.g., BRILMAYER, supra note 69, at 135-49; SCOLES & HAY, supra note 52, at 78-109.
87 SCOLES & HAY, supra note 52, at 220.
88 SIEGEL, supra note 52, at 41-43.
89 For a discussion of the traditional territorial basis for jurisdiction, see LEFLAR, supra note 69, at 39-43.
90 Id. at 65-66; SIEGEL, supra note 52, at 46.
prong, a state acquires personal jurisdiction over a person if that person is served with notice while physically present within the state.\textsuperscript{91} It does not matter whether the defendant is domiciled within the state or just present on an airplane as it flies over the state;\textsuperscript{92} physical presence within a state gives the state the right to hold a person accountable in the state’s court.\textsuperscript{93} Although at one point the continuing validity of this basis had been questioned, the U.S. Supreme Court reaffirmed the “tag you’re it” variety of personal jurisdiction in 1990,\textsuperscript{94} and it now appears unlikely to disappear.

Under the second basis, a state may acquire personal jurisdiction if the defendant has sufficient minimum contacts with the state.\textsuperscript{95} The minimum contacts test traces back to \textit{International Shoe Co. v. Washington},\textsuperscript{96} in which the U.S. Supreme Court declared that the critical inquiry (provided the defendant was not physically served in the state) is whether the defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”\textsuperscript{97} The Supreme Court has continued to be vague about precisely what facts are sufficient to satisfy this test, but rather conducts a case by case inquiry examining the relationship between the defendant and the forum state, with an eye to whether it is “fair” for the forum to require the defendant to answer in its court.\textsuperscript{98} Most of the subsequent Supreme Court cases applying this test have focused on situations where the defendant is a corporation or has never actually set foot in the state.\textsuperscript{99} It is generally accepted that when a defendant physically comes into a state and commits some action while present in the state, that state can exercise

\textsuperscript{91} BRILMAYER, \textit{supra} note 69, at 268-69; LEFLAR, \textit{supra} note 69, at 65; SCOLES & HAY, \textit{supra} note 52, at 218; SIEGEL, \textit{supra} note 52, at 44-46; WEINTRAUB, \textit{supra} note 82, at 200-01.
\textsuperscript{93} See WEINTRAUB, \textit{supra} note 82, at 200-01.
\textsuperscript{94} Burnham v. Superior Court, 495 U.S. 604 (1990).
\textsuperscript{95} BRILMAYER, \textit{supra} note 69, at 268; SIEGEL, \textit{supra} note 52, at 58-64. It should also be noted here that I am addressing what is often called “specific” as opposed to “general” jurisdiction. General jurisdiction focuses on whether the defendant’s contacts with the forum are so extensive that the forum can hear any litigation on any subject concerning the defendant. Specific jurisdiction, by contrast, looks at whether the defendant’s contacts on a particular issue (e.g., violation of a protection order) are sufficient to allow the forum to adjudicate a dispute concerning that issue. \textit{Id.} at 281-86.
\textsuperscript{96} Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945).
\textsuperscript{97} Id. at 316 (citations omitted).
\textsuperscript{98} LEFLAR, \textit{supra} note 69, at 44-45.
\textsuperscript{99} See, e.g., \textit{id.} at 49-58; see also BRILMAYER, \textit{supra} note 69, at 268-75.
personal jurisdiction over the defendant, at least with respect to the actions that occurred within the state’s boundaries. The implications for enforcement of foreign protection orders are clear. If a person is physically present within a state at the time he or she violates a protection order, the Due Process Clause would allow the state to exercise personal jurisdiction over that person for purposes of determining whether the protection order was violated, and if so, to impose sanctions.

As mentioned above, however, personal jurisdiction cannot be resolved without also looking at state law. State law regarding personal jurisdiction is generally easy, as most, if not all, states have some version of a long arm statute, allowing the state to exercise personal jurisdiction to the full extent permitted by the U.S. Constitution. It is always important, however, to actually check the long arm statute of the state in question, as it may be limited to particular subjects. It is quite likely, however, that all state long arm statutes would allow the state to reach out and haul a person into state court for violating a protection order, even if the alleged violator has left the jurisdiction. What is important, both in terms of the Constitution and state law, is that the violation occurred within the boundaries of the state.

b. Legislative Jurisdiction

Once a state has authority to hear a particular case, it must decide what law to apply. In most cases, that will simply be the law of the forum. In other instances, however, the parties may argue for application of another state’s law, contending that it is the more proper law to govern the case or that the application of forum law is unfair. This issue is known in conflicts jurisprudence as "legislative jurisdiction," the power of a given state to apply its law to the case at hand. Stated somewhat differently, legislative jurisdiction is the power of a state’s legislature to enact laws governing a particular person’s conduct. As with personal jurisdiction, the Due Process Clause of the U.S. Constitution is the touchstone.

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100 See BRILMAYER, supra note 69, at 285 (These illustrations “suggest a general principle: specific jurisdiction is constitutional where the costs of litigating in the forum are merely the costs arising out of the defendant’s choice to enter the forum or to engage in conduct having consequences there.”).

101 SIEGEL, supra note 52, at 58-64.

102 Id. at 60-61.

103 LEFLAR, supra note 69, at 163.

104 Id. at 163-64. As is also true with personal jurisdiction, other constitutional clauses may have some relevance, but the Due Process Clause is the most important. See, e.g., BRILMAYER, supra note 69, at 135-49; SCOLES & HAY, supra note 52, at 78-109.
In the context of personal jurisdiction, the Supreme Court (through the rubrik of the Due Process Clause) focuses on the relationship between the defendant and the forum state. In the context of legislative jurisdiction, however, the Supreme Court focuses on the relationship between the particular subject matter or underlying factual circumstances of the litigation and the state who seeks to apply its law. Again, the test is vague, examining whether a state has "a significant aggregation of contacts with the parties and the occurrence, creating interests, such that application of its law [is] neither arbitrary nor fundamentally unfair." The Court has provided no theory to explain how it evaluates the contacts, but two major lines of analysis have evolved.

The first examines whether applying a given state's law would work an unfair surprise, that is, whether there are some contacts indicating, or making it "foreseeable," that state law might apply. The second line of analysis focuses on a quid pro quo, on whether the contacts are such as to give the defendant the benefit of state law. In some sense, it is not clear whether these are two separate lines of analysis, since the existence of some sort of quid pro quo, of the defendant taking advantage of state law, surely means that it is foreseeable a court might apply that law to resolve a dispute. In any event, there is a strong territorial bent to this area of law. If certain key events happen within a state's borders, that has usually proven sufficient for application of that state's laws. Again, the test and the answers may be vague around the margins, but they are straightforward in the context central to this Article. If a person is physically present within a state at the time that person violates (or is alleged to violate) a protection order, that state will have legislative jurisdiction over the alleged violator; the state has the power to evaluate the alleged violator's conduct under state law and impose any prescribed punishment if indeed a violation occurred.

Clearly, then, the alleged violator's physical presence within the state at the time of the violation, and the fact that the violation occurred within the state's boundaries, is all that is necessary to give a state both judicial and legislative jurisdiction for both criminal and civil purposes. As the next
section makes equally clear, matters are not so simple in the context of tribal governments.

B. Jurisdiction Rules for Tribes

The tribal jurisdiction rules are not nearly as easily stated.110 The modern history of tribal jurisdiction traces back twenty-five years and, as is also true for state jurisdictional rules, the Supreme Court has been largely responsible for the development and creation of these rules. The Court has not, however, made reference to state jurisdiction in the process of creating the rules for tribes.111 Rather, the Supreme Court has embarked on a wholly separate track, including creating different rules for tribal criminal and civil jurisdiction, for a time splitting tribal civil legislative and civil adjudicative jurisdiction into two tests, and finally merging tribal civil jurisdiction back into one test. This part of the Article explores the development and current status of tribal jurisdiction.112 Because the application of these rules to the

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110 This Article does not purport to address tribal jurisdiction in Public Law 280 states, but rather limits its focus to non-Public Law 280 jurisdictions. Public Law 280 is a federal statute granting states the power to assume certain types of civil and criminal jurisdiction in Indian Country. Only a handful of states have taken jurisdiction under Public Law 280, and the rules for jurisdiction in those states thus contain an extra layer of complexity. For a closer look at Public Law 280 and its effects, see Carole Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405 (1997).

This section may also surprise some who did not realize that tribal courts existed and exercised such a wide range of authority. Most law schools fail to teach their students about the existence of these courts, much less what they do. For a brief history of tribal courts, see Melissa L. Koehn, Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts, 29 Ariz. St. L.J. 705 (1997) [hereinafter Koehn, Civil Jurisdiction]. For a more current look at the workings of tribal courts, see Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life 57-135 (1995); Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285 (1998).

111 See generally Resnik, supra note 1. For an explanation of the Court’s rulings from a different perspective, see Deborah A. Geier, Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law, 1994 BYU L. Rev. 451.

112 Because my purpose here is to explore the existing rules and how to work within them, I will take a similar approach to explaining the jurisdictional rules binding tribes as I did when exploring the rules binding states. That is to say, I have attempted to take a “middle of the road” expository approach, setting forth the rules themselves as they currently exist with minimal critique and commentary on those
VAWA's full faith and credit requirements is quite complex, that application will be deferred until Part III.

1. **Criminal Jurisdiction**

The modern history of tribal criminal jurisdiction started in 1978 with the U.S. Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*.

That case involved two non-Indian defendants charged in the Suquamish Indian Provisional Court. The first defendant was charged with assaulting a tribal officer and resisting arrest; the second with recklessly endangering another person and injuring tribal property after he allegedly led tribal officers on a high-speed chase that ended when the defendant crashed into a tribal police car. Neither case had proceeded to trial, as they were stayed pending a resolution of whether the tribe possessed authority to pursue criminal charges against a non-Indian.

The Supreme Court ruled against the tribes, declaring 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

rules. In the state section, I was able to rely on standard conflicts of law treatises. There are no similarly complete, up to date sources for Indian law. The standard treatise in the field, Felix Cohen's *Handbook of Federal Indian Law*, is twenty years out of date. The other two potential sources have built-in limitations. While Judge Canby has done a wonderful job with the *American Indian Law in a Nutshell*, it is limited by the nutshell format. The *American Indian Law Deskbook* contains similar restrictions in that it is a streamlined overview, but more critically, the *Deskbook* is written from a biased perspective. See, e.g., Joseph William Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. REV. 315 (1994). Thus, this section will explore the jurisdictional rules by looking primarily at the key Supreme Court opinions themselves, as well as some of the law review literature examining those opinions. Because *Nevada v. Hicks*, 121 S. Ct. 2304 (2001), was newly decided at the time of this writing, and there is yet no existing body of work examining it, that opinion will receive a bit more detailed treatment. For a more historical look at federal policy and tribal jurisdiction, see Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973 (2000).

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114 *Id.* at 193-94.
115 *Id.* at 194.
116 *Id.*
117 *Id.*
United States except in a manner acceptable to Congress." In reaching its
decision, the Court explored, somewhat imperfectly, the history of relations
between the United States and American Indians on the issue of criminal
laws and criminal punishment. In so doing, the Court split tribal civil and
tribal criminal jurisdiction into two distinct areas, with tribes flatly
prohibited from exercising criminal jurisdiction over non-Indians.

It is interesting to note that nowhere in the Oliphant opinion did the
Court discuss standard principles of criminal jurisdiction as applied to
states. Rather, the Court carved out a unique test specific to Indian tribes,
a test which seems to flow from the Court's presumption that all tribes lost
territorial sovereignty when they were merged into the United States. This
presumption is based on the Court's analysis of federal Indian policy. The
Court, however, is a notoriously poor historian, and its approach in
Oliphant has been roundly criticized by a number of scholars. The
Court's conclusion that tribes are not territorial sovereigns also marks a
distinct split from its approach to state sovereignty. As Professor Dussias
has noted, this approach is particularly unusual in the context of criminal
jurisdiction, as a criminal offense has always historically been treated as an
offense against the sovereign, not just against the particular individual
victim. Nevertheless, Oliphant is clearly the first in a series of Supreme
Court decisions limiting tribal sovereignty to issues concerning tribal
members.

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118 Id. at 210.
119 For another examination of this history, see Allison M. Dussias,
122 Dussias, supra note 119, at 37-38.
It is also interesting to note that the Court did not specifically indicate whether the restrictions it created were based on a lack of tribal subject matter jurisdiction over non-Indian crimes or a lack of tribal personal jurisdiction over non-Indians accused of crimes. In any event, the ultimate result is the same—no tribal criminal jurisdiction over non-Indians.

The Court carried that ruling a step further twelve years later in the case of *Duro v. Reina*. Albert Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians, lived on the Salt River Indian Reservation. Duro was thus a "nonmember Indian;" he is an Indian, but is not a member of the Indian community on whose land he lived. Duro was accused of killing a fourteen year old boy on the Salt River Reservation and was charged in tribal court with illegally firing a weapon on the reservation. The Court extended its earlier ruling in *Oliphant*, holding that nonmember Indians should be treated the same as non-Indians, since nonmembers were also, by definition, outside the internal governance structure of the tribe.

In *Duro*, the Court did explicitly recognize that "[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." The Court held that tribes, however, no longer possess full sovereignty in this area, as it would not be consistent with the tribes' status as dependent sovereigns. There is no explicit discussion of why tribes lost this part of their sovereignty when they became part of the United States, but individual states did not.

The Court did obliquely address this argument at two points, first during its discussion of why tribal criminal jurisdiction over nonmembers is inconsistent with the tribes' dependent status, and second, when addressing one aspect of the lower court's ruling. As to the first point, the

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125 *Id.* at 679.
126 *Id.* at 681. At the time of the alleged shooting, the Indian Civil Rights Act ("ICRA") limited tribes to imposing criminal penalties of no more than six months imprisonment and a $500 fine. Those limitations have since been increased, see 18 U.S.C. § 1302 (1994), but "major" crimes, including murder, committed by Indians against Indians, fall primarily within federal jurisdiction. Tribes can also prosecute without offending double jeopardy restrictions, see *United States v. Wheeler*, 435 U.S. 313 (1978), but they usually choose to charge defendants with misdemeanors, given ICRA's restrictions.
128 *Id.* at 685.
129 *Id.* at 685-86.
Court engaged in a brief examination of the history of federal Indian policy, concluding that the legislative and executive branches deliberately removed tribal criminal jurisdiction over nonmembers, just as with non-Indians.\textsuperscript{130} Probably more important, however, is the Court's discussion of the "special nature" of tribal courts and its obvious concerns about turning non-Indians over to a political entity in which they have no voice and that is not bound by the strictures of the federal constitution.\textsuperscript{131}

As to the second point, the lower court sought to adopt a version of a "contacts" test. The Supreme Court dismissed this attempt out of hand, declaring:

The contacts approach is little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him. We have rejected this approach for non-Indians. It is a logical consequence of that decision that nonmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status.\textsuperscript{132}

If the Court had adopted this test, it would have brought tribal criminal jurisdiction more in line with state jurisdiction.

Congress quickly passed a statute overturning the \textit{Duro} decision, explicitly stating that tribes have always possessed criminal jurisdiction over all Indians, member and nonmember alike.\textsuperscript{133} That statute, however, did not alter the status quo regarding non-Indians.
Much has been written about the ultimate division of criminal jurisdiction in Indian Country. Criminal jurisdiction now turns on a complex calculus of determining the identity of the victim (Indian or non-Indian), the identity of the alleged perpetrator (Indian or non-Indian), and the nature of the crime (i.e., its seriousness).\textsuperscript{134} Regardless of who possesses actual jurisdiction, however, tribes repeatedly report difficulty getting federal or state prosecutors to act on the crimes in Indian Country over which they possess jurisdiction.\textsuperscript{135} The result has been many instances of lawless behavior, with the tribal police and prosecutors unable to directly prosecute offenders and unable to obtain enforcement from those with authority.\textsuperscript{136} These problems are particularly acute in domestic violence situations, which often involve both an Indian and a non-Indian.\textsuperscript{137} As discussed more thoroughly below, tribal police are put in the situation of maintaining law and order in the face of no tribal ability to prosecute offenders.\textsuperscript{138}

2. Civil Jurisdiction

The history of tribal civil jurisdiction has taken a different path than tribal criminal jurisdiction. While the Court clearly set out rules for tribal civil legislative jurisdiction in 1981, the rules for tribal civil adjudicative jurisdiction have been more imprecise, although the Court clarified that test with its 2001 decision in the case of \textit{Nevada v. Hicks}.\textsuperscript{139} The tests for tribal civil legislative and tribal civil adjudicative jurisdiction are now the same.

\textsuperscript{131} See, e.g., \textit{WILLIAM C. CANBY, \textsc{american indian law in a nutshell} 142-68 (3d ed. 1998)}; \textit{COHEN, supra} note 56, at 335-41.

\textsuperscript{135}See Dussias, \textit{supra} note 119, at 38-43.

\textsuperscript{136}See, e.g., \textit{id. at} 38-43.

\textsuperscript{137}See, e.g., Edward Reina, Jr., \textit{Domestic Violence in Indian Country: A Dilemma of Justice}, 5 \textsc{Domestic violence rep.} 33, 47 (2000).

\textsuperscript{138}See \textit{infra} notes 258-63 and accompanying text.

\textsuperscript{139}Nevada v. Hicks, 121 S. Ct. 2304 (2001).
Since these tests only recently have merged, however, each is explored in turn.

\[a. \text{ Legislative Jurisdiction}\]

The modern history of tribal civil jurisdiction traces back to the Supreme Court's 1981 decision in *Montana v. United States.* The relevant portion of that litigation revolved around attempts by the Crow Tribe to regulate non-Indian hunting and fishing within its reservation. As part of resolving that controversy, the Supreme Court established a test for tribal legislative jurisdiction. Since the test depends heavily on the history of federal Indian policy, a brief detour through that history is required.

As part of its dealings with the Indians, the federal government chose to separate whites and Indians, first by removing Indians westward and later by confining them to reservations. These reservations were generally set aside for the tribe itself, and not for any particular individual member(s) of the tribe. In the latter part of the 1800s, however, the federal government shifted its policy toward the Indians, attempting to dismantle the tribes and assimilate individual Indians into the mainstream of American society. The primary vehicle for accomplishing this task was the General Allotment (Dawes) Act of 1887. With this statute, Congress began the process of assigning reservation lands to individual Indians, a process known as "allotment." The extra or "surplus" lands left over within the reservation borders, after all allotments were assigned, were generally sold to non-Indians (thus conveying fee simple title to the non-Indian). Land allotted to individual Indians was generally subject to some restrictions, with the federal government holding the title for a certain period of time before issuing the fee patent to the individual Indian owner.

The allotment policy was a total failure, and Congress officially repudiated it in 1934 with the passage of the Indian Reorganization Act ("IRA"), which encouraged tribal governments and provided mechanisms
for re-establishing those governments. Although the IRA halted the allotment policy, it did not roll it back. Land sold to non-Indians remained in non-Indian hands, unless explicitly purchased back by the tribe.\textsuperscript{147} By the time of the IRA, fee patents to many allotted parcels had been released by the federal government, and many Indians either sold their allotments to non-Indians or were swindled out of their land.\textsuperscript{148} Any allotted land still subject to restrictions at the time of the IRA was conveyed into trust.\textsuperscript{149} Thus, reservations subject to allotment now possess a variety of different types of land tenure. Some land is held in trust by the federal government (either on behalf of individual tribal members or the tribe itself), some land is held in fee by Indians (who may or may not be members of the tribe), and some land within the original boundaries of the reservation is held in fee by non-Indians.

One more bit of information concerning the definition of Indian Country is needed before turning back to the \textit{Montana} decision. As with all sovereigns, tribal sovereignty is tied to a particular geographic area, one known as "Indian Country." Congress established a definition for Indian Country as part of the Major Crimes Act, a statute assuming federal authority over certain enumerated crimes occurring within Indian Country. That definition, however, has been extended to apply to all types of situations, in both civil and criminal contexts. Indian Country is:

\begin{itemize}
  \item[(a)] all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
  \item[(b)] all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
  \item[(c)] all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.\textsuperscript{150}
\end{itemize}

Thus, "Indian Country" is broader than "reservation," although the term "reservation" is often used as a shorthand term.

With this history, we are now ready to turn back to our examination of \textit{Montana v. United States}. The Crow Reservation in Montana was subject to allotment, and at the time of the litigation, approximately sixty-nine percent of the reservation was held in trust by the federal government,

\textsuperscript{147} Royster, \textit{supra} note 141, at 15-18.
\textsuperscript{148} \textit{Id.} at 10-18.
\textsuperscript{149} \textit{Id.} at 17.
twenty-eight percent was owned in fee by non-Indians, two percent was held in fee simple by the state of Montana, and less than one percent was owned in fee simple by the United States.\(^{151}\)

One of the central disputes in the litigation concerned the ability of the Tribe to regulate hunting and fishing by nonmembers\(^{152}\) within the reservation. This attempted exercise of power by the Tribe is (as should be obvious by now) an issue of legislative jurisdiction. Within the context of Indian law decisions, however, the Court repeatedly uses the term “regulatory jurisdiction,” as opposed to “legislative jurisdiction.”\(^{153}\) The Court, again using a somewhat shaky and incomplete historical analysis of federal Indian policy, held that trust land and fee land owned by non-Indians must be treated differently.\(^{154}\) According to the Court, when the allotment policy caused reservation lands to be sold to non-Indians, those lands were removed from tribal authority, and Congress never evidenced any intent to reverse that change.\(^{155}\) Thus, after \textit{Montana}, tribes were deemed to have regulatory jurisdiction over all persons present on trust land within the boundaries of the tribe’s Indian Country.\(^{156}\) Tribes, however,


\(^{152}\) As was referenced \textit{supra} notes 124-31 and accompanying text, the universe of people for purposes of tribal jurisdiction can be divided into three categories: members of the tribe in question; persons who are Indians, but are not members of the tribe in question; and non-Indians. One underlying issue has often been how to treat nonmember Indians. This issue was explicitly addressed in \textit{Duro} v. \textit{Reina}, 495 U.S. 676 (1990), with the Supreme Court concluding that nonmember Indians are in the same position as non-Indians. Congress disagreed with that interpretation when it enacted the “\textit{Duro} fix” legislation. \textit{See supra} note 133 and accompanying text. Thus, for purposes of criminal jurisdiction, all Indians are treated alike. The Court, however, has continued to refer to “members” and “nonmembers” in its civil jurisdiction cases, see, e.g., \textit{Nevada} v. \textit{Hicks}, 121 S. Ct. 2304 (2001), but has not been explicitly confronted with the need to analyze whether that is the correct division for purposes of civil jurisdiction, or whether civil jurisdiction should also speak in terms of “Indians” and “non-Indians.” For a look at some of the consequences of defining jurisdiction based on tribal membership, see Dussias, \textit{supra} note 119, at 78-96.

\(^{153}\) It is not altogether clear why the Court has used different terminology. It might be because the Court views tribal territorial sovereignty as more limited than state territorial sovereignty, and thus has deliberately adopted a different term. On the other hand, it could simply be because the Court has not focused on the fact that tribal “regulatory jurisdiction” and state “legislative jurisdiction” are in essence the same issue.

\(^{154}\) \textit{Montana}, 450 U.S. at 557-66.

\(^{155}\) \textit{Id.} at 559-63.

\(^{156}\) \textit{Id.} at 557.
presumptively had lost regulatory jurisdiction over nonmembers on fee land located within the boundaries of the tribe's Indian Country.\textsuperscript{157} That presumption could be rebutted if the tribe could establish that the non-Indian had entered into a consensual relationship with the tribe or its members\textsuperscript{158} or if the non-Indian's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."\textsuperscript{159} The Court recently reaffirmed this basic approach to tribal regulatory jurisdiction with its decision in \textit{Atkinson Trading Co. v. Shirley}.\textsuperscript{160}

\textbf{b. Adjudicative Jurisdiction}

For a number of years, the Supreme Court appeared to take a much more supportive view of tribal civil adjudicative jurisdiction than it did of

\begin{table}
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\textsuperscript{157} Id. at 565-66. For a critique of the Court's decision, see Getches, \textit{supra} note 121, at 1608-12; Gould, \textit{supra} note 123, at 872-75; Royster, \textit{supra} note 141. Cf. Frickey, \textit{supra} note 123, at 25. \\
\textsuperscript{158} \textit{Montana}, 450 U.S. at 565. \\
\textsuperscript{159} Id. at 566. \textit{Montana} and later cases have demonstrated that the Supreme Court takes a particularly crabbed approach to the direct effects test. \textit{See}, e.g., Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989). For a closer examination of the flaws in the Court's approach, see Royster, \textit{supra} note 141, at 43-63. For a particularly egregious application of the direct effects test by a lower court, see Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210 (9th Cir. 2000), rev'd en banc 266 F.3d 1201 (9th Cir. 2001), \textit{cert. denied}, 122 S. Ct. 1296 (2002); see also Royster, \textit{supra} note 141, at 49. \\
\textsuperscript{160} \textit{Shirley}, 121 S. Ct. at 1825.
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tribal civil legislative jurisdiction. In the cases of Williams v. Lee and Santa Clara Pueblo v. Martinez, the Court held that certain types of cases must be brought in tribal court. In the mid-1980s, the Court twice held that disputes about the extent of tribal adjudicative jurisdiction over non-Indians must first be litigated ("exhausted") in tribal court. This so-called "tribal exhaustion" requirement funneled many non-Indian litigants into tribal court, although it did establish a mechanism for the federal courts to review tribal court determinations as to jurisdiction.

This deference to tribal courts came to a screeching halt in 1997 with the Supreme Court's decision in Strate v. A-1 Contractors. Strate began when Gisela Fredericks and Lyle Stockert were involved in the same traffic accident on the Fort Berthold Indian Reservation in North Dakota. The accident itself occurred on a state highway running through the reservation pursuant to a right-of-way granted to the state by the United States. Fredericks was not herself a tribal member, but her deceased husband and her five children were all members of the tribe. Stockert was driving a gravel truck owned by his employer, A-1 Contractors (a non-Indian owned

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161 This Article compares a state's jurisdiction within its borders to a tribe's jurisdiction within its borders. For an examination of tribal, federal, and state adjudicatory jurisdiction in Indian Country, see Laurie Reynolds, Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction, 38 WM. & MARY L. REV. 539 (1997).

162 Williams v. Lee, 358 U.S. 217 (1959) (action by non-Indian to collect debt incurred by Indian on the reservation). For a closer look at this case, see Dussias, supra note 119, at 46-49.

163 Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (action by tribal member alleging her tribal government had violated the Indian Civil Rights Act).


165 For a closer look at the tribal exhaustion doctrine, see Koehn, Civil Jurisdiction, supra note 110. For a closer look at post-exhaustion review in the federal courts, see Judith V. Royster, Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions, 46 U. KAN. L. REV. 241 (1998).

166 Strate v. A-1 Contractors, 520 U.S. 438 (1997). See, e.g., Pommersheim, supra note 1, at 128 ("This credo of respect and comity [appeared to be the Court's approach toward tribal courts] ... Yet, a short ten years later, the Court in Strate v. A-1 Contractors appeared to veer sharply away from this model of engagement to one of raw power ... ").

167 Strate, 520 U.S. at 442.

168 Id. at 442-43.

169 Id. at 443.
business), and at the time of the accident, A-1 Contractors was subcontracted to do work for the tribe, although the record did not indicate whether Stockert was working on that subcontract when the accident occurred. Fredericks filed suit in tribal court against both A-1 Contractors and Stockert, seeking to recover for her injuries suffered in the accident.

The case wound its way to the Supreme Court, which held that, at least with respect to nonmembers, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." The Court also declared Montana's test for tribal civil legislative jurisdiction was the appropriate test for determining the extent of tribal civil adjudicative jurisdiction. As to the facts of the litigation itself, the Court held that, despite the fact that the state highway came within the statutory definition of "Indian Country," the highway should be considered the same as non-Indian fee land. The state highway was the legal equivalent of non-Indian fee land, thus activating Montana's presumption that the tribe lacked civil jurisdiction over non-Indian activity on the land. The tribe could rebut this presumption by satisfying either the consensual relationship or direct effects test. The Court found that the first exception, consensual relations, did not apply to the accident and that the tribe had not satisfied the second exception, the direct effects test. Thus, the tribe was deemed not to possess adjudicative jurisdiction over an on-reservation auto accident between the widow/mother of tribal members and a subcontractor working for the tribe.

In reaching its decision, the Court did not explicitly state whether its decision was based on subject matter or personal jurisdiction. Given the

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170 Id.
171 Id.
172 Id. at 443-44.
173 Id. at 453. For a critique of the decision to conflate these two types of jurisdiction, see Reynolds, supra note 161, at 580-86.
174 Strate, 520 U.S. at 453.
175 Id. at 454-56.
176 Id. at 456.
177 Id. at 456-57.
178 Id. at 457-59.
179 For another look at the flaws of the Court's reasoning concerning the place of the tribal courts in our federal system, see Pommersheim, supra note 1.
180 Cf. Reynolds, supra note 161, at 583 ("[T]he recent confusion between legislative and adjudicatory jurisdiction is but a continuation of a long series of Indian law opinions in which the Court has dealt with various tribal jurisdictional
tenor and basis of the Court’s decision, however, the Court quite likely viewed this as a subject matter jurisdiction case, as it focused on the Court’s ability to hear the substance of the case, rather than to issue a decision binding on the parties. And since the non-Indian plaintiff had filed the suit in tribal court, she would be deemed to have consented to tribal court jurisdiction, thus leaving the tribal court’s authority over the non-Indian defendant the only issue. Since the court continually referred to the subject matter of the lawsuit, as well as to the fact that Fredericks, Stockert, and A-1 Contractors were all non-Indian, the Court was probably not focused simply on personal jurisdiction.¹⁸¹

The Court’s recent decision in Nevada v. Hicks¹⁸² reinforces this interpretation. Hicks is, in fact, the Court’s latest statement on tribal adjudicative jurisdiction, and while it clarifies many principles, it does so in a very disturbing way. The case began in 1990 with Nevada game wardens suspecting that Floyd Hicks killed a California bighorn sheep, a protected species, off the reservation.¹⁸³ Hicks is a member of the Fallon Paiute-Shoshone Tribes and resides on tribally-owned trust land on the tribes’ reservation in western Nevada.¹⁸⁴ Throughout the course of their investigation, Nevada state officials obtained two state search warrants for Hicks’ home. Before executing those warrants, however, state law enforcement also obtained a tribal search warrant each time, and the actual searches were jointly conducted by state and tribal law enforcement.¹⁸⁵ Neither search revealed any evidence of wrongdoing.¹⁸⁶

After the second search, Hicks filed suit in tribal court against the tribal judge, the tribal officers, the state wardens in their individual and official capacities, and the state of Nevada.¹⁸⁷ The suit alleged that officers had damaged Hicks’ property and that the second search exceeded the bounds of the warrant.¹⁸⁸ The suit wound its way first through the tribal and then through the federal court system, finally reaching the U.S. Supreme Court. The primary issue before the Court was whether the tribal court “has jurisdiction to adjudicate the alleged tortious conduct of state wardens issues without clarifying the type of jurisdiction at issue.”).¹⁸⁹

¹⁸¹ For a look at how some tribal courts have approached the question of their personal jurisdiction, see Newton, supra note 110, at 322-26.
¹⁸³ Id. at 2308.
¹⁸⁴ Id.
¹⁸⁵ Id.
¹⁸⁶ Id.
¹⁸⁷ Id.
¹⁸⁸ Id.
executing a search warrant for evidence of an off-reservation crime; and, as to the [federal law claim], whether the Tribal Court has jurisdiction over claims brought under 42 U.S.C. § 1983.189

The justices of the Supreme Court issued five opinions: a majority opinion,190 two concurring opinions,191 an opinion concurring in part and concurring in the judgment,192 and an opinion that concurred only in the judgment.193 Three of those opinions are likely to prove pivotal—the majority opinion, the concurring opinion by Justice Souter, and the opinion by Justice O'Connor concurring in part and concurring in the judgment. My analysis will, therefore, focus on those three opinions. I will first summarize the key portions of each opinion and then turn to an analysis of the impact of the decision.

Justice Scalia wrote the majority opinion, which was joined by five other justices. The opinion begins by reiterating the Court's statement in Strate v. A-1 Contractors194 that a tribe's adjudicatory jurisdiction over nonmembers does not exceed its legislative jurisdiction.195 The opinion therefore turns to an examination of the tribe's legislative jurisdiction on these facts, as a determination that the tribe lacks legislative jurisdiction would effectively end the inquiry.196 The opinion also drops an early

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189 Id. at 2309. Section 1983 is a federal statute that provides a procedural mechanism for persons to file suit claiming that state officials have violated rights secured by the federal constitution and statutes. For more on the workings of § 1983 suits, see Koehn, The New American Caste System, supra note 120.

190 Justice Scalia authored the opinion, and was joined by Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas and Ginsburg. Hicks, 121 S. Ct. at 2307.

191 One by Justice Souter, joined by Justices Kennedy and Thomas, id. at 2318 (Souter, J., concurring); and one by Justice Ginsburg writing only for herself. Justice Ginsburg's opinion was short, only two paragraphs, and simply reiterated that the majority's decision was limited to the issue of tribal court jurisdiction over state law enforcement officers enforcing state law; it did not purport to resolve the issue of tribal court jurisdiction over nonmember defendants generally. Id. at 2324 (Ginsburg, J., concurring).

192 Authored by Justice O'Connor and joined by Justices Stevens and Breyer. Id. at 2307 (O'Connor, J., concurring).

193 Authored by Justice Stevens and joined by Justice Breyer. Justice Stevens' opinion focused on the issue of tribal court ability to hear § 1983 suits, arguing that tribal courts do possess authority to entertain those suits. Id. at 2332-34 (Stevens, J., concurring).


195 Hicks, 121 S. Ct. at 2309.

196 Id. In both Strate and Hicks, the Court found no tribal legislative jurisdiction. It is not clear what form the next stage of the analysis would take should the Court find that a tribe does possess legislative jurisdiction. In other words, will the tribe
footnote stating that the opinion is "limited to the question of tribal-court jurisdiction over state officers enforcing state law." 197

The opinion begins the Montana analysis by reinterpreting that case and by rewriting the test in a way not previously understood. Justice Scalia is, of course, notorious for performing this type of re-analysis. 198 This time, Justice Scalia's brand of reworking results in the statement that the general rule of Montana limits tribal jurisdiction over all non-Indians, and the "status of the land ... is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations." 199 If such regulation is not necessary, the tribe will lack legislative jurisdiction over non-Indians, even on trust land. 200 Justice Scalia does concede, however, that sometimes the status of the land can be dispositive, but that will not automatically be so. 201

The majority opinion thus turns to an analysis of the Montana exceptions, that is, whether the consensual relationship or direct effects test will reverse the standard presumption and allow the tribe to exercise regulatory jurisdiction over nonmembers. These tests too, however, have been subsumed as part of a larger inquiry into whether tribal jurisdiction over nonmembers on these facts is "necessary to protect tribal self-government or to control internal relations." 202 The opinion quickly dismisses the consensual relationship test as irrelevant, declaring that it applies only to private consensual arrangements, and not to official exercises of state law enforcement authority. 203

That left only the direct effects test, which the opinion launches into with the ominous declaration that "Ordinarly, ... an Indian reservation is considered part of the territory of the State." 204 The Court supports this

automatically have adjudicative jurisdiction or will some test be developed to determine whether a tribe's adjudicative jurisdiction is less than its legislative jurisdiction?

197 Id. at 2309 n.2. Somewhat sinisterly, though, that footnote opens by noting that the Court has never held that a tribal court has jurisdiction over a nonmember defendant. Id.

198 For example, see Justice Scalia's majority opinion in Employment Division v. Smith, 494 U.S. 872 (1990).

199 Hicks, 121 S. Ct. at 2310.

200 Id.

201 Id.

202 Id. (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

203 Id. at 2310 n.3.

204 Id. at 2311 (quoting U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 510 (1958)).
bizarre statement, which is inconsistent with the express policies of Congress and the executive branch, by citing to three sources. The first is the 1958 edition of *Federal Indian Law*, which is not only an old (and outdated) edition of that treatise, but is an edition that has been roundly criticized as biased since it was written by the U.S. Department of the Interior acting pursuant to an old, and since repudiated, federal policy of terminating tribes. The second source is a 116 year-old Supreme Court opinion that also does not account for changes in federal policy over the last one hundred years. Finally, the third source was a 1962 Supreme Court decision concerning Alaskan natives and the status of their land is governed largely by the Alaskan Native Claims Settlement Act and is completely different than the land status of tribes in the continental United States.

With this proposition established, the Court then conducted its analysis of whether the actions by state law enforcement officials intruded on tribal self-government, but it never identified or examined a single tribal governmental interest. Instead, the Court focused exclusively on the interest of state law enforcement in investigating off-reservation crime. That interest was sufficient to give state officials the ability to enter into the reservation, onto tribally-owned trust land, and conduct their investigation. Not once in its analysis does the majority opinion refer back to the fact that prior to both searches the state officials obtained a tribal warrant or that tribal police were also present at both searches. The Court concluded that the tribal government lacked the ability to regulate the actions of the state law enforcement under these circumstances, and therefore lacked adjudicative authority absent some federal delegation of authority. The Court found no such delegation.

The Court then turned to an examination of whether tribal courts had the power to hear § 1983 cases. The Court held that they do not because tribal courts are not courts of general jurisdiction and because allowing them to hear § 1983 actions "would create serious anomalies," such as with removal jurisdiction. The majority concluded its analysis by loosening

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205 *Id.*
206 *Id.* (citing Utah & N.R. Co. v. Fisher, 116 U.S. 28 (1885)).
207 *Id.* (citing Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962)).
209 Hicks, 121 S. Ct. at 2311-13.
210 *Id.* at 2313.
211 *Id.* at 2313-14.
212 *Id.* at 2314.
the tribal exhaustion doctrine and holding that the defendants were not required to exhaust their tribal court remedies in this case.\textsuperscript{213}

Justice Souter’s concurring opinion went even further than the majority’s. Justice Souter, joined by Justices Kennedy and Thomas, argued for a general rule that tribes do not possess civil jurisdiction over nonmembers absent one of the two \textit{Montana} exceptions.\textsuperscript{214} The concurring justices would not limit their holding, as did the majority, to state law enforcement officers acting in their official capacity.\textsuperscript{215} This new rule would make the identity of the defendant the primary jurisdictional fact, with the status of the land relevant only insofar as it relates to one of the exceptions.\textsuperscript{216} To support its conclusion, the concurring opinion engaged in a highly suspect review of precedent and history, taking decisions and statements out of context, citing dissenting opinions, and referring to language in treaties with tribes other than the one at bar.\textsuperscript{217}

The crux of its rationale, however, lies not in this analysis, but rather in some statements made near the end of the opinion, where Justice Souter writes:

A rule generally prohibiting tribal courts from exercising civil jurisdiction over nonmembers, without looking first to the status of the land on which individual claims arise, also makes sense from a practical standpoint, for tying tribes’ authority to land status in the first instance would produce an unstable jurisdictional crazy quilt.\textsuperscript{218}

This statement blithely ignores two critical facts. First, it was the Court that introduced this “unstable jurisdictional crazy quilt” in the first instance with its decision in \textit{Montana v. United States}.\textsuperscript{219} That the Court can create a complex maze and then remove tribal jurisdiction based on that complexity seems odd. Justice Souter’s opinion also ignored the fact that the crazy quilt could be reversed in a different direction—by returning territorial integrity to the tribes and giving tribal governments full sovereignty within their geographic territory. Indeed, this result would be much more consis-

\textsuperscript{213} \textit{Id.} at 2315.

\textsuperscript{214} \textit{Id.} at 2318 (Souter, J., concurring).

\textsuperscript{215} \textit{Id.} (Souter, J., concurring).

\textsuperscript{216} \textit{Id.} (Souter, J., concurring).

\textsuperscript{217} \textit{Id.} at 2319-22 (Souter, J., concurring).

\textsuperscript{218} \textit{Id.} at 2322 (Souter, J., concurring).

tent with current federal policy as established by both the legislative and executive branches.220

The reason for Justice Souter's failure to explicitly consider this possibility is likely found in his next three paragraphs, discussing the "'special nature of Indian tribunals.' ... The opinion referenced the fact that tribal courts have different structures and different substantive laws, "which would be unusually difficult for an outsider to sort out."222 Anyone who comes into a state's territory is required to follow its laws, even if an understanding of those laws rests on the interrelationship of some arcane statutes, regulations, and court decisions. As other scholars have discussed, however, this does not seem to be a problem when state jurisdiction is at issue.223 Escaping the fact that the Supreme Court's recent Indian law decisions rest largely on racist presumptions about the nature of tribal governments in general and tribal courts in particular is becoming increasingly difficult.224

220 See, e.g., Royster, supra note 141, at 63-76. It would also be more consistent with Supreme Court precedent prior to 1978. See generally, Frickey, A Common Law for Our Age of Colonialism, supra note 123; Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, Marshalling Past and Present]. For additional critiques of the current Supreme Court's Indian law jurisprudence, see Dussias, supra note 119, at 18-43; Getches, supra note 121; Gould, supra note 123.

221 Hicks, 121 S. Ct. at 2323 (Souter, J., concurring) (quoting Duro v. Reina, 495 U.S. 676, 693 (1990)).

222 Id. (Souter, J., concurring).


224 See generally Koehn, The New American Caste System, supra note 120; John P. LaVelle, Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787 (1999); Royster, supra note 141, at 253; Singer, supra note 223. Cf. Frickey, A Common Law for Our Age of Colonialism, supra note 123, at 7 ("It is the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty. The coherence that underlies the doctrinal confusion in the cases is a strong, albeit largely unarticulated and undefended, judicial aversion to basic claims of tribal authority over nonmembers that is implicitly projected upon Congress as well."). For a different perspective, suggesting that the Court's decisions are an effort to further its own agenda regarding principles of federalism, see Alex Tallchief Skibine, The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country, 36 TULSA L.J. 267 (2000).

While there have been instances of unfair treatment by tribal governments and tribal courts, states are also not free from these types of influences. The Supreme Court recently heard a case in which a state judge was convicted of misusing his
Justice O'Connor's opinion, joined by Justices Stevens and Breyer, is little better. Despite the fact that it is labeled an opinion concurring in part and concurring in the judgment, Justice O'Connor's opinion is in large measure a dissenting opinion, as it accuses the majority of issuing a "sweeping opinion [that], without cause, undermines the authority of tribes to 'make their own laws and be ruled by them.'" Justice O'Connor would, however, follow the majority in ruling that *Montana* is the appropriate test for analyzing tribal "civil jurisdiction over nonmembers both on and off tribal land." She parts ways with the majority with respect to the manner in which they applied that test; she views the majority's analysis as inconsistent with precedent.

To support her conclusion, Justice O'Connor reviewed prior cases applying the *Montana* test and concluded that the status of the land, as either trust or fee, is a very important part of that analysis and should play a much larger role than it was accorded by the majority. She argues in her opinion that:

> power to sexually assault and sexually harass women. See United States v. Lanier, 520 U.S. 259 (1997). Also in recent years, a federal judge has been impeached for bribery; the highest judicial officer in the state of New York was convicted of essentially stalking his former mistress; a justice of another state supreme court was accused of using his law clerks to acquire drugs to feed his addiction; and several members of the Vermont Supreme Court have been embroiled in accusations of judicial misconduct. And that list does not even begin to address the flagrant politicization of state elected judiciaries, particularly in election years and during election campaigns. Why are concerns of judicial competence and neutrality of paramount importance for the jurisdiction of tribal courts, but bear little, if any, relevance to the jurisdiction of state courts? In addition, perceived "unfairness" of tribes is not limited just to nonmembers. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (in which the Supreme Court found no federal jurisdiction to hear a case alleging that a tribe had illegally discriminated against a tribal member on the basis of gender). As is true for any type of prejudice, education is the primary weapon to combat these misunderstandings. For an excellent look behind the prejudice against tribal courts, and an effort to use education to reverse that prejudice, see Newton, *supra* note 110.

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226 *Id.* at 2325 (O'Connor, J., concurring).

227 *Id.* (O'Connor, J., concurring).

228 Justice O'Connor also would have not taken such a limited approach to the consensual relations test, as she argues that it cannot be dismissed out of hand since states and tribes do enter into consensual relationships with each other through the process of compacting and interjurisdictional cooperative agreements. *Id.* at 2327-29 (O'Connor, J., concurring).
If Montana is to bring coherence to our case law, we must apply it with due consideration to land status, which has always figured prominently in our analysis of tribal jurisdiction.

... The Tribes' sovereign interests with respect to nonmember activities on its land are not extinguished simply because the nonmembers in this case are state officials enforcing the law. ... The actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the actions of private parties.  

Justice O'Connor does not, however, engage in an independent analysis of what impact the status of the land had on the present case. She would, instead, use basic principles of official and qualified immunity to solve the dispute. Since the lower courts did not consider this issue, and in light of the tribal exhaustion doctrine, she would have remanded the case for further proceedings.

What is now clear after Hicks is that Montana's general rule preempting tribal civil jurisdiction over nonmembers applies throughout Indian Country, with land status used only as a factor in determining whether one of the Montana exceptions has been met. What is not clear, however, is the way in which land status will factor into this analysis. The majority opinion performed no real analysis of land status, as it focused almost exclusively on the fact that the defendants were state law enforcement officials investigating an off-reservation crime. The majority gave no hint of how to analyze land status when the defendant is not an official state actor. Justice Souter, writing for two other members of the Court, appears to give short shrift to land status, focusing primarily on the identity of the defendant. Justice O'Connor, also writing for two other members of the Court, would give much more significant weight to land status. Accordingly, we have a 3-3 split, with the other three justices (Scalia, Rehnquist, and Ginsburg) giving no indication of how they would factor land tenure into a more typical case.

In any event, the seeming agreement by all of the Justices that Montana controls tribal jurisdiction over nonmembers throughout the reservation turns the rationale of that decision on its head. In Montana, the Court justified treating trust and fee land differently by examining how fee land came into being. The Court found that when Congress opened reservations

229 Id. at 2329 (O'Connor, J., concurring) (citations omitted).
230 Id. at 2330 (O'Connor, J., concurring).
231 Id. at 2330-32 (O'Connor, J., concurring).
to non-Indians, and sold reservation lands to them, Congress intended to remove that fee land from tribal jurisdiction. No such justification can be proffered as to trust land because Congress indicated an intent, in both the Allotment Act and the IRA, to keep that land in Indian hands. Thus, the Court’s decision in *Hicks* to extend *Montana* to trust lands is without any legal foundation.\(^2\)

The *Hicks* decision also pulls the *Oliphant* decision out of context when it uses that case as an example of tribes’ lack of jurisdiction over nonmembers. *Oliphant*, however, rested on the Court’s determination that the federal government had made a conscious decision to create different rules for tribes in the criminal jurisdiction arena than in the civil jurisdiction arena. *Hicks* thus continues the Court’s trend of developing federal Indian law in a manner that directly contravenes the policy of the other two branches of federal government, the branches which are supposed to have primary responsibility for setting Indian policy.\(^3\) Increasingly apparent is the conclusion that the only possible justifications for the Court’s decisions are its own arrogant confidence in its “correctness” and its racist views of tribal courts.\(^3\)

Regardless of any lack of justification, however, *Hicks* is now the law. As a result, tribal civil adjudicative jurisdiction is no broader than tribal

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\(^3\) For further critique about the ways in which the Supreme Court has given undue influence to the allotment policy, see Frickey, *A Common Law for Our Age of Colonialism*, supra note 123; Getches, *supra* note 121, at 1622-26. Professor Judith Royster has written an excellent article devoted to tracing and critiquing this trend. See Royster, *supra* note 141. In that article, she notes “[t]he allotment policy is reminiscent of a horror movie villain, defeated in the final scenes and officially dead. But as the closing credits roll, the faint continuing throb of a heartbeat can be detected, and soon sequel after sequel resurrects the villain to continue its course of destruction.” *Id.* at 20.

\(^3\) See, e.g., LaVelle, *supra* note 224; Resnik, *supra* note 1; Singer, *supra* note 223. For an argument that the Court’s decisions are based on efforts to further its views of federalism, see Skibine, *supra* note 224.

As is true for any type of prejudice, education is the primary weapon to combat ignorance. For an excellent look behind the prejudice against tribal courts, and an effort to use education to reverse that prejudice, see Newton, *supra* note 110.
regulatory jurisdiction, and both use the same test. That test, as now interpreted, declares that tribes generally do not possess civil jurisdiction of any sort over nonmembers anywhere on the reservation unless the tribe can demonstrate that the actions of the nonmembers imperil tribal self-government or internal relations. The consensual relationship and the direct effects test will help guide this inquiry.

Now that the boundaries of tribal criminal and civil adjudicative jurisdiction are clear, I will turn to an examination of how those boundaries create difficulties for tribal governments faced with implementing the full faith and credit requirements of the Violence Against Women Acts. Tribal governments face many difficulties states do not, and Congress's failure to directly address these complexities will inevitably lead to problems for persons holding protection orders and who travel, live, or work in Indian Country.

III. TRIBAL IMPLEMENTATION OF VAWA'S FULL FAITH AND CREDIT PROVISIONS

All tribal and all state governments must now implement the VAWA's full faith and credit requirements. In the process of implementing this federal statute, states and tribes must make a number of decisions. These decisions must focus both on the government as the enforcing jurisdiction and on the government as the issuing jurisdiction. After all, each government now has an incentive to ensure that its protection orders qualify for the VAWA's full faith and credit protection. Tribes and states face similar issues when acting as the issuing jurisdiction, and these issues are briefly highlighted in the first subsection of this part. As is probably apparent from the discussion of jurisdiction rules in the previous section, tribes face much more complicated issues when it comes to being the enforcing jurisdiction. Those issues will be explored in more detail in the second subsection of this part.

A. Tribes as the "Issuing Jurisdiction"

In the VAWA, Congress mandated that all states and all tribes give full faith and credit to any qualifying protection order issued by any other state
or tribe. The VAWA also defines what constitutes a qualifying protection order. Those requirements, however, are basic and straightforward. The actual definition of "protection order" is quite broad and covers almost every conceivable way to issue a protection order—by a civil or criminal court, as a temporary or final order, and as a result of a dedicated proceeding for the purpose of obtaining a protection order or as part of another legal proceeding. The court issuing the protection order must have possessed both personal and subject matter jurisdiction and must have provided the respondent with due process. Finally, the VAWA puts strict limitations on mutual protection orders. Some jurisdictions issue mutual protection orders—orders that direct both parties to stay away from each other—almost as a matter of course. The VAWA's full faith and credit requirements do not include these orders, at least not the protection order automatically issued to the respondent. The petitioner's order still qualifies for full faith and credit. More specifically, the mutual protection order issued to respondent (against the petitioner) does not qualify under the VAWA unless it was issued as a result of cross or counter petitions and the issuing court made specific findings that each party was entitled to the order.

Congress drafted the VAWA's definitions and prerequisites to cast a broad net and reach as many legitimate protection orders as possible. With this backdrop, a court can issue a protection order that qualifies under the VAWA with relative ease. Nevertheless, there are some steps that an issuing court can take to ensure that another jurisdiction will give full faith and credit to the protection order. The first suggestion, and a step often

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The term 'protection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court ... whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

Id.

237 Id. § 2265(b)(1).

238 Id. § 2265(b)(2).

239 Id. § 2265(c).

240 Id.

241 A full discussion of the methods and procedures for issuing protection orders is beyond the scope of this Article. Instead, this subsection is limited to discussing those aspects of a protection order necessary to qualify for full faith and credit under the VAWA. For more about domestic violence codes and protection orders in general, see LEHRMAN, supra note 23; NAT'L INST. OF JUSTICE, supra note 22;
overlooked, is to use clear language in the protection order, language that is concise and specific.\textsuperscript{242} It is impossible to train police officers in all of the possible permutations of fifty different types of state protection orders\textsuperscript{243} and over two hundred different tribal orders, not to mention adding in the permutations of the District of Columbia and U.S. commonwealths, possessions, and territories. By using clear language that is easily understood, a court can ensure not only that both the petitioner and respondent understand the terms of the order, but also that the order can be easily interpreted by law enforcement officers and courts throughout the country.

Within the body of the order, the court should also explicitly indicate whether the protection order satisfies the VAWA’s requirements of jurisdiction and due process. In addition, if the order is a mutual protection order, the court should declare whether the VAWA’s prerequisites are met. Just to make sure there is no misunderstanding, the issuing court should also include in the protection order a specific statement that the order satisfies the requirements of the VAWA and is due full faith and credit under that statute (assuming, of course, that the order does qualify).

These steps are not, however, the end of the measures that an issuing court can use. The body of the order should also clearly list the duration of the order, when it takes effect and when it expires. The duration of protection orders varies greatly among jurisdictions and this prevents guessing games by the police officer called out to enforce a foreign protection order, usually under circumstances that make legal research difficult, if not impossible. The issuing court may also want to include some sort of contact information for the officer who needs to verify the validity of the foreign protection order. This contact information may take the form of a state registry or may simply be the phone number and hours of the court clerk.

In addition, the issuing court should comply with all relevant laws on child custody,\textsuperscript{244} again explicitly stating in the body of the order whether it

\textsuperscript{242} The suggestions here are drawn largely from the judge’s bench card developed by the National Council of Juvenile and Family Court Judges. See Violence Against Women Online Resources: Full Faith and Credit—A Judge’s Bench Card, at http://www.vaw.umn.edu/FinalDocuments/judgefin.htm (last modified Feb. 11, 2000).

\textsuperscript{243} Fifty would be the bare minimum. In all likelihood the number will be much greater when you factor in the disparities in form and content of the cities and/or counties within each state.

\textsuperscript{244} For a brief discussion of the intricacies of child support and child custody laws in connection with the VAWA, see infra notes 294-302 and accompanying text.
satisfies those requirements. It has also been recommended that the issuing court make mention in the order of the relevant federal laws. As mentioned above, the VAWA also created a number of new federal crimes regarding interstate domestic violence. By noting these laws in the order, the court can further put the respondent on notice of the consequences of violating the protection order. Indeed, a court issuing a protection order should explain to all the parties the scope of the order and the consequences for violating it. Finally, the court should provide each party, particularly the petitioner, with a certified copy of the order. A certified copy of the order will assist the petitioner in obtaining enforcement of that order.

B. Tribes as the "Enforcing Jurisdiction"

The VAWA directs the enforcing jurisdiction to enforce a protection order issued by another state or tribe as if it were the order of the enforcing jurisdiction. As generally interpreted, this mandate means that the enforcing jurisdiction sets the procedures for enforcement, as well as the penalties for violations. The enforcing jurisdiction cannot refuse to enforce, however, on the grounds that its own laws would not have allowed the petitioner to obtain the order or that its own laws do not provide for a certain type of provision present in the protection order. In other words, an enforcing jurisdiction cannot refuse to act because the protection order is invalid under its own law. The only questions are whether the issuing court possessed the jurisdiction to issue the order and provided respondent with the necessary due process. The VAWA does not, however, excuse the enforcing government from standard jurisdictional requirements. In other words, the enforcing government must possess both legislative and adjudicatory jurisdiction over an alleged violator before that government can punish a violation of a foreign protection order.

As discussed in Part II, the Supreme Court has used different approaches for analyzing state and tribal jurisdiction. The language of the VAWA’s original full faith and credit provisions contained an ambiguity with respect to tribal enforcement of foreign protection orders. The ambiguity arises from the fact that Congress failed to recognize the differences in state and tribal jurisdiction on the face of the VAWA. Section 2265(a) provides that

> any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.²⁴⁵

The problem is with the language "enforced as if it were the order of the enforcing State or tribe."

Under the Supreme Court's jurisdictional rules, states possess territorial jurisdiction, but tribes do not. The Court's rulings as to tribal jurisdiction, however, explicitly recognize that Congress has the power to change those default rules, giving tribes more jurisdiction. Did Congress intend to exercise this power when it equated states and tribes in the language of the VAWA's full faith and credit requirement? In other words, one interpretation of the key language is that Congress intended to grant tribes the ability to enforce all foreign protection orders, thereby changing the default rules that limit tribal jurisdiction over non-Indians.

Another possibility, however, is to interpret the language to ascribe no such intent to Congress. Under this interpretation, Congress did not add any jurisdictional authority to what tribes already possess, but rather left both states and tribes to ask the initial question "do we have the necessary jurisdiction in this case?" under the standard rules of jurisdiction. The first interpretation, that Congress intended to grant broader jurisdiction to tribes, would make the most sense given the legislative intentions behind the statute, which was to ensure that protection orders were valid throughout the United States. On the other hand, Congress should know by now that courts generally want to see an explicit statement from Congress before they will hold that Congress has altered standard legal rules and presumptions. This consideration would cut against finding a broader grant of jurisdiction, as Congress made no statement in the Act's legislative history that it was intending to extend tribal jurisdiction over all persons who violate protection orders in Indian Country.

This ambiguity left tribes in a quandary as to how to enforce the VAWA's full faith and credit requirements. Indeed, just what those requirements were when it came to tribes was not clear—do they enforce all foreign protection orders or must they first conduct the complicated jurisdictional analysis to determine whether the tribe has power over the violator? Fortunately, Congress recognized this dilemma and has taken some action, albeit imperfect, to address the question as part of the VAWA 2000.

As finally enacted, the Violence Against Women Act of 2000 declared that "tribal court[s] shall have full civil jurisdiction to enforce protection

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orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.”

The legislative history of this section is somewhat sparse. The conference report says simply that these provisions “clarify] that tribal courts have full civil jurisdiction to enforce protection orders in matters arising within the authority of the tribe.”

What is likely clear after this amendment, however, is that tribes do not have criminal jurisdiction over non-Indians under this statute. In other words, VAWA does not alter the contours of existing tribal criminal jurisdiction. If Congress had intended to expand tribal criminal jurisdiction, surely it would have said something about tribal criminal jurisdiction in the VAWA 2000. This conclusion is reinforced by an examination of two other bills introduced into the House of Representatives on this topic.

House Bill 357 actually went the farthest in favor of expanding tribal jurisdiction. As written, that bill provided:

For purposes of enforcement, a tribal court may exercise civil and criminal jurisdiction over any person, Indian or non-Indian, who violates a protection order within the tribal court’s jurisdiction, if the exercise of jurisdiction complies with the Indian Civil Rights Act . . . . The exercise of criminal jurisdiction under this paragraph is subject to Federal court habeas corpus review under [ICRA] after tribal court remedies are exhausted.

The bill also flatly declared that “a Federal, State or tribal court may not refuse to enforce a tribal court order on the grounds that the tribal court lacks jurisdiction over the defendant because of the defendant’s status as a non-Indian or nonmember Indian.”

This bill, however, died in committee.

House Bill 1248 also addressed issues of full faith and credit for protection orders, and the committee report in conjunction with that bill contains a letter from an Assistant Attorney General urging Congress to “reinforce that protection orders issued by tribes are entitled to full faith and credit, and make it clear that Indian tribes have jurisdiction to enforce

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251 Id. § 411(b)(2).
protection orders against Indian and non-Indian offenders.\(^2\) The absence of any language in the ultimate VAWA 2000 regarding criminal jurisdiction is certainly likely to be interpreted by the courts as meaning no Congressional intent to expand tribal criminal jurisdiction, especially as the "Duro fix" legislation shows that Congress knows how to write legislation on that topic.

The question, then, is whether Congress has altered the general status quo of tribal civil jurisdiction. The VAWA 2000 declares that "tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe."\(^3\) This language is somewhat circular, as it states that tribal courts have full civil jurisdiction over matters within their authority.

One interpretation of this language is that the final phrase "over matters within their authority," signals that Congress did not intend to expand tribal civil jurisdiction past the default limitations established by the Supreme Court. This argument can be bolstered by pointing to the fact that the legislative history says that the section is intended to "clarify" tribal civil jurisdiction rather than to expand or to redefine it.\(^4\) Even under this interpretation, however, tribes do have full authority to impose all civil penalties over any offender, once the tribe establishes jurisdiction under the Supreme Court's precedent.

This interpretation is by no means the only one. This language can also be read as intending to give tribal civil jurisdiction over all those who violate foreign protection orders within the tribe’s Indian Country. Perhaps the strongest argument in support of this second interpretation is to look at what happens if the language in the VAWA 2000 is interpreted as not altering the default rules for tribal jurisdiction. The following subsection, therefore, examines the issues that would confront tribes if they must enforce Congress’s mandate within existing jurisdictional limitations. After exploring these problems, the Article will return in Part IV to the argument that this second, broader interpretation of the language in the VAWA 2000 must be the proper one.

Regardless of whether tribes are looking at their civil or their criminal jurisdiction, they must always keep the key dictate of the VAWA in mind. That dictate provides that a valid foreign PPO shall be "enforced as if it

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\(^3\) 18 U.S.C. § 2265(e).
were the order of the enforcing . . . tribe." While this language contains several ambiguities, particularly in the case of tribes, the federal statute clearly intends that a tribe treat a foreign protection order as if it were issued by the tribal court. This means, at a minimum, that whatever penalties the tribal court imposes for a violation of its own protection order shall also apply to violations of a foreign protection order. Otherwise, the tribe will be enforcing foreign protection orders differently than its own, which is inconsistent with the VAWA. Thus, a tribe must be careful to create only one schedule of penalties for violating a protection order. As discussed below, that schedule of penalties should be applied both to violations of tribal protection orders and to violations of foreign protection orders.

1. Addressing Criminal Jurisdiction Under the VAWA

Clearly, then, tribes do not possess criminal jurisdiction over non-Indians who violate foreign protection orders in Indian Country. That does not mean, however, that tribes should have no criminal laws prohibiting and punishing violations of protection orders. Tribes still possess criminal jurisdiction over all Indians, and it is certainly possible that a person who violates a foreign protection order may be an Indian. Thus, a tribe should consider whether criminal penalties are consistent with tribal tradition and culture. If they are, a tribe may want to create criminal penalties, with the understanding that those penalties are subject to two limitations. First, any criminal penalty cannot exceed the limitations established by the Indian Civil Rights Act. Second, those criminal penalties cannot be applied to non-Indians. Thus, a tribe will certainly want to establish some sort of civil penalties for violating foreign protection orders. These civil penalties could then be applied to any person who violates a foreign protection order in Indian Country, provided, of course, that the tribe has jurisdiction over that person.

If a tribe does decide to establish criminal penalties, it must also examine its laws regarding the abilities and powers of tribal police

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256 See Part II.B.1; see also Christopher B. Chaney, The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction, 14 BYU J. PUB. L. 173 (2000).
officers. Tribes will particularly want to determine whether their police officers have the authority to investigate and to detain all persons for any potential violation of tribal law, as well as to examine the contours of the arrest authority provided to their police officers. Specifically, do tribal police have the authority to perform warrantless arrests for violations of protection orders? Many states classify violations of protection orders as misdemeanors, and common law generally provides that police officers may make a warrantless arrest for a misdemeanor only if it was committed in their presence. Thus, state police officers may not possess authority to make warrantless arrests of all those who violate protection orders, absent specific statutory authorization.

Tribal law may or may not contain similar restrictions. Tribes will also want to consider other methods their police might use to handle these situations and ensure that tribal law will allow officers to take those actions. For example, tribal police could escort the person off the reservation, establish some other procedure for bringing the alleged violator before the tribal court, or turn the alleged violator over to state or federal authorities for prosecution.

Any police officer dealing with a protection order situation should also keep in mind that other laws may be pertinent, not simply those rules specific to violations of protection orders. This is especially true for tribal police officers given the lack of tribal criminal jurisdiction over non-Indians. Some tribal police officers may operate as federal officers, and others may be cross-deputized as state officers, allowing them to act to enforce federal and/or state law. This situation requires that tribal police be familiar not only with tribal law, but also with state and federal law. Federal law especially has been in flux, with the VAWA creating a number of new domestic violence crimes, such as interstate domestic violence and

258 For a look at some of the challenges and problems facing tribal police, see STEWART WAKELING ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (2001); Eileen M. Luna, Law Enforcement Oversight in the American Indian Community, 4 GEO. PUB. POL’Y REV. 149 (1999).

259 See, e.g., NAT’L INST. OF JUSTICE, supra note 22, at 2.

260 It also requires that some sort of procedures be put in place to coordinate the activities of tribal, state, and federal law enforcement and prosecution officials. See, e.g., Paziotopoulos, supra note 33, at 24-25 ("Once it is determined that a federal crime under VAWA was committed, communication between the city and state prosecutors and the U.S. attorneys will facilitate charging decisions involving what to charge abuser with and where to file charges. In some cases, an abuser may be charged under the laws of several jurisdictions.").

interstate violation of a protection order. In addition, the Supreme Court has continually recognized that tribal police may arrest and detain offenders for purposes of turning them over to the appropriate jurisdiction for prosecution, even if the tribe itself lacks criminal jurisdiction.

Finally, tribal police officers may act in a civil, regulatory capacity and not only in their capacity as enforcers of criminal laws. The next section explores tribal civil jurisdiction over persons accused of violating foreign protection orders.

2. Addressing Civil Jurisdiction Under the VAWA

To recap, one interpretation of the VAWA 2000 is that before a tribe can enforce a foreign protection order, it must first determine whether it has

\[262\] Id. § 2262(a)(1). These are just two of the new federal crimes. For a more complete look at these, and other, federal crimes related to domestic violence, see Id. §§ 922(g), 2261, 2261A, and 2262.

\[263\] Duro v. Reina, 495 U.S. 676, 697 (1990) (declaring that tribal law enforcement possessed authority "to restrain those who disturb public order on the reservation, and if necessary, to eject them"); if the tribe itself does not possess jurisdiction to try and punish an offender, "tribal officers may exercise their power to detain the offender and transport him to the proper authorities [for prosecution]"); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (acknowledging continued ability of Suquamish Indian Tribe's power to detain offenders and turn them over to the federal government for prosecution); United States v. Mazurie, 419 U.S. 544 (1975) (a tribe's inherent sovereignty includes the power to exclude from tribal lands persons whom they deem to be undesirable). See also Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975) (upholding tribal officer's stop, search, and detention of a non-Indian believed to be violating state or federal law on public roads running through the reservation, and turning him over to the DEA after finding marijuana in his camper); State v. Haskins, 887 P.2d 1189 (Mont. 1994) (tribal officers did not exceed their authority when they investigated non-Indian's drug trafficking activities on reservation and turned evidence over to state authorities for use in his criminal prosecution); State v. Pamperien, 967 P.2d 503 (Or. Ct. App. 1998) (upholding tribal officer's authority to stop, arrest and detain non-Indian for on-reservation violations of state speeding law); State v. Schmuck, 850 P.2d 1332 (Wash. 1993) (upholding ability of tribal police to stop a driver on reservation for possible violation of tribal law and determine if the driver is an Indian subject to the tribe's jurisdiction; upon learning the speeding offender was non-Indian, tribal officer had inherent authority to detain and turn him over to the Washington State Patrol). A tribe may, of course, also want to do both, as the double jeopardy clause does not bar punishment by two (or three) different sovereigns. Tribes are sovereign entities for purposes of the double jeopardy clause. United States v. Wheeler, 435 U.S. 313 (1978).
jurisdiction over the person accused of violating the order. That analysis will turn on the identity of the offender and possibly on the nature of the land where the violation occurred. The previous section analyzed tribal criminal jurisdiction. This section focuses on the analysis for tribal civil jurisdiction. Under the current test established by the U.S. Supreme Court, if the alleged violator is a member of the tribe, and the violation occurred within the tribe’s Indian Country, the tribe will have full civil jurisdiction over the alleged violator. If the person is not a member of the tribe, however, the tribe must engage in a complex analysis to determine whether it possesses legislative and/or adjudicative jurisdiction.

Before engaging in that analysis, the tribe must first examine whether it has voluntarily limited its own jurisdiction. Some tribes, either as a matter of tribal constitutional or statutory law, have disclaimed jurisdiction over non-Indians. These limitations were generally not "voluntary" in the true sense of the word, as the disclaimers were often inserted by attorneys at the Bureau of Indian Affairs during the process of proposing, reviewing, and approving tribal constitutions and laws. Many tribes have removed these provisions, but some still remain. The rest of this section will proceed on the assumption that a tribe exercises civil jurisdiction to the full extent permitted by federal law. Each tribe, however, must conduct a survey of its own law to ensure the truth of that assumption.

As discussed above in Part II, the same legal test governs both a tribe’s civil regulatory and civil adjudicative jurisdiction. To exercise civil jurisdiction over non-Indians within Indian Country, a tribe must show that the non-Indian either (1) engaged in consensual relations with the tribe or an individual member of the tribe, or (2) that the non-Indian’s action has a direct effect on the core integrity of the tribe. In making this showing, a tribe should identify the status of the land where the violation was committed. If the land is tribal trust land, then the tribe is more likely to possess civil jurisdiction over non-Indians on that land. If the land is fee land, however, a tribe is less likely to have jurisdiction.

To maximize their civil jurisdiction under this test, tribes must be prepared to make an evidentiary showing on either or both of these two

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264 As discussed supra note 152, the Court has consistently used the terms "member" and "nonmember" in its civil jurisdiction cases. This is a different division than that made in criminal cases after the Duro fix legislation. Since the Court has not been explicitly confronted with the question, it is unclear whether the relevant distinction is between members and nonmembers or between Indians and non-Indians.

265 See supra Part II.B.
Montana exceptions. One method to assist in that showing is for tribes to enact strong purpose language as part of any tribal code concerning the enforcement of foreign protection orders. As is true with any legislation, “purpose language” can assist future courts in understanding the legislature’s thinking and the rationales underlying the statute. Within the context of tribal civil jurisdiction, strong purpose language can promote awareness of the ways in which violations of protection orders by nonmembers satisfy both of the Montana exceptions.

Whether a particular situation satisfies the Montana exceptions is a factually based determination. Thus, a tribe must make a factual record of the ways in which a person who violates a foreign protection order has engaged in consensual relations under the first prong of Montana and/or has directly impacted the health and welfare of the tribe under the second prong of Montana. One method of demonstrating that these tests are satisfied is for the tribe to make legislative findings regarding these two issues.

In making these findings, the tribal council should look at a wide variety of things, including tribal tradition and culture, the rate of domestic violence on tribal lands, and at the quantity of tribal resources spent combating domestic violence. In examining these factors, the council should keep in mind questions such as:

1) Does anything in tribal tradition or culture reference marriage or intimate relationships as a consensual relationship that draws the spouse or partner into the web of tribal society?
2) Is domestic violence committed in disproportionate numbers by non-Indians?
3) Are violations of protection orders committed in disproportionate numbers by non-Indians?
4) What types and quantities of tribal resources are spent combating domestic violence and its impacts? This question could focus on factors from tribal police activities to intervention by tribal child welfare services to medical expenses incurred by the tribe.

The tribal council should document the hearing(s) in which these findings are made by making some type of written or electronic record. The council should also incorporate the findings into the text of the code itself. The goal is to provide a record to which the tribe can point as part of any possible future litigation challenging tribal civil jurisdiction over a non-Indian who violated a protection order in Indian Country.
Once a tribe determines it does possess civil jurisdiction over a particular individual accused of violating a protection order, the tribe must have some sort of procedure for handling these cases. For example, if a violation of a foreign protection order is classified as a civil infraction, how will those cases come before the tribal court? Can the tribal police arrest a person for a civil infraction and bring the person before the court? Does the prosecutor file a charge for the civil infraction? Can the person harmed by the violation directly petition the tribal court requesting that the court impose sanctions for the violation? How will the defendant be given notice of these proceedings? Can the tribal court issue a bench warrant under these circumstances? What rules exist for hearing these cases? All of these questions are primarily matters of tribal law and will require some thought and attention by each tribe to develop a method that best suits the circumstances of the tribe.

Finally, once an alleged violator has been brought before the tribal court, the court determines it has jurisdiction, and the court conducts a hearing, the court must then decide what penalties to impose upon an individual found to have violated a foreign protection order. In the VAWA 2000, Congress explicitly stated that once the tribe determines that it has jurisdiction, it may exercise the full range of civil penalties, including civil contempt powers, exclusion from tribal lands, and other civil penalties authorized by the tribe. This power exists regardless of the identity of the offender as a member or nonmember.

Congress's declaration merits a closer look, particularly at civil contempt sanctions. Generally speaking, civil contempt sanctions include both fines and imprisonment, although imprisonment is less common for civil contempt than for criminal contempt. A tribe that chooses to impose imprisonment upon a non-Indian for civil contempt may run the risk of having that action overturned by the federal courts, which have authority to review the tribal court's action through the habeas corpus provisions of the Indian Civil Rights Act.266 The Supreme Court has expressed great reservations at the prospect of tribes putting non-Indians in jail.267 This reluctance could lead to a flat ruling that tribes cannot impose imprisonment as a penalty for a non-Indian, even for a civil infraction. On the other hand, incarceration is an accepted penalty for civil contempt in several circumstances, and the VAWA 2000 explicitly recognizes that tribal courts can impose penalties for civil contempt. That statement, coupled with

268 See, e.g., Duro, 495 U.S. at 684-92; Oliphant, 435 U.S. at 209-11.
existing law on tribal civil jurisdiction, should be sufficient to support a tribal court’s decision to impose jail time. “Should,” however, does not always carry the day in federal Indian law decisions.\textsuperscript{269} In any event, the tribe may want to provide civil penalties other than imprisonment, so that it will have a penalty to impose upon a non-Indian who violates a foreign protection order, particularly since imprisonment is rare for civil contempt.

Even if “should” does carry the day, and tribes are able to impose the full range of penalties for civil contempt, the primary problem with this interpretation of the VAWA 2000 is that it undercuts the spirit and purposes of the VAWA’s full faith and credit provisions.\textsuperscript{270} Congress clearly intended those provisions to create a system in which each and every protection order (as that is defined in the federal statute) is valid throughout the United States.\textsuperscript{271} To achieve this goal, Congress required that all states and all tribes must enforce every valid protection order, regardless of which state or tribe issued the order. This creates a blanket of protection across the entire United States. If the restrictive interpretation is adopted, thus keeping the current limitations on tribal civil jurisdiction over non-Indians intact, Congress will have created holes in that blanket—pockets of territory where a person cannot rely on the coverage of his or her protection order.\textsuperscript{272}

\textsuperscript{269} See supra Part II.B.2.

\textsuperscript{270} For a fuller discussion of this problem, see infra Part IV.

\textsuperscript{271} See Susan B. Carbon et al., The Role of Judges in Enforcing Full Faith and Credit, at http://www.vaw.umn.edu/FFC/chapter6.html (last modified Nov. 5, 1999) (“The purpose and rationale [of the VAWA] is simple: Women who receive protection from any court, be it tribal or state, ought to be entitled to protection throughout the United States and Indian country without having to repeat the process. Whether she is crossing state or reservation lines for business or pleasure, or fleeing form her batterer, she is entitled to the protections afforded by the original state or tribal protective order.”).

\textsuperscript{272} There is one other possible issue with respect to the penalties imposed by an enforcing jurisdiction. The VAWA is unclear about what “enforcing” a protection order entails, as the statute simply states that a valid foreign protection order shall be “enforced as if it were the order of the enforcing...tribe.” 18 U.S.C. § 2265(a) (2000). Does enforcement include just the explicit terms of the order (for example, “don’t go near the petitioner”) or does enforcement also include any penalties contained on the face of the order (“if you do, you may spend up to 60 days in jail”)? The statute does not give any guidance about how to answer that question.

This ambiguity also potentially collides with the limited criminal penalties a tribe may impose, even upon a defendant who is subject to the tribe’s jurisdiction. It is possible that a foreign jurisdiction’s protection order might call for a fine and/or jail term that exceeds that permitted by the Indian Civil Rights Act. Of
3. Other Issues Tribes Must Confront

While the above issues are the most difficult and troubling in terms of jurisdiction, there are a number of other issues that tribes must confront due to their special legal situation. Specifically, tribes must make decisions about whose orders will be recognized, how to handle civil and criminal protection orders, how to handle child support and custody orders, whether to extend statutory immunity to law enforcement officers, and whether to create a registration system. States must also confront all five of these issues, but each of the issues contains at least one extra layer in the tribal context. What follows is a brief discussion of these issues, intended to highlight the scope of the problem. This section of the Article does not attempt to be comprehensive and provide answers for all of the problems. The model code and commentary set forth in the appendix does provide a look at how the Michigan Working Group on Full Faith and Credit resolved the issues and provides some statutory language tribes might wish to use.

a. Whose Orders Will Be Recognized

The VAWA requires that states and tribes recognize and enforce valid protection orders issued by the court of any other state or tribe. The statute defines "state" as "a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States." The word "tribe" is not explicitly defined, but likely has a common meaning of all federally recognized tribes.

It is often said that the purpose of the VAWA was to make sure that protection orders are good anywhere within the United States. But the VAWA's full faith and credit requirements do not cover all courts issuing protection orders. The obvious gap is that federal protection orders are not listed. This may seem natural, as family law and family violence are not course, this also brings up the issues discussed above as to the tribe's ability to impose a criminal penalty upon a non-Indian. The general consensus after discussing this issue with many experts is that the VAWA requires enforcement of the substantive terms of the protection order, with the penalties left to the laws of the enforcing jurisdiction.

273 Id.

Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

Id.

274 Id. § 2266(8).
traditional subjects for federal courts, but some federal courts do handle these issues, particularly in the context of criminal proceedings. Federal courts may issue protection orders as part of a release order in a criminal case or may directly issue a protection order under 18 U.S.C. §1514, which grants federal courts the power to issue a civil order protecting the victim or a witness in a federal criminal case. These orders would not be automatically entitled to full faith and credit under the VAWA’s provisions, although states and tribes are certainly free to choose to recognize them.

In addition, some specialized federal courts do routinely handle family violence issues. It appears that most military protection orders are issued by commanding officers rather than by military courts, but that does not mean that no military courts issue protection orders. Any protection order issued by a military court also falls outside of the VAWA’s mandates.

But the important gap as far as tribes are concerned may be Courts of Indian Offenses, which are federal courts. The Bureau of Indian Affairs began establishing Courts of Indian Offenses, also known as CFR courts, in the second half of the nineteenth century as a method of maintaining law and order on the reservations. As federal policy toward Indian tribes changed in the twentieth century to a policy of self-governance rather than assimilation, Congress passed the Indian Reorganization Act, which authorized tribes to create (actually, re-establish) their own courts to replace the CFR courts. Many tribes chose to take advantage of this opportunity to supplant the CFR courts, but some of these courts still remain today, exercising authority to adjudicate disputes, including issuing protection orders. Since these protection orders are issued by a federal court sitting on a reservation, rather than an actual tribal court, they very

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275 Id. § 1514.
276 These courts are so named because the laws and regulations governing them are set forth in the Code of Federal Regulations. See Law and Order on Indian Reservations, 25 C.F.R. § 11 (2001).
279 Tribes operated their own courts and dispute resolution mechanisms for centuries before the Europeans set foot on this continent. For a brief history of tribal courts, see Koehn, Civil Jurisdiction, supra note 110. For a more current look at the workings of tribal courts, see POMMERSHEIM, supra note 110, at 57-135; Newton, supra note 110.
280 For a list of the Courts of Indian Offenses, see 25 C.F.R. § 11.100.
likely do not fall under the VAWA’s full faith and credit provisions. Remember, those provisions refer only to “state” and “tribal” courts.

Thus, a tribe implementing the VAWA’s requirements may want to provide broader recognition than is required. Since tribal governments are sovereign entities, possessing the ability to enact and enforce laws, they are certainly able to recognize and enforce protection orders issued by CFR courts. Nothing in the federal statute provides that only tribal and state protection orders are entitled to full faith and credit; rather, the federal statute sets a floor, not a ceiling. To account for the historical vacillations of federal Indian policy and to ensure all protection orders issued in Indian Country are given full faith and credit, tribes may want to include CFR courts within their definition of “issuing courts.” Of course, states may also want to consider CFR courts in their statutes, especially those states in which CFR courts are located.

Finally, protection orders issued by other countries are also not listed in the VAWA. This omission is much more understandable, as orders and judgments of foreign courts are not automatically recognized by U.S. courts. But the drawing of international borders, particularly those with Mexico and Canada, arbitrarily divided some Indian tribes. Groups that had been part of one people are now separated by lines they had no part in drawing.

Obviously, given the proximity of Michigan and Canada, many tribes in Michigan are closely related to tribes in Canada and may have at one time been part of a single Indian nation. As a result of this problem, the tribal jurisdiction subcommittee of the Michigan Working Group on Full Faith and Credit explored the possibility of including Canadian protection orders in its model tribal code. The first question, of course, is whether Canadian courts even issue protection orders. A survey of Canadian law reveals that at least two provinces, Saskatchewan and Prince Edward Island, have adopted a domestic violence act that includes a provision for protection orders.

What is not clear is the form and content of these orders—what do they look like and what do they say? How should police recognize and handle

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281 For an overview of the treatment of foreign country judgments, see Linda Silberman, Enforcement and Recognition of Foreign Country Judgments in the United States, 648 PLI/Lit 255 (2001).

282 For a look at some of the issues and problems presented by this history, see Richard Osburn, Note, Problems and Solutions Regarding Indigenous Peoples Split by International Borders, 24 AM. INDIAN L. REV. 471 (2000).

these orders if and when the police are confronted with them? After some discussion and hesitation, the committee determined that some of the issues were inherent in the VAWA's requirements and both those, as well as any remaining issues, can be resolved. Adding Canadian protection orders into the mix does not add much more variety than already exists when one considers that the VAWA's full faith and credit requirements encompass over two hundred tribal courts, fifty state courts (more, if you count the individual cities and counties), the District of Columbia courts, and the courts of all U.S. territories, commonwealths, and possessions. Also, the VAWA, as well as the model tribal code, contains two provisions to help deal with this variety.

The first provision is the intentionally broad definition of a protection order. The VAWA casts a broad net of coverage in its definition:

The term “protection order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court . . . whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.\(^{284}\)

As is clear, this definition includes both civil and criminal orders, temporary and final orders, and orders issued in a stand alone proceeding, as well as orders issued as part of any other legal proceeding. This would encompass just about any method and form that Canada might use to issue protection orders.

The second provision is the due process requirement. In defining “valid protection order,” that is, a protection order that must be given full faith and credit, the VAWA requires that the issuing court provide due process to the respondent.\(^{285}\) These basic requirements of notice and an opportunity to be heard should minimize potential unfairness to the respondent and ensure that the protection order was issued as a result of a fair proceeding.

There is no requirement in the VAWA that states and tribes recognize protection orders issued by foreign countries.\(^{286}\) Indeed, there may be many


\(^{285}\) Id. § 2265(b)(2).

\(^{286}\) There may, however, be international law provisions, including treaties, that speak to this issue. An exploration of international law is beyond the scope of this Article.
countervailing concerns, such as determining the form and content of the protection order and ensuring that due process was provided. In addition, there is the standard presumption in U.S. law against enforcing foreign protection orders. On the other hand, these problems can be controlled and recognizing foreign protection orders would give effect to the spirit of the VAWA that a person covered by a protection order be able to travel freely and rely on the protection of that order. Again, states (particularly border states) may also want to consider these issues; however, since tribes were arbitrarily divided by state borders, they may have a more significant interest in doing so.

b. Which Orders Will Be Recognized

As discussed in the prior subsection, the VAWA contains a very broad definition of “protection order,” encompassing civil and criminal orders, temporary and permanent orders, and orders issued both in separate proceedings and as part of other legal proceedings. This broad definition, particularly the portion of the definition requiring enforcement of orders issued by both civil and criminal courts, can create numerous problems for the enforcing jurisdiction.

The problem is not with civil court, but rather with criminal courts. Criminal courts may include protection provisions as conditions of release, probation, or parole; criminal courts may also issue them as part of an anti-stalking case. It is not standard practice for one jurisdiction to enforce another’s criminal laws, including these types of provisions. This lack of enforcement is the result of a number of problems, including difficulties verifying the terms of the order and a lack of statutory enforcement authority. This lack of authority generally takes two related forms. First, many legislatures have not enacted statutes permitting (or requiring) the prosecution of individuals who violate criminal orders issued by another jurisdiction. Second, and often a corollary to the first, most jurisdictions have not given their law enforcement officers authority to arrest those who violate another jurisdiction’s criminal orders.

A variety of measures exist to address these issues. For example, one possibility is for each jurisdiction to enact a law making it an offense (either civil or criminal) to violate any protection order issued by another jurisdiction. This statute could even specifically indicate that it covers protection orders issued by criminal courts. As part of this approach, a jurisdiction could also require that criminal and civil protection orders be

treated the same. This would minimize some of the difficulty of handling disparate types of orders and would comply with the VAWA's full faith and credit requirements. The enforcing jurisdiction would then be enforcing its own laws when it punishes a violation of a protection order, and not the criminal laws of the issuing jurisdiction.

Another possibility is for a jurisdiction to extradite the offender to answer for his actions before the court that issued the protection order. This possibility, however, brings with it two additional problems. The first is that extradition is not truly "enforcement" of the criminal protection order, thus violating the VAWA's requirements. The second is that criminal and civil orders are being treated differently, with one enforced and the other not enforced. Obviously, this again violates the VAWA's intent that all valid protection orders be effective throughout the United States.

A final possibility that has been suggested is for a jurisdiction to implement the VAWA by enacting a statute that provides for enforcement only of civil foreign protection orders. This approach is the one embodied in the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act promulgated by the National Conference of Commissioners on Uniform State Laws. Section 2(5) of that Uniform Act defines "[p]rotection order" as "an injunction or other order, issued by a tribunal under the domestic-violence or family-violence laws of the issuing State...."288 This definition is clearly narrower than the one contained in the VAWA, particularly in the omission of any mention of orders issued pursuant to criminal laws.289

This omission is reinforced in Section 3(b) of the Uniform Act, which declares that "[a] tribunal of this State290 may not enforce a foreign protection order issued by a tribunal of a State that does not recognize the standing of a protected individual to seek enforcement of the order."291 Although this statutory language is somewhat cryptic, the drafters' comment makes the intention clear. In the comment, the drafters state that this subsection is designed to "address [ ] the problem of the enforcement

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288 UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT, supra note 76, § 2(5).
289 This not only omits all protection order conditions that might be part of release, probation or parole for assault and battery, but also omits any possibility of a protection order under an anti-stalking statute.
290 "State" is defined by the Uniform Act as including an Indian tribe or band. UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT, supra note 76, § 2(7).
291 Id. § 3(b).
of protection orders issued by criminal courts." According to the comment, the Constitution prohibits one jurisdiction from enforcing another's criminal protection order, as "a criminal protection order is one that provides a remedy to the public as a whole," as opposed to an individual.

This statement shows a fundamental misunderstanding of the nature of criminal protection orders. Although they are issued as part of a criminal proceeding, they are designed to protect a specific individual, and that individual has the right to rely on such protection. In essence, that right is at the heart of the VAWA's full faith and credit requirements. Granted, the traditional punishment for violating conditions of release, probation, or parole is the revocation of that freedom. The VAWA, however, does not require that the enforcing jurisdiction enforce the foreign protection in the same manner as the issuing jurisdiction would. Instead, the VAWA states that an enforcing jurisdiction must enforce the order as if it were issued by a court of the enforcing jurisdiction. That means the enforcing jurisdiction can create its own mechanisms for handling the violation, such as through the first suggestion discussed above. Congress mandated full faith and credit to both civil and criminal orders. Compliance with the federal statute is a must, unless there is simply no constitutional method of doing so. Since there is a constitutional method of handling criminal protection orders, a failure to enforce foreign criminal protection orders is a violation of federal law.

c. Child Support and Custody Orders

In the previous two subsections, the open issues confronting tribes and states were very similar, although an extra layer of complexity existed for tribes. In this section, the issues are once again somewhat similar, but the open issues confronting tribes are much more difficult and unique. The problems revolve once again around the different possible contexts and contents of protection orders.

Protection orders may be issued, among other ways, as part of a divorce action, a child custody proceeding, or a separate procedure instituted specifically for the purpose of obtaining a protection order. Since all of these actions may result in protection orders, as well as orders regarding child support and child custody, they can create a number of problems for courts. Both the original and amended language of the VAWA complicate these problems.

292 Id. § 3(b) cmt.
293 Id.
The 1994 VAWA's definition of a protection order contained a parenthetical excluding "support or child custody orders." This parenthetical raised a number of questions, the most important of which is identifying the "support or child custody orders" Congress intended to exclude from coverage. Two possibilities exist. First, protection orders themselves may contain provisions related to child custody and support. Congress could have intended to excerpt these provisions from the ones entitled to full faith and credit. In other words, the enforcing jurisdiction should enforce all the provisions of the protection order except any support or custody provisions. Second, child support and custody orders themselves may include a protection order provision. Thus, the protection order is not a separate document, but is one element of the custody and/or support decree. Congress might have been intending to exclude these types of protection orders from the VAWA's mandates, or may have simply intended to explain that the protection order provision is entitled to full faith and credit under the VAWA, but that the VAWA does not automatically reach out and encompass the rest of the custody and support decree.

The 2000 VAWA attempted to resolve this ambiguity with new language in the parenthetical exclusion. As amended, the statute now states that a protection order does not include "a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law." This amendment did clarify which child custody and child support orders were being discussed. The problem is that the amendment introduced an extra layer of complexity concerning tribes.

The parenthetical now refers to support and custody orders issued pursuant to "state" divorce and child custody laws. Tribes also issue divorce and custody orders pursuant to tribal divorce and child custody laws. Was the omission of "tribes" inadvertent or deliberate? The legislative history is not helpful on this issue. Some inferences, however, can be drawn.

The key is the last clause of the parenthetical, the one stating "except to the extent that such an order is entitled to full faith and credit under other Federal law." Cross jurisdictional enforcement of child support and custody orders is governed by a complex web of statutes, including, but not

295 Id. § 2266(5) (2000).
296 A full discussion of the rules concerning child custody jurisdiction and enforcement in the tribal context are complicated and outside the scope of this Article, so this section will be limited to an examination of the child support and
limited to the Uniform Child Custody Jurisdiction Act ("UCCJA"), its updated version, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), the Parental Kidnapping Prevention Act ("PKPA"), and the Indian Child Welfare Act. On top of these statutes are added any variations states may have added when adopting the uniform laws and any relevant tribal laws.

It is possible that Congress referred only to states (and not tribes) in the parenthetical because it was concerned with the PKPA, which is the primary federal law setting standards for giving full faith and credit to child support and custody orders. The PKPA is arguably inapplicable to tribes, as it refers to "states" and defines that term to include states, the District of Columbia, Puerto Rico, and U.S. territories and possessions; tribes are not included on that list. Courts, however, have split over the applicability of the PKPA to tribes. As a result, there is no clear answer to how tribes should handle foreign protection orders contained in other tribes' child custody and support orders. One possibility is for a tribe to enforce only the protection portion of the order, and not the custody and support provisions. It is also possible, however, that Congress did not intend even the protection portions of these orders to be given full faith and credit unless the orders otherwise qualify for full faith and credit. Congress simply has

custody issues raised by the VA W A. For a start in understanding the complexity of these issues, see In re Marriage of Skillen, 956 P.2d 1 (Mont. 1998); Barbara Ann Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. REV. 1051 (1989); Barbara Ann Atwood, Identity and Assimilation: Changing Definitions of Tribal Power Over Children, 83 MINN. L. REV. 927 (1999); Patricia M. H o f f, The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act, 32 FAM. L.Q. 267 (1998); David M. Ujke, Tribal Court Jurisdiction in Domestic Relations Matters Involving Indian Children: Not Just a Matter of Comity, 66-AUG WIS. LAW. 10 (1993); see also WEINTRAUB, supra note 82, at 327-45.

302 See, e.g., Larch v. E. Band of Cherokee Indians, 872 F.2d 66 (4th Cir. 1989) (tribe is a state under PKPA); Brown v. Babbitt Ford, Inc., 571 P.2d 689 (Ariz. Ct. App. 1977) (tribes are not bound by the full faith and credit provision of § 1738 because Indians are not "territories or possessions" of the United States); In re Guardianship of Chewiwi, 1 Navajo Rptr. 120 (1970) (same).
not provided enough guidance, and courts will have to deal with these orders on a case by case basis.

d. Immunity

The law enforcement community is inextricably bound up in the success or failure of the VAWA’s full faith and credit requirements.\textsuperscript{303} Police are often the first called when there are allegations that a protection order has been violated.\textsuperscript{304} The officers on the scene must determine the best method of handling the problem and take the appropriate actions. According to the VAWA, those actions must be the same regardless of whether the protection order involved was issued by that jurisdiction or by another jurisdiction.

Since the passage of the VAWA, police have been concerned about a whole new wave of liability stemming from enforcement of foreign protection orders.\textsuperscript{305} The officer standing on someone’s front lawn at 2:00 a.m. in the pouring rain, reading a strange protection order with different phraseology and a different format, may also have her job complicated by worries of false arrest claims should she arrest the respondent only to find out later that the protection order was invalid.\textsuperscript{306}

The problem is further complicated by the fact that by not acting on a valid protection order, the police officer may be opening herself up to a suit by the petitioner. Police are unaccustomed to liability for failure to act, especially after the U.S. Supreme Court’s decision in \textit{DeShaney v. Winnebago County}.\textsuperscript{307} In that case, a social worker chose not to remove a boy from his home, despite repeated instances of abuse.\textsuperscript{308} The boy’s stepfather ultimately beat him so badly that he ended up with permanent

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\textsuperscript{303} Klein, \textit{supra} note 31, at 264-65.
\textsuperscript{304} Immunity issues arise for all government actors involved in enforcing foreign protection orders. The issues are particularly acute for police officers, however, as they will often be called upon to act in situations and under time constraints such that they are not able to fully gather all evidence. In addition, common law and statutory immunities for prosecutors and judges tend to be broader than immunity for police officers. Thus, this section will focus on immunity for police. Any statutory immunity provision should, however, encompass all governmental actors and not just police officers.
\textsuperscript{305} See, e.g., Klein, \textit{supra} note 31, at 264-65.
\textsuperscript{306} Woo, \textit{supra} note 5, at 409.
\textsuperscript{307} DeShaney v. Winnebago County, 489 U.S. 189 (1989).
\textsuperscript{308} \textit{Id.} at 192-93.
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The boy’s mother filed suit on his behalf under § 1983, seeking damages. The Court held that the social worker’s failure to act was not actionable under § 1983, as she was under no duty to act to protect the boy. The difference under the VAWA, however, is that jurisdictions are statutorily bound to enforce foreign protection orders as they would their own. So a failure by police to arrest for a violation of a foreign protection order, when they would arrest for a similar violation of a domestic protection order, is a violation of that statutory duty.

Accordingly, law enforcement officers feel caught in a catch-22, open to liability both for enforcing and for failure to enforce a foreign protection order. Police do usually possess some sort of common law good faith immunity for both statutory and common law torts, but many police groups have pushed for explicitly stating immunity for their actions with respect to foreign protection orders. The counter argument often offered for this proposal is that an explicit statement of immunity in one statute may imply a lack of immunity elsewhere. This is a problem, however, that can be neutralized by the language used in the immunity provisions.

One issue concerning immunity is the same for both state and tribal governments—should an immunity provision cover only good faith actions or should it also cover good faith refusals to act? The attorneys with the Full Faith and Credit Project, as well as others in the field, have strongly argued that any immunity provision should protect only those who in good faith take action to enforce a foreign protection order. These attorneys argue that the purpose of the VAWA’s full faith and credit requirements is to mandate enforcement of foreign protection orders and that, therefore, the presumption should be in favor of enforcement. Providing immunity for omissions or non-enforcement, they argue, would undercut that presumption.

This argument does have some force, but I believe it is ultimately outweighed by the counter argument. Yes, the presumption should be in favor of enforcement, and police should be encouraged to enforce foreign protection orders. Situations will certainly arise, however, in which a police

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309 Id. at 193.
310 Id.
311 Id. at 199-202.
312 Many states also provide statutory immunity for actions police take pursuant to domestic violence statutes. See Klein, supra note 31, at 264-65.
313 Letter from Mary Malefyt, Senior Attorney for the Full Faith and Credit Project, to Gail Kreiger, Michigan Coalition Against Domestic and Sexual Violence (Mar. 6, 2001) (on file with author).
An officer makes a good faith determination that the foreign protection order does not exist or is invalid. For example, suppose an officer is called out to the scene of a domestic dispute and the woman informs the officer that she has a protection order that requires her ex-husband to stay a certain distance from her. Since the two are standing face to face on the same front lawn, that protection order is currently being violated. Suppose further that the woman does not have a copy of the protection order to show to the officer. A physical copy of the order is not required under the VAWA as a prerequisite to enforcement. Indeed, most police are being trained in methods to verify the existence and terms of foreign protection orders. Suppose all those verification efforts turn up nothing—no evidence the order exists, but no evidence that it does not, either. The officer should still enforce the foreign protection order, provided the officer has reasonable cause to believe the woman is being truthful about the existence and terms of the order. But what if the woman is drunk or high on drugs or both? That type of impairment, depending on the degree and the physical manifestations, may lead the police officer to discount the woman’s credibility. In those circumstances, the police officer should certainly take all necessary steps to keep the peace, including arresting the ex-husband for any pertinent offense such as trespass or breach of the peace or even public drunkenness. The officer may, however, make a reasonable determination under the circumstances not to arrest the ex-husband for a violation of the protection order. In those circumstances, provided the officer’s decisions were reasonable and taken in good faith, the officer should not be open to liability should it later be proven that the foreign protection order did, in fact, exist. Police officers should be taught to enforce foreign protection orders whenever it is reasonable to do so (and they should not be allowed to get away with crabbed definitions of “reasonable”), but they should not be required to enforce foreign protection orders when they legitimately and reasonably believe that the order does not exist. Thus, I would recommend immunity both for good faith failures to enforce as well as for good faith actions to enforce foreign protection orders.

Finally, liability and immunity for tribal law enforcement can be more complicated than for state officers, lending further impetus to the need for an explicit statement of immunity. While by definition, tribal police officers act pursuant to tribal law, and are thus subject to tribal tort claims, tribal officers may also act as federal and/or state officers. Tribal officers may be cross-deputized as state officers. In addition, some tribal officers may also operate as BIA officers, thus making them federal officers. Thus, the liability and immunity of tribal officers may depend on a complex interrelationship of tribal, state, and federal law. All three of these
jurisdictions have both statutory and common law methods for holding governmental officials responsible for their actions, as well as the ability to spread the sovereign’s defense of immunity to help shield those officers from liability for good faith actions. A full analysis of these complexities are both outside the scope of this Article and impossible to resolve absent more facts. What is possible, however, is for a tribe to head off some of these problems by including an explicit statement of immunity in the tribal statute implementing the VAWA’s full faith and credit requirements.

e. Registration

A final issue arising under the VAWA’s full faith and credit provision revolves around registration of foreign protection orders. The 1994 VAWA said nothing about registration, leaving the states to take diverse paths, with some allowing registration, some requiring it, and some not creating a registration mechanism. Many argued, however, that registration was inconsistent with the purposes of the VAWA and with the language of 18 U.S.C. § 2265(a), which states that qualifying protection orders "shall be afforded full faith and credit," without mentioning prior steps such as registration.

The problem is twofold. First, the VAWA requires full faith and credit, but does not prescribe the procedures for accomplishing that task. Rather, it simply directs states and tribes to enforce foreign protection orders as they would their own protection orders. This leaves each jurisdiction broad latitude to create those procedures, and regardless of the VAWA’s demands, there is no doubt that each jurisdiction will have to create some procedures specific to foreign protection orders. At a minimum, each jurisdiction will have to create training procedures for law enforcement officers and courts regarding the demands of the VAWA and how to recognize qualifying protection orders. Several states, however, went even

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314 For a start on that analysis, see Dry v. United States, 235 F.3d 1249, 1253 (10th Cir. 2000) and authorities cited therein (analyzing the Indian Law Enforcement Act in context of a claim under the Federal Tort Claims Act); United States v. Bettelyoun, 16 F.3d 850 (8th Cir. 1994); see also Indian Law Enforcement Act, 25 U.S.C. § 2804(f) (2000); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) (2000).
315 For an example of such a provision, see infra Section V and accompanying commentary of the model tribal code set out in the appendix.
316 See Klein, supra note 31, at 257-65.
318 See Klein, supra note 31, at 256-57, 263-64.
further in the years after the VAWA’s passage and set up more elaborate procedures for foreign protection orders, including registries.

The second aspect of the problem revolves around the fact that there are strong arguments both for and against registration procedures. In the typical registration procedure, a person holding a protection order takes a certified or other official copy of that order to the courts of the new jurisdiction. The courts of the new jurisdiction then verify that the protection order qualifies for full faith and credit under the VAWA and enter an order declaring that the foreign protection order so qualifies. Both the foreign protection order and the attached recognition order are then filed with the new jurisdiction’s courts and law enforcement officials.

These procedures have the advantage of relieving law enforcement officers of resolving the uncertainty of the existence and/or validity of a foreign protection order. The registration process creates a standard recognition form and a paper trail that facilitates full faith and credit by both police and courts.

At the same time, however, this paper trail may cause officers to become overly reliant on the standard form. As a result, police may fail to enforce a valid protection order that has not been registered with the new jurisdiction. Thus, registration may become a de facto requirement for enforcement. Such a requirement would seem to violate the provisions of the 1994 VAWA, as it would create additional hurdles for a person covered by a protection order. After all, the primary purpose of the VAWA’s full faith and credit requirements was to minimize those hurdles. Requiring registration, moreover, would come perilously close to saying that a foreign protection order is invalid unless and until it is registered, which would also seem to violate the terms of the VAWA. Finally, registration brings with it the perils that notice may be sent to the respondent, thus revealing the location of the petitioner at a potentially dangerous time.

The ability of enforcing jurisdictions to require registration was put to rest with the VAWA 2000. In that statute, Congress explicitly mandated that, while a jurisdiction may provide for an optional registration process, registration cannot be a prerequisite to enforcement of a valid foreign protection order.

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320 For an example of a typical registration procedure, see infra Section VII and accompanying commentary of the model tribal code set out in the appendix.
321 See Klein, supra note 31, at 263.
322 See id. at 256-57, 263-64.
323 See id. at 256-57.
protection order. Thus, in implementing the VAWA's full faith and credit requirements, each jurisdiction must decide for itself whether it will create an optional registration process. Those jurisdictions that do decide to establish such a process must also keep in mind that the VAWA 2000 explicitly forbids notifying the respondent unless the petitioner specifically requests notification.

IV. THE CASE FOR A BROADER INTERPRETATION OF THE VAWA 2000

As Part III makes clear, tribal governments must overcome a number of obstacles before they can implement the VAWA's full faith and credit provisions. Some of those obstacles are shared, albeit to a lesser degree, by state governments. For example, both state and tribal governments must make decisions involving enforcement of foreign criminal protection orders, regarding immunity for governmental employees involved in the enforcement decision, and regarding the creation of a voluntary mechanism for registering foreign protection orders. While these decisions are a bit more complicated for tribal governments, they are not unknown to state governments. Indeed, these shared issues are also of the type commonly faced by those who must implement any statute. Most statutes leave some holes or gaps or unanswered questions that must be resolved by administrative agencies charged with enforcing the new requirements. Although these types of questions can present thorny issues, they are not insurmountable obstacles to fulfillment of the legislature's purpose.

Tribes, however, also face some additional obstacles to implementation of the VAWA’s full faith and credit provisions, obstacles that states do not share. These are the obstacles that could prove deadly, undermining the entire purpose of the statutory scheme. These obstacles are, of course, the jurisdictional differences between a tribal and a state government. If we

324 "Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State or tribal jurisdiction." 18 U.S.C. § 2265(d)(2).

325 A State or Indian tribe according full faith and credit to an order by a court of another State or Indian tribe shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State or tribal jurisdiction unless requested to do so by the party protected under such order. Id. § 2265(d)(1).

326 For a more detailed examination of these shared issues, and how the issues differ in the tribal context, see supra Part III.B.3.
stay with the factual circumstances of a protection order violation delimited above, that is, when a respondent restrained by a protection order is physically present in the enforcing jurisdiction at the time of the violation, then once a state resolves the standard issues referenced above, the state faces no other obstacles to enforcing the foreign protection order. The fact that a protection order was violated (or allegedly violated) within the state by a person physically present within the state is sufficient to give the state both criminal and civil jurisdiction over the offender. That is not, however, true of tribal governments.

As explained in Part II, a series of Supreme Court decisions has limited tribal jurisdiction over non-Indians, even when those persons are physically present within the tribe’s Indian Country. Tribes no longer possess criminal jurisdiction over non-Indians present within the tribe’s borders, and tribes may also lack civil jurisdiction over non-Indians. A tribe possesses civil jurisdiction over non-Indians only if the tribe can demonstrate that the non-Indian engaged in consensual relations with the tribe or its members or if the tribe can establish that the non-Indian’s conduct has a direct effect on the health and integrity of the tribe. The Supreme Court has consistently stated, however, that these rules are subject to change by Congress.

The relevant question, then, is whether Congress intended to alter these rules for purposes of the VAWA’s full faith and credit provisions. As explained above in the introduction to Part III.B, the original language of the VAWA’s full faith and credit provisions did not address this question, and the amendments in the VAWA 2000 address it in an ambiguous fashion. The issue, then, is how to resolve this ambiguity.

As a reminder, the amendments in the VAWA 2000 state that “tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.” It is clear that Congress did not intend to change the default rules for tribal criminal jurisdiction. The open question is the effect of this amendment

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327 Again, as noted supra Part II.B., the Supreme Court has used the term “nonmember” in the civil jurisdiction context, which encompasses both non-Indians and those Indians who are members of other tribes. The Supreme Court used a similar distinction in criminal cases, but Congress overturned that distinction via statute. The Supreme Court has not explicitly addressed whether the proper distinction in the civil context is Indian/non-Indian (as it is in the criminal context) or whether the proper distinction is member/non-member.

329 See supra Part III.B.
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on tribal civil jurisdiction, particularly with respect to interpreting the phrase "in matters arising within the authority of the tribe."\textsuperscript{330}

There are two possible interpretations for this phrase, one narrow and one broad. Under the narrow interpretation, "authority of the tribe" is equated with "jurisdiction of the tribe," as that phrase is defined in the Supreme Court's default rules. This is the interpretation set forth in Part III.B.2 above. To reiterate, this interpretation means that before a tribe can impose civil penalties on a non-Indian for violating a foreign protection order, the tribe must first establish sufficient facts to satisfy either the consensual relationship or direct effects test. The Supreme Court has made satisfaction of these tests very difficult.

Under the broader interpretation, "authority of the tribe" is equated with "the tribe's Indian Country." In other words, for purposes of the VAWA's full faith and credit provisions, a tribe would possess civil jurisdiction over all persons physically present within its borders, regardless of the person's identity as an Indian or non-Indian. An examination of Congress's purpose, and the consequences of the narrow interpretation, clearly argue in favor of the broader interpretation of the VAWA 2000 amendment.

First, a look at the statutory language clearly indicates Congress's intent to include both tribes and states within the full faith and credit provisions. The original full faith and credit provisions mentioned both states and tribes. When questions arose about the extent of tribal jurisdiction, Congress amended the statute to make it clear that tribes possessed full civil jurisdiction for purposes of the VAWA's full faith and credit requirements. The amendments clearly affirm the civil jurisdiction of tribal courts. Most fundamentally, if a tribe does not possess jurisdiction, then it cannot give full faith and credit to a foreign protection order. A narrow interpretation of the amendment means a narrowing of the full faith and credit provisions, with the consequence of reduced enforcement of foreign protection orders.

If a tribe does not possess civil jurisdiction over all persons present within its borders who violate protection orders while in the tribe's territory, many women will be left unprotected, despite having obtained a valid protection order. An Indian woman involved with an abusive non-Indian cannot retreat to the safety of her tribe and her tribal government, for the tribe would be powerless to protect her. Furthermore, it is uniformly recognized that the most dangerous time for a woman is when she leaves the abusive relationship, and it is equally clear that the most dangerous

\textsuperscript{330} 18 U.S.C. § 2265(e).
respondent is the one who will physically pursue the woman during her attempt to leave.

The federal government will lack jurisdiction in these circumstances, unless it can prove all the elements of one of the new domestic violence crimes and/or unless the respondent injures the petitioner so badly that his conduct rises to the level of a "major" crime under the Major Crimes Act. I doubt Congress intended to limit a woman's protection to circumstances where she is gravely injured or even killed. That is a bit like shutting the barn door after the horse is gone. Even if the federal government does possess jurisdiction, a U.S. Attorney must be willing to pursue the case. Few U.S. Attorneys have the budget or the inclination to do so. Domestic violence often ranks below terrorism, drugs, and white collar crime on the U.S. Attorney priority list. The state government might possess jurisdiction in certain special circumstances, but those circumstances would have to be proven, and again, a district attorney would have to be willing to devote the time and resources to the case. A state would also possess jurisdiction (at least criminal jurisdiction) if both the petitioner and respondent are non-Indian. Again, though, these limitations severely constrain the class of persons who can claim protection of the VAWA's full faith and credit provisions in Indian Country.

It is very difficult to believe that a Congress so concerned with women's safety, and so determined to make a valid protection order enforceable throughout the United States, would deliberately leave women to the uncertain safety net of tribal jurisdictional default rules, especially when Congress specifically addressed the situation and opted to declare that tribal courts possessed full civil jurisdiction over matters arising within its authority. It is clear that Congress did not intend tribes to possess criminal jurisdiction in these circumstances, but it must also be equally clear that Congress considered and approved of tribal civil jurisdiction in these circumstances. "Over matters arising within its authority" must refer to matters arising within the tribe's territory, that is to persons who are physically present within the tribe's Indian Country and who violate a foreign protection order while there.

This conclusion is further reinforced if one considers the rationale behind the Supreme Court's decisions limiting tribal civil jurisdiction over non-Indians. The Court has expressed great reluctance to permit tribal jurisdiction over non-Indians, largely on two bases. First, the Court has argued that non-Indians cannot vote in tribal elections and are not true members of the tribal polity. But a man who lives in Oklahoma and follows his ex-wife to New Mexico where he violates an Oklahoma protection order is also not a member of the New Mexico polity. That is no barrier to New
Mexico's enforcement of the Oklahoma protection order. It should likewise not be a barrier to the Navajo Nation's enforcement of the Oklahoma protection order.

Second, the Supreme Court has also expressed great reluctance about subjecting non-Indians to the "unfamiliar" vagaries of tribal law, with its "strange" and "different" customs and culture. But there is nothing "unfamiliar" or "strange" about a tribal law which prohibits violation of a valid foreign protection order. Indeed, that tribal law is mandated by federal law. And that federal law applies uniformly throughout the United States. Indian Country should not be and cannot be allowed to become a haven for abusive persons who may violate protection orders with impunity. That is certainly not in keeping with either the letter or the spirit of the VAWA's full faith and credit requirements. All of these considerations point toward the broader, rather than the narrower, interpretation of the VAWA 2000 amendments.

CONCLUSION

Over the last twenty-five years, the Supreme Court has consistently eroded the sovereignty of Indian tribes, largely by limiting their jurisdiction over persons who are not members of the tribe. The Supreme Court has continued on this path, despite repeated statements by Congress and presidents from Nixon through Clinton reiterating the sovereignty of tribes and announcing intentions to deal with tribes on a government to government basis. These decisions have created different sets of jurisdictional rules for tribes, states, and the federal government, resulting in a complex set of rules that is difficult to master even for lawyers who work regularly in Indian law.

The full faith and credit requirements of the Violence Against Women Act are a paradigmatic example of the problems stemming from these complicated rulings. As one article put it: "The message should be clear and unequivocal: 'In the United States, your order of protection is good anywhere; don't leave home without it.'" The problem, of course, is that the special jurisdictional rules for tribes have tripped up Congress's efforts to create a national blanket of coverage for those individuals holding protection orders. A person moving in and out of Indian Country for work, travel, recreation, or family purposes cannot automatically rely on a preexisting order of protection.

331 Lutz & Bonomolo, supra note 31, at 28.
Even under optimal conditions, the effectiveness of the VAWA's full faith and credit requirements is heavily dependent on training both law enforcement officers and courts about the VAWA's requirements and how to comply with them. Without necessary training and education, it is possible for a wide variety of people and institutions to with ease stymie Congress's intentions by violating both the letter and spirit of the VAWA. But even without purposeful (or negligent) obstructive actions, the built in limitations of tribal jurisdiction mean that a person must often obtain both a tribal and a state protection order to be fully covered.\textsuperscript{332} That is contrary to the purposes and intentions of VAWA—that an individual needs only to obtain one protection order, which then applies throughout the United States.

APPENDIX:

PROPOSED MODEL CODE FOR USE BY MICHIGAN INDIAN TRIBES:
ENFORCEMENT OF FOREIGN PROTECTION ORDERS

INTRODUCTION

Across America, tribal and state courts are working to curtail domestic violence. A key component of that effort is the issuance of protection orders. To assure that those orders will serve their intended purpose in this mobile society, in 1994 Congress enacted the full faith and credit provision of the Violence Against Women Act ("VAWA"), 18 U.S.C. § 2265 (1994). In 2000, Congress amended the VAWA as part of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The law requires tribes and states to enforce valid protection orders issued by other tribes and states as if the orders had been issued by the enforcing jurisdiction. Many of the details of that enforcement are left to tribes and states.

During a two year period beginning in early 2000, the Michigan Working Group on Full Faith and Credit drafted a recommended model enforcement code for tribes in Michigan to consider. The "Enforcement of Foreign Protection Orders" model code, which follows, concerns how a tribe would enforce a "foreign protection order," that is, a protection order issued by a different tribe or by a state. It does not pertain to a tribe's decision to issue or enforce its own protection orders.

On the pages that follow the model code, the Working Group offers commentary regarding legal issues involved in formulating a tribal code covering enforcement of foreign protection orders. As explained in the commentary, significant issues remain unresolved. While a tribe's authority to enforce a protection order that binds one of its members is evident, questions concerning its civil and criminal authority over others continue to pose challenges, as does the applicability of the VAWA full faith and credit provisions to protection orders containing child custody provisions. Certainly, Congress intends that tribes enforce foreign protection orders. However, the details of that enforcement are clouded by larger jurisdictional issues, which are discussed in the commentary.

Like any model code, this proposal is designed to serve as a starting point. A tribe wishing to draft a code that meets its needs should follow its customary procedures when adopting any tribal law, which undoubtedly include consulting tribal counsel and considering existing tribal laws, relevant federal laws, treaties or Acts of Congress, state laws, and its relationship with federal, local, and state law enforcement.

PROPOSED MODEL CODE FOR USE BY MICHIGAN INDIAN TRIBES: ENFORCEMENT OF FOREIGN PROTECTION ORDERS

Section I. Purpose and Findings

A. Domestic violence is immoral conduct that is contrary to the values of this Tribe. It is devastating to its victims and to any family in which it happens. It also harms the entire community, because violence endangers everyone's physical, mental, emotional, and spiritual health.

B. We will not allow domestic violence among our people or in the lands that we govern. In other chapters of our law, we explain how we issue and enforce protection orders. In this chapter, we explain how we enforce protection orders issued by other tribes, states, and nations.

C. Our own public policy and federal law (18 U.S.C. § 2265) require us to enforce a valid foreign protection order. We enact this Code to enable us to fully enforce valid foreign protection orders in a consistent manner.

D. We have the authority to enact this chapter of our law. We have the inherent sovereign right to enact laws for the welfare and protection of our Tribe and our people, and of all persons within the lands that we govern. Therefore, this chapter applies to violations of foreign protection orders within the lands that we govern.
Section II. Definitions

A. When we say "this Tribe," "our people," or "our Tribal court," or when we use words like "we," "us," "our," and "ourselves," we are referring to ______ [insert the formal name of the Tribe], and its Tribal council, Tribal law enforcement, and Tribal court, as the context requires.

B. "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement, and shall be adjudged by the Tribal court upon consideration of factors such as the length of time of the relationship; the type of relationship; the frequency of interaction between the parties; and, if the relationship has been terminated by either of the parties, the length of time since the termination of the relationship. This term does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context.

C. "Foreign protection order" means a protection order issued by any issuing court except our Tribal court.

D. "Issuing court" means a court that has issued a protection order and includes a court of any tribe; Canada; a province of Canada; a territory of Canada; the United States; a state of the United States; the District of Columbia; or a commonwealth, territory, or possession of the United States.

E. "Lands that we govern" means all our land that qualifies as Indian Country under 18 U.S.C. § 1151.

F. "Mutual order" means a protection order issued against both the respondent and a petitioner who has petitioned, filed a complaint, or otherwise filed a written pleading seeking a protection order against abuse by a spouse or intimate partner.

G. "Petitioner" means the person who has petitioned, filed a complaint, or otherwise filed a written pleading seeking a protection order.

H. "Protection order" means any order or judgment of any kind entered by an issuing court to prevent violence, threats, harassment, contact, communication, or physical proximity to another person. A protection order can be permanent or temporary; it can be civil or criminal; it can be issued in a case filed for the sole purpose of obtaining the protection order, or a case that has been filed for other purposes so long as any civil order was issued in response to a complaint, petition or motion filed on behalf of the person seeking protection. A protection order includes a "mutual
order" as defined in subsection II(F), but enforcement against the petitioner is permissible only if the conditions set forth in subsections III(E) and IV(F) are satisfied. A protection order does not include a support or child custody order issued pursuant to state divorce and child custody laws of the issuing court except to the extent that such an order is entitled to full faith and credit under other federal law.

I. “Respondent” means the person against whose conduct the petitioner seeks a protection order.

J. “Spouse or intimate partner” means: (1) a spouse or former spouse, (2) a person who shares a child in common, (3) a person who has or has had a dating relationship, or (4) a person residing or having resided in the same household.

Section III. Judicial Enforcement of Foreign Protection Orders

A. If a foreign protection order is valid, as defined in subsection III(D), we will enforce it as if it were issued by our Tribal court, at no cost to the petitioner.

B. A person protected by a foreign protection order does not need to register it with our Tribal court.

C. A proceeding to enforce a foreign protection order may be started in our Tribal court by several methods, including:
   1. a motion filed by the petitioner holding the foreign protection order, alleging that respondent has violated the protection order and requesting that the Tribal court enforce the order; and/or
   2. an action filed by the Tribal prosecutor alleging that respondent has violated the foreign protection order.

D. If a foreign protection order bears the name of an issuing court, the persons to whom it applies, a judge’s signature or an equivalent sign, terms and conditions against the respondent, and does not bear an expiration date that has passed or any other obvious indication that it is not authentic, it will be deemed valid, and we will enforce it, unless the party against whom the order is to be enforced proves, as an affirmative defense, that:
   1. the issuing court did not have jurisdiction over the parties or the dispute under the law of the issuing court; or
   2. the respondent was not given due process, which means reasonable notice and an opportunity to be heard. If the foreign protection order was originally entered ex parte, notice and
opportunity to be heard must be provided within the time required by the law of the issuing court, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights; or

3. the protection order is a support or child custody order issued pursuant to State divorce and child custody laws that is not entitled to full faith and credit under other federal law.

E. A mutual order is enforceable against the respondent. A mutual order is enforceable against the petitioner only if (1) the respondent filed a cross or counter petition, complaint, or other written pleading seeking a protection order against the petitioner, and (2) the issuing court made specific findings that the respondent was entitled to a protection order.

Section IV. Role of Law Enforcement

A. A law enforcement officer shall enforce a foreign protection order in the same manner as he or she would enforce a protection order issued by our Tribal court.

B. A law enforcement officer may rely on a copy of a foreign protection order that is provided to the officer from any source, and may rely on the statement of a person protected by a foreign protection order or any other reliable source that the order remains in effect.

C. If a copy of a foreign protection order is provided to the officer from any source, the officer shall enforce the order if it appears to the officer to be authentic. An officer shall treat a foreign protection order as authentic if it:

1. bears the names of the issuing court and the persons to whom it applies, terms and conditions against the respondent, and a judge’s signature or an equivalent sign; and

2. does not bear an expiration date that has passed or any other obvious indication that it is not authentic.

The fact that the foreign protection order cannot be verified in the manner described in the following paragraph does not mean that the order is not authentic.

D. If a person claiming to be protected by a foreign protection order does not have a copy of the order, the law enforcement officer shall take reasonable steps to verify the existence of the order, the names of the issuing court and the persons to whom it applies, the terms and conditions against the respondent, and that the order does not
bear an expiration date that has passed or any other obvious indication that it is not authentic. If the law enforcement officer verifies this information, the officer shall enforce the foreign protection order. Examples of reasonable steps to verify the order include consulting the issuing court or law enforcement in that jurisdiction, the Law Enforcement Information Network ("LEIN"), the National Crime Information Center ("NCIC"), a registry operated by the issuing jurisdiction, or any similarly reliable source.

E. If a person claiming to be protected by a foreign protection order does not have a copy of the order and the law enforcement officer cannot verify the existence of the order through other reliable sources, the officer shall maintain the peace and take any other lawful action that appears appropriate to the officer.

F. A mutual order is enforceable against the respondent. A mutual order is enforceable against the petitioner only if (1) the respondent filed a cross or counter petition, complaint or other written pleading seeking a protection order against the petitioner, and (2) the issuing court made specific findings that the respondent was entitled to a protection order.

Section V. Immunity

A. No Tribal judge, Tribal law enforcement officer, Tribal court employee, or other Tribal government official who in good faith takes, or refrains from taking, any action to enforce a foreign protection order can be sued in a civil suit or prosecuted in a criminal action.

B. The fact that we make this statement of immunity does not imply an absence of immunity elsewhere. The Tribe and all its officials, employees, and agents retain all available immunity in all settings, unless specifically and explicitly waived in writing.

Section VI. Penalties

A. When, following a hearing, our Tribal court finds that a person has violated a foreign protection order within the lands that we govern, our Tribal court may impose any penalty provided by Tribal law for violating a protection order issued by our Tribal court.

B. The determination whether a foreign protection order has been violated is made in accordance with the procedures governing criminal and civil cases in our Tribal court.
PROPOSED MODEL CODE FOR USE BY MICHIGAN INDIAN TRIBES: ENFORCEMENT OF FOREIGN PROTECTION ORDERS

COMMENTARY

General

This model code is designed to provide tribes with a mechanism to implement the full faith and credit provision of the Violence Against Women Act ("VAWA") of 1994, 18 U.S.C. § 2265, and its related provisions, as amended by the Violence Against Women Act of 2000. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The model code was drafted by the tribal jurisdiction subcommittee of the Michigan Working Group on Full Faith and Credit. This Working Group was a comprehensive committee consisting of representatives of federal, state, and tribal governments and attorneys in private practice. During the drafting process, the tribal jurisdiction subcommittee consulted with tribal attorneys, tribal judges, tribal police officers, and tribal domestic violence victim advocates, as well as other knowledgeable persons.

The VAWA is a federal statute containing a number of methods to address violence against women. The full faith and credit provision was enacted pursuant to Congress's authority under the Full Faith and Credit clause of the United States Constitution, U.S. CONST. art. IV, § 1.

The VAWA's full faith and credit requirements can be found at 18 U.S.C. § 2265, with some relevant definitions codified at 18 U.S.C. § 2266. Essentially, this statute requires that all states and all tribes give full faith and credit to valid protection orders issued by any other state or tribe. These requirements, however, are not fully self-executing; rather, each state and tribe must determine how it will implement the statute's requirements. In making these determinations, each jurisdiction must focus on two areas: (1) crafting enforceable protection orders when the tribe is the "issuing jurisdiction," and (2) determining how to enforce foreign protection orders when the tribe is the "enforcing jurisdiction."

The tribal jurisdiction subcommittee concentrated its efforts on the tribe as the "enforcing jurisdiction," and the model code presumes that a tribe has an existing body of tribal law governing issuance and enforcement of its own protection orders. The National Council of Juvenile and Family Court Judges has prepared a judge's bench card briefly addressing both enforcement and issuance aspects of the VAWA. See Violence Against Women Online Resources: Full Faith and Credit—A Judge's Bench Card, at http://www.vaw.umn.edu/FinalDocuments/judgefin.htm (last modified Feb. 11, 2000). That bench card contains useful suggestions for crafting an
enforceable protection order, recommending that judges issuing protection orders:

1) use clear, concise, and specific language;
2) specify whether the respondent had notice and an opportunity to be heard;
3) comply with relevant laws on child custody;
4) provide contact information for verification purposes;
5) specify the duration of the protection order;
6) if the order is mutual, indicate whether terms of the VAWA are satisfied;
7) inform all parties of the scope of the protection order;
8) specify if the order is due full faith and credit under the VAWA;
9) specify relevant federal laws in the protection order, and that possession of a firearm while subject to the order, even if the order does not prohibit firearm possession, or interstate travel to violate the order, may subject the party to federal prosecution;
10) provide the parties with a certified copy of the order.

When the tribal jurisdiction subcommittee began its work, it first examined work done by others in this area. That led the subcommittee to two primary sources: a model tribal code drafted by B.J. Jones of the Northern Plains Tribal Judicial Training Institute, and a model state code. The subcommittee also reviewed variations on these two models. These sources were used as a starting point in formulating the model code accompanying this Commentary. The tribal jurisdiction subcommittee also worked closely with the Working Group’s subcommittee drafting proposed enabling legislation for implementation of the VAWA’s full faith and credit provisions in Michigan. In 2001, the Michigan legislature enacted into law a comprehensive package of domestic violence legislation which includes many of the recommendations of the Working Group. A summary of the legislation appears at http://www.mfia.state.mi.us/CFSAdmin/dv/domestic_violence.html. The full text of each Public Act can be found on the Michigan legislature’s web site, located at http://www.michiganlegislature.org under House Bill 5275 or Senate Bill 729.

Tribes considering this model code should be aware that the model code was prepared using the assumption that the tribe exercises jurisdiction to the full extent permitted by federal law. Thus, each tribe should review its constitution and laws to make sure that the tribe’s jurisdiction has not been limited. In particular, some tribal constitutions disclaim all jurisdiction over non-Indians. If a tribe’s constitution contains such a limiting provision, then the tribe should adjust the model code as needed before adopting it unless a constitutional amendment is planned.

This model code is designed to be adopted as a separate section of an existing tribal domestic violence code. The model code is not a substitute
for a domestic violence code, as it does not contain procedures for issuing protection orders; rather, the model is concerned only with enforcing protection orders issued by other jurisdictions. There are several points at which the model code will intersect with an existing domestic violence code; these points are specified in the Commentary. Consideration should be given to whether adoption of the model code will necessitate amendments to any provisions of an existing domestic violence code and/or other existing tribal law.

Some Michigan tribes have enacted an ordinance or court rule to fulfill the reciprocity requirement of Michigan Court Rule 2.615, which provides a mechanism for enforcement of tribal judgments in Michigan state courts. MICH. CT. R. ("MCR") 2.615 applies only if a tribe has enacted a reciprocal measure to recognize state court judgments and orders, and explicitly states that it "does not apply to judgments or orders that federal law requires be given full faith and credit." Id. at 2.615(D). The VAWA's full faith and credit requirements for protection orders are just such a federal law. Thus, Michigan state or tribal courts presented with a foreign protection order would enforce it not under MCR 2.615, but under the VAWA and any laws, codes, rules, or procedures that may be enacted to enforce foreign protection orders pursuant to federal law.

Before adopting this model code, a tribe should review any existing tribal law regarding recognition of foreign judgments, but it is probable that any provision enacted with respect to MCR 2.615 does not fully satisfy the VAWA. The tribal law may be limited to Michigan state orders or contain a reciprocity requirement. The VAWA full faith and credit provision applies not just to protection orders issued by state courts in Michigan, but to valid protection orders issued by jurisdictions throughout the United States. See Model Code, Section II(D) (defining "issuing court"). Reciprocity is inherent in the VAWA, which requires each state and tribal jurisdiction to recognize and enforce valid protection orders issued by another state or tribal jurisdiction.

SECTION I. PURPOSE AND FINDINGS

Subsections I(A) and I(B), "Purpose" Language

These two subsections are designed to serve as "purpose" language, explaining the motivations and intentions behind enacting this code. Purpose language is always important as it gives the public, and particularly the courts, an indication of legislative intent. Purpose language is especially important here in light of the United States Supreme Court decisions limiting tribal jurisdiction over non-Indians.
Under current federal law, tribes have no independent criminal jurisdiction over non-Indians, although Congress is free to authorize tribes to exercise broader criminal jurisdiction. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribal courts cannot exercise criminal jurisdiction over non-Indians except in a manner acceptable to Congress).


The same legal standard governs both a tribe’s civil regulatory and civil adjudicatory jurisdiction. *Nevada v. Hicks*, 121 S. Ct. 2304 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Tribes clearly possess civil jurisdiction over their own members. To exercise civil jurisdiction over non-Indians, a tribe must show that the non-Indian either (1) engaged in consensual relations with the tribe or an individual member of the tribe, or (2) that the non-Indian’s action has a direct effect on the core integrity of the tribe. In making this showing, a tribe should identify the status of the land where the violation was committed. If the land is tribal trust land, then the tribe is more likely to possess civil jurisdiction over non-Indians on that land. If the land is fee land, however, a tribe is less likely to have jurisdiction. See, e.g., *Nevada v. Hicks*, 121 S. Ct. 2304 (2001); see also *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

Strong purpose language is important in establishing civil jurisdiction over non-Indians. The purpose language is important because it promotes awareness over the ways in which violations of protection orders satisfy both of the so-called “Montana exceptions” (the consensual relations and the direct effects test). Whether a particular situation satisfies the *Montana* exceptions is a factually based determination. Thus, a tribe must make a
factual record of the ways in which a person who violates a foreign protection order has engaged in consensual relations under the first prong of Montana and/or has directly impacted the health and welfare of the tribe under the second prong of Montana. One method of demonstrating that these tests are satisfied is for the tribe to make legislative findings regarding these two issues. Some of the possible topics for these findings include:

(A) Look at the rate of domestic violence on tribal lands—is it high compared to other jurisdictions? Are domestic violence and/or violations of protection orders committed in disproportionate numbers by non-Indians? If so, incorporate that information into the purpose language.

(B) Look to tribal tradition and culture—incorporate anything that relates to marriage (or other intimate relationship) as a “consensual relationship” with the tribe (current case law usually references some sort of contractual relationship—anything that establishes a voluntary relationship between the non-Indian and the Tribe), or to domestic violence as an offense against the tribe itself.

(C) Look at tribal resources that are spent on combating domestic violence—again, incorporate anything that might establish that domestic violence and protection order violations directly affect the tribe’s ability to govern itself or directly impacts upon the health and welfare of the tribe (and not just individual tribal members).

Legislative findings should be documented in a recorded form, such as a written or electronic transcript of the hearing, and incorporated into the text of the code itself, most likely in the purpose and findings section. The subcommittee has not proposed language in this area, as each tribe’s findings will be unique, and include tribal history and culture.

**SUBSECTION II. DEFINITIONS**

Subsection II(D), Issuing Court

The definition of “issuing court” has been expanded beyond the scope of the VAWA. The VAWA does not require full faith and credit for protection orders issued by a province of Canada, the Dominion of Canada, or for a protection order issued by the United States. Federal courts may issue protection orders as part of a criminal release order or independently under 18 U.S.C. § 1514, and some CFR courts issue protection orders as well. Accordingly, the committee included courts of the United States as part of the definition of “issuing court.” If a tribe does not want to go beyond the actual requirements of the federal statute, it should delete references to these three jurisdictions when adopting a code.
In addition, given the proximity of Michigan to Canada, the tribal jurisdiction committee thought that full faith and credit to Canadian protection orders would further the spirit and purposes of the statute. However, the form or status of protection orders issued in Canada is unclear, which creates a potential for confusion if a Canadian order were presented to a tribal officer or judge for enforcement. Research on the issue of Canadian protection orders has produced limited information regarding Canadian protection order law. Research did disclose The Victims of Domestic Violence Act, a 1994 Saskatchewan law that took effect in 1995. It seems that Prince Edward Island is the only other province that has adopted this law. It is described in Dolgopol v. Dolgopol, [1995] 127 Sask. R. 237, available at 1995 ACWSJ LEXIS 11936, as “a novel piece of legislation intended to protect domestic antagonists from violence one against the other and, in an emergency, to provide immediate relief from a turbulent predicament.” Given the limited information gathered about the form and content of Canadian protection orders, the subcommittee had some initial hesitation about including them within the model code. After some discussion, it was decided that the answer to the concern about confusion lies in the model code itself. First, there is the intentionally broad definition of protection order found in subsection II(H). Second, there is the due process requirement of subsection III(D)(2). These sections define a valid protection order entitled to enforcement.


Subsection II(E), “Lands that we govern”

Consistent with the VAWA, the Indian Country definition contained in 18 U.S.C. § 1151 is used. Tribes should consider how that definition pertains to their tribal lands in light of existing case law. Some decisions worthy of consideration are:

Alaska v. Native Village of Venetie Tribal Gov’t, 522 U.S. 520 (1998) (tribally owned fee lands are not “dependent Indian community” because the lands had to be set aside by the United States and be under federal superintendence);

Cardinal v. United States, 954 F.2d 359 (6th Cir. 1992) (all lands within the exterior boundaries of the reservation are Indian Country under 18 U.S.C. § 1151(a) regardless of who owns the land, and therefore, federal
jurisdiction existed under Major Crimes Act for rape committed by an Indian on reservation even if land within the reservation was patented to a non-Indian; observing in dicta that if the land had been patented to a non-Indian prior to creation of the reservation, it might not be within § 1151(a)'s definition, and that such a result would create "checkerboard jurisdiction" and confusion Congress specifically tried to avoid in enacting § 1151);

_People v. Bennett_, 491 N.W.2d 866 (Mich. Ct. App. 1992) (state has criminal jurisdiction over a tribal member for driving while under the influence of alcohol where arrest occurred on land within exterior boundaries of reservation because the right-of-way was not Indian Country under 18 U.S.C. § 1151(a); the right-of-way was patented to non-Indians before the effective date of the Treaty of October 18, 1864, which created the reservation and, therefore, was not "unsold lands within the" reservation created by the treaty);


Subsection II(F), Mutual Orders

Consistent with the VAWA, this subsection is intended to exclude from full faith and credit domestic relation "mutual orders" which have been issued against a petitioner unless it is clear that the respondent, in obtaining the order against the petitioner, filed a cross or counter petition and the court made specific findings that each party was entitled to the protection order. A mutual order is enforceable against the respondent and entitled to full faith and credit as provided by subsections III(A)-(D) (judicial enforcement) and subsections IV(A)-(E) (law enforcement role).

Note that a petitioner is defined differently for purposes of "mutual orders." Compare subsection II(F) (for purposes of "mutual orders" only, petitioner means the person who has petitioned, filed a complaint, or otherwise filed a written pleading seeking a protection order against abuse _by a spouse or intimate partner_) with subsection II(G) ("Petitioner" means the person who has petitioned, filed a complaint, or otherwise filed a written pleading seeking a protection order"). Thus, the "mutual order" definition is not implicated in the rare instance where the petitioner has "petitioned, filed a complaint, or otherwise filed a written pleading seeking
a protection order against abuse by someone other than "a spouse or intimate partner." (See discussion below concerning broad definition of "spouse or intimate partner").

In subsection II(F) the "cross or counter petition" language contained in the VAWA is used. Subsections II(B) and II(J) include a definition of "spouse or intimate partner" consistent with the language contained in the proposed enabling legislative bill drafted by the state legislative subcommittee. The "spouse or intimate partner" definition mirrors the "domestic relationship" definition contained in Michigan's domestic relationship personal protection order statute, MICH. COMP. LAWS. ANN. ("M.C.L.A.") § 600.2950(1) (West 2000), rather than the definition in the VAWA. 18 U.S.C. § 2266. Note that § 600.2950(1) has been amended by the 2001 legislative amendment. See H.B. 5299, pt. 200 (Mich. 2001).

Michigan's definition includes categories of people not included in the VAWA such as siblings, roommates, parent/adult child, and those dating but not residing together, and affords broader protections than the VAWA. This has been done to create uniformity in application by law enforcement officers and judges in Michigan. Subsection II(B)'s "dating relationship" definition is consistent with the definition found in M.C.L.A. § 600.2950(30)(a), but also incorporates additional guidance for tribal judges in determining whether such a relationship exists. Additionally, the effect of using Michigan's broader definition is that a larger category of petitioners will be exempt from arrest than under the VAWA's definition of "spouse or intimate partner."

Subsection IV(F) (discussed below) requires that responding law enforcement officers address whether or not a mutual order is entitled to enforcement against the petitioner because it satisfies the requirements in Subsection IV(F), that is, (1) the respondent filed a cross or counter petition, complaint or other written pleading seeking a protection order against the petitioner, and (2) the issuing court made specific findings that the respondent was entitled to a protection order. The tribal subcommittee believes this is the intent of the VAWA, and it is also consistent with the views and recommendations of the state legislative subcommittee. This means that if a law enforcement officer in the field is presented with a situation involving a mutual order, the officer would enforce it against the respondent consistent with subsection IV(A)-(E). However, it would not be enforceable against the petitioner unless the officer saw evidence that the respondent filed a cross-pleading and the court made specific findings that each party was entitled to protection. As indicated in subsection III(E), a judge must also examine this issue when confronted with a mutual order.
Consistent with the VAWA definition of "protection order," the model code's definition includes both civil and criminal orders of protection. See 18 U.S.C. § 2266(5). Although most protection orders are issued in a civil proceeding, the full faith and credit provision applies to valid criminal orders of protection, which are issued by some jurisdictions as a condition of release, probation or parole. Such orders may be difficult to enforce because of verification problems, because of a lack of arrest authority in the enforcing jurisdiction, and because most jurisdictions do not have laws which allow for prosecution of offenders who violate criminal orders issued by another jurisdiction. These difficulties may be further compounded in tribal courts, which lack criminal jurisdiction over non-Indians. Nevertheless, Congress clearly intended that all valid orders of protection, whether issued in a civil or criminal proceeding, be accorded full faith and credit.

Some jurisdictions consult with the issuing jurisdiction to determine if extradition is necessary when presented with a violation of the issuing jurisdiction's criminal order. Other jurisdictions may have statutes which make it unlawful to violate a criminal protection order issued by another jurisdiction. See Commentary, Sections IV and VI (describing law enforcement responses and penalties for protection order violations in tribal jurisdictions). Another approach is to treat the protective order provision of a criminal order the same way such protective provisions are treated when contained in a civil order. See Section VI (penalties for violating protection orders). While limiting the definition of "protection order" to civil orders has been suggested by some, see UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC-VIOLENCE PROTECTION ORDERS ACT § 3(b) (2000) and accompanying Comment, the tribal jurisdiction subcommittee rejected this approach because it is contrary to the VAWA and creates a gap in protections that should be afforded to domestic violence victims.

The "protection order" definition incorporates the VAWA 2000's parenthetical exclusionary language concerning support or child custody orders issued pursuant to State divorce and child custody laws. Such orders are not entitled to full faith and credit under the VAWA "except to the extent that such an order is entitled to full faith and credit under other federal law." 18 U.S.C. § 2266(5). The meaning of the exclusionary language was the topic of much discussion within the Working Group.
Proposed Michigan VAWA Full Faith & Credit Legislation, Commentary, Section 2, Child Custody or Support Provisions Within Protection Orders.

The VAWA 2000 modified the language, but did not resolve questions surrounding its meaning, and in at least one way caused more confusion by referring to only "State" divorce and child custody laws, omitting reference to "Tribal" laws. *Compare* VAWA 1994, 18 U.S.C. § 2266 ("'protection order' includes . . . (other than support or child custody orders") *with* VAWA 2000, 18 U.S.C. § 2266(5) ("'protection order' includes . . . (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law") (emphasis added).

The tribal subcommittee does not know if the omission of "Tribal" law was inadvertent given the applicability of the VAWA full faith and credit provision to tribal and state protection orders. The model code follows the language of the VAWA, however, because the primary controlling federal law, the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A, is arguably inapplicable to Tribes (see discussion below).

The issue of whether custody or support provisions in protection orders are entitled to full faith and credit is complex, and a detailed analysis is beyond the scope of this Commentary. The tribal subcommittee has attempted to address some of the issues tribal courts could face when presented with a foreign protection order that contains provisions granting custody of the parties' minor children to the petitioner, temporary custody provisions, and/or visitation provisions which could result in conflicting support or child custody orders.

The issue of whether such provisions are entitled to enforcement may turn on several laws, including, but likely not limited to, the VAWA, the PKPA, 28 U.S.C. § 1738A, the Indian Child Welfare Act, 25 U.S.C. § 1901-63, the Uniform Child Custody Jurisdiction Act ("UCCJA"), 9 V.L.A. 261 (1999), and its updated version, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), 9 V.L.A. 649 (1999), and if the foreign protection order was issued by a tribal court, the issuing tribal court's codes, tribal constitution and other written law.

Each state has adopted its own version of either the UCCJA or the UCCJEA, but tribal governments likely have not adopted such a "uniform" law. Only the UCCJEA makes reference to tribal court proceedings (see UCCJEA, 9 V.L.A. 261, § 104), meaning those states that have enacted a provision modeled after section 104 would be required to treat tribes as if they were states, and tribal court custody proceedings as if they were sister state court proceedings. Michigan adopted the UCCJEA, including section

While facially the PKPA does not appear to be applicable to tribal-state jurisdictional conflicts because "state" is defined as, "[a] State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States," 28 U.S.C. § 1738A(b)(8), there is a conflict of authority on its applicability. Compare Brown v. Babbitt Ford, Inc., 571 P.2d 689 (Ariz. Ct. App. 1977) (tribes are not bound by the full faith and credit provision of § 1738 because Indians are not "territories or possessions" of the United States), and In re Guardianship of Chewiwi, 1 Navajo Rptr. 120 (1970) (same), with Larch v. E. Band of Cherokee Indians, 872 F.2d 66 (4th Cir. 1989) (tribe is a state under PKPA). The following additional authorities discuss custody jurisdiction rules and enforcement procedures, and may provide further guidance:

In re Marriage of Skillen, 956 P.2d 1 (Mont. 1998);

Barbara Ann Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. REV. 1051 (1989);


Patricia M. Hoff, The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act, 32 FAM. L.Q. 267 (1998);

David M. Ujke, Tribal Court Jurisdiction in Domestic Relations Matters Involving Indian Children: Not Just a Matter of Comity, 66-AUG Wis. LAW. 10 (1993);

These sources do not address the specific issue concerning the applicability of the full faith and credit provision of the VAWA to protection orders containing custody provisions. They do provide a helpful starting point to understanding the issues of conflicting decrees and the existing body of law upon which the VAWA provision must be understood. This information will be useful to tribes as they consider and decide how
they will treat foreign protection orders containing custody provisions within their code.

SECTION III. JUDICIAL ENFORCEMENT OF FOREIGN PROTECTION ORDERS

Subsection III(A), Judicial Enforcement of Foreign Protection Orders

This section contains the VAWA requirement that a tribe enforce all foreign protection orders in the same manner that it enforces its own protection orders. This is one place where the code is designed to intersect with existing tribal law concerning the enforcement of protection orders. A tribe considering adopting this code should consult with tribal attorneys and judges to determine how the tribal court is enforcing its own protection orders. Wherever those procedures are found, be it a tribal ordinance, code, or court rule, is where the tribal court must look when enforcing foreign protection orders. The code is designed to supplement, rather than supplant, existing tribal law and procedures.

Subsection III(C), Judicial Proceedings to Enforce Foreign Protection Orders

A tribe adopting this code may want to omit subsection III(C) if existing tribal law already contains a similar set of procedures. The committee was concerned with providing a method for a petitioner to bring an enforcement action personally, rather than depending on tribal prosecutors, particularly if the procedure is civil rather than criminal.

Subsection III(D), Affirmative Defenses to Judicial Enforcement of Foreign Protection Orders

The code provides that the tribal court will "enforce" the order. Penalties for violating a foreign protection order are discussed in section VI. What is missing is a detailed discussion of the methods of enforcement. This is left to existing tribal law, which likely includes some type of hearing with both parties present, an ex parte hearing leading to a bench warrant, etc. A tribe considering this model code should also note that 18 U.S.C. § 2265(e) explicitly provides that "[f]or purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe." (emphasis
added). This provision is discussed in more detail in the Section VI Commentary addressing penalties.

Subsection III(D) contemplates that judges, not responding law enforcement officers, will address questions about the issuing court’s jurisdiction, reasonableness of notice and opportunity to be heard, and whether child custody/support provisions are entitled to enforcement. Such issues should be raised as affirmative defenses, and proof of these matters would not be part of the movant’s case-in-chief.

SECTION IV. ROLE OF LAW ENFORCEMENT

Subsection IV(A), Tribal Officer’s Role in Enforcing Foreign Protection Orders

All subsections within this section should be carefully considered with input from the law enforcement community, as issues will likely arise in this area. In particular, subsection IV(A) is another place where the model code intersects with existing tribal law regarding enforcement of the tribe’s own protection orders. In light of the contours of federal law on this subject, tribal law becomes of key importance. Particularly, what authority has the tribe given its law enforcement officers? Tribes must examine their own law and determine whether their police officers have the authority to investigate and detain all persons for any potential violation of tribal law, and tribes will also want to examine the contours of the arrest authority provided to their police officers. Specifically, do tribal police have the authority to perform warrantless arrests for violations of protection orders? How else might the police handle the situation? For example, tribal police could escort the person off the reservation, establish some other procedure for bringing the alleged violator before the tribal court, or turn the alleged violator over to state or federal authorities for prosecution. It is important to remember that police officers can act both in their capacity as enforcers of tribal criminal laws and in their capacity as enforcers of tribal civil regulations. Although the VAWA does not expand tribal civil or criminal authority, in VAWA 2000 Congress explicitly recognizes that tribal courts “have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.” 18 U.S.C. § 2265(e).

In addition to examining existing tribal law (as the VAWA requires tribal police to enforce foreign protection orders in the same manner as they enforce their own such orders), the following cases may be worthy of consideration:
Duro v. Reina, 495 U.S. 676, 697 (1990) (recognizing that tribal law enforcement authority existed to restrain those who disturb public order on the reservation, and if necessary, to eject them; where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities);

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), and United States v. Mazurie, 419 U.S. 544 (1975) (holding that intrinsic in a tribe's inherent sovereignty is their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands). Oliphant is a consolidation of two federal habeas corpus cases brought by non-Indians who were criminally charged in the Suquamish Indian Tribal Court. The Supreme Court held that the inherent sovereignty of Indian tribes does not extend to criminal jurisdiction to try and punish non-Indian offenders, and that such jurisdiction exists only where there is an affirmative authorization by Congress. Oliphant, 435 U.S. at 208. At the same time, the Supreme Court acknowledged the continued vitality of the Suquamish Indian Tribe's power, reserved in Article 9 of the Treaty of Point Elliott, to retain offenders and turn them over to government officials for prosecution. Id. at 206-08;

Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975) (holding that intrinsic in a tribe's inherent sovereignty is the power to prescribe and enforce internal civil and criminal laws, and to exclude trespassers from the reservation; Papago Indian tribal officer's stop, search and detention of a non-Indian believed to be violating state or federal law on public roads running through the reservation, and turning him over to the DEA after finding marijuana in his camper, was proper);

State v. Haskins, 887 P.2d 1189 (Mont. 1994) (holding that tribe had "authority to enact ordinances regulating the conduct of [its] members and to employ law enforcement officers to enforce such ordinances and to maintain the peace"; Confederated Salish and Kootenai tribal officers did not exceed their authority by investigating and gathering evidence of non-Indian's drug trafficking activities on the reservation and turning the evidence over to State of Montana authorities for use in their criminal prosecution);

State v. Pamperien, 967 P.2d 503 (Or. Ct. App. 1998) (upholding tribal officer's authority to stop, investigate, arrest and detain non-Indian for on-reservation violations of state speeding law; tribal officer's authority
derives from the tribe’s inherent power as sovereign to maintain public order on the reservation).

*State v. Schmuck,* 850 P.2d 1332 (Wash. 1993) (holding that tribe retained the power to prescribe and enforce internal criminal and civil laws, which necessarily included the power to stop a driver on the reservation for possible violation of tribal law and determine if the driver is an Indian subject to the tribe’s jurisdiction; upon learning the speeding offender was a non-Indian, the tribal officer had the inherent authority to detain and turn him over to the Washington State Patrol);

In addition, tribes should also consider their relationship with federal, state and local law enforcement agencies and the existence of any cross-deputization agreements. Federal domestic violence laws may be implicated, and tribal authorities should use their standard process in referring allegations of federal crimes to the appropriate federal agency. Under the VAWA, it is a federal crime

* to travel “in interstate or foreign commerce or enter[] or leave[] Indian country with the intent to kill, injure, harass, or intimidate a spouse or intimate partner and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner,” 18 U.S.C. § 2261(a)(1);

* to cause “a spouse or intimate partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against such spouse or intimate partner,” 18 U.S.C. § 2261(a)(2);

* to travel “in interstate or foreign commerce or to enter or leave Indian country, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and then engages in such conduct,” 18 U.S.C. § 2262(a)(1);

* to cause “another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel, the
perpetrator engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued," 18 U.S.C. § 2262(a)(2);

* to travel "in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enter[ ] or leave[ ] Indian country with the intent to kill, injure, harass or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family (defined in 18 U.S.C. § 115) of that person, or the spouse or intimate partner of that person," 18 U.S.C. § 2261A;

* "with the intent (A) to kill or injure a person in another State or tribal jurisdiction or within the special maritime or territorial jurisdiction of the United States; or (B) to place a person in another State or tribal jurisdiction or within the special maritime or territorial jurisdiction of the United States in reasonable fear of death of, or serious bodily injury to (i) that person; (ii) a member of the immediate family (as defined in section 115) of that person; or (iii) a spouse or intimate partner of that person, use the mail or any facility of interstate or foreign commerce to engage in a course of conduct [defined at 18 U.S.C. § 2266(2)] that places that person in reasonable fear of the death of, or serious bodily injury to, any person described in (i) through (iii)," 18 U.S.C. § 2261A(2).

The VAWA 2000 became effective on October 28, 2000. The statutory changes include creation of a "cyberstalking" provision, 18 U.S.C. § 2261A(2) (described above). Although the statute does not specifically identify stalking by means of a computer as a prohibited activity, the legislative history makes it clear the phrase "mail or any facility of interstate or foreign commerce" was meant to encompass stalking by telephone or by computer attached to the Internet. See 146 CONG. REC. S10193 (Oct. 11, 2000); H.R. REP. NO. 106-939, at 105 (2000); 146 CONG. REC. S10219 (Oct. 11, 2000) (statement of Sen. Abraham). The cyberstalking statute reaches criminal conduct against the person stalked, a member of that person's immediate family, or an intimate partner of the stalked person. 18 U.S.C. § 2261A(2)(B).

Other notable changes under the VAWA 2000 include:
the jurisdictional nexus in the interstate domestic violence, interstate stalking and interstate violation of a protection order statutes now focuses on traveling in interstate or foreign commerce (or entering or leaving Indian country) whereas prior to VAWA 2000 the focus was on crossing state lines. 18 U.S.C. §§ 2261, 2261A, 2262. This language is intended to clarify that the statutes reach persons crossing United States borders as well as crossing state lines. 146 CONG. REC. S10193 (Oct. 11, 2000); H.R. REP. NO. 106-939, at 105 (2000);

removal of the requirement from 18 U.S.C. § 2261 that the defendant complete a crime of violence and cause bodily injury. The government must prove that the defendant either committed or attempted to commit a crime of violence. The statute also removes the bodily injury requirement from 18 U.S.C. § 2262(a)(2). These changes make “the nature of the ‘harm’ required for domestic violence, stalking, and interstate travel offenses consistent by removing the requirement that the victim suffer actual physical harm from those offenses that previously had required such injury.” 146 CONG. REC. S10193 (Oct. 11, 1993); H.R. REP. NO. 106-939, at 105 (2000);

broadening the reach of 18 U.S.C. § 2262, which formerly reached conduct that violated portions of protection orders that involve “protection against credible threats of violence, repeated harassment, or bodily injury.” The amended § 2262 reaches conduct that violates the portion of a protection order “that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person”;

removal from the interstate violation of a protection order statute, 18 U.S.C. § 2262(a)(2), the requirement that the victim be an intimate partner of the defendant. This corrected the inconsistency in the statute that required an intimate partner relationship under § 2262(a)(2), but did not require such a relationship under § 2262(a)(1);

adding “or to facilitate such conduct or travel” to 18 U.S.C. §§ 2261(a)(2) and 2262(a)(2), to clarify that “federal jurisdiction to ensure reach to battery or violation of specified portions of protection order before travel to facilitate the interstate movement of the victim.” 146 CONG. REC. S10193 (Oct. 11, 1993); H.R. REP. NO. 106-939, at 105 (2000).
In addition to the VAWA statutes, the Gun Control Act makes it a federal crime in certain situations for domestic abusers to possess firearms or ammunition. It is a federal crime under the Gun Control Act

* for persons subject to a “qualifying protection order” to possess a firearm or ammunition, to ship or transport firearms or ammunition in interstate or foreign commerce, to receive any firearm or ammunition which has been so shipped or transported, or to have seized firearms returned, 18 U.S.C. § 922(g)(8);

* for persons convicted of a “qualifying misdemeanor crime of domestic violence” to possess, ship, or transport a firearm or ammunition. 18 U.S.C. § 922(g)(9).

Subsection IV(B), Officer’s Reliance on Information

The model code explicitly states that the officer may rely on a copy of the order provided from any source and that the officer may also rely on the statement of the protected person that the order remains in effect. The model code does not require that officers determine whether the respondent was given notice of the protection order. Although notice is required for a valid protection order, the code makes lack of notice an affirmative defense to be raised before the tribal court, and does not require officers on the scene to sort out issues of notice.

Some tribes have modeled their personal protection order law after Michigan’s law, which allows for the issuance of ex parte protection orders in some situations. See M.C.L.A. § 600.2950; M.C.L.A. § 600.2950a; MCR 3.705(A). Under these laws, if the individual restrained or enjoined has not been served, police officers responding to a dispute alleging a protection order violation must serve the respondent with a true copy of the order or provide verbal notice. M.C.L.A. § 600.2950(22), M.C.L.A. § 600.2950a(19). However, a tribal officer would not need to provide written or verbal notice if the petitioner or respondent states that service has been made, and therefore, consideration should be given to adding this sentence to subsection IV(B): “A law enforcement officer may also rely on the statement of the petitioner or respondent that respondent has received notice of the order.”

While verification of the existence or validity of a protection order can be accomplished in some instances by accessing Michigan’s Law Enforcement Information Network (“LEIN”) and/or the National Criminal Information Center (“NCIC”), this form of verification is not required for
enforcement of a valid protection order. See Model Code, Section IV(A)-(E). The LEIN does allow for entry of protection orders, and some Michigan tribes may be entering their protection order information into the LEIN. The NCIC now has a Protection Order File into which thirty-seven states enter their protection orders. As of the drafting of this code and commentary, Michigan was not one of the states entering protection order information in the NCIC.

Subsection IV(F), Mutual Orders

This subsection requires that responding law enforcement officers address whether or not a mutual order is entitled to enforcement against the petitioner because it satisfies the requirements in subsection IV(F), that is, (1) the respondent filed a cross or counter petition, complaint or other written pleading seeking a protection order against the petitioner, and (2) the issuing court made specific findings that the respondent was entitled to a protection order. See also Model Code, Subsection II(F) and Commentary. This means that if an officer in the field is presented with a situation involving a mutual order, the officer would enforce it against the respondent consistent with subsections IV(A)-(E). However, it would not be enforceable against the petitioner unless the officer saw evidence that the respondent filed a cross-pleading and the court made specific findings that each party was entitled to protection. While this does place a burden on law enforcement officers, the subcommittee believes this procedure is required under the VAWA. To help ease this burden, law enforcement officers must be trained on how to recognize a mutual order and how to determine if it satisfies the VAWA requirements.

SECTION V. IMMUNITY

There was some concern about this immunity language. The law enforcement community (both tribal and state) have concerns about being sued for enforcing (or not enforcing) these orders, and favored an explicit provision providing immunity for good faith actions. However, some people were concerned that an express statement of good faith immunity in this portion of a tribal code could imply that immunity did not exist for other governmental actors unless explicitly provided. The model code attempts to account for both perspectives.

Another concern was whether or not to provide immunity for non-enforcement of a protection order. The subcommittee considered this concern, and while it does not want to encourage non-enforcement of
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protection orders, decided there could be rare circumstances where a good faith decision not to enforce an unverifiable order might occur. Therefore, the immunity language was drafted as it appears in the model code, keeping in mind the code also contains procedures for law enforcement officers to follow when taking all reasonable steps to verify a foreign protection order. As with all provisions of this model code, each tribe must decide whether the suggested language meets the needs of the tribe. Review of the following may also provide useful information when considering the immunity issues that may be implicated:

* Inherent tribal sovereign immunity as applied to suits against tribes and tribal officials in their official capacities. See Dry v. United States, 235 F.3d 1249, 1253 (10th Cir. 2000), and authorities cited therein.


SECTION VI. PENALTIES

Once again, this is a place where the model code intersects with existing tribal law. The VAWA provides that a valid foreign protection order shall be "enforced as if it were the order of the enforcing . . . tribe." 18 U.S.C. § 2265(a). This language contains several ambiguities, particularly in the case of tribes. The federal statute clearly intends that a tribe treat a foreign protection order as if it were issued by the tribal court. This means, at a minimum, that whatever penalties the tribal court imposes for a violation of its own protection order shall also apply to violations of a foreign protection order. Otherwise, the tribe will be enforcing foreign orders differently than its own orders, which is inconsistent with the VAWA. Given the VAWA's requirements and the ambiguities discussed below, a tribe may want to reexamine its current penalties for protection order violations.

It is important to recall that under current federal law, tribes have no independent criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribal courts cannot exercise criminal jurisdiction over non-Indians except in a manner acceptable to Congress). Tribes also possess limited civil jurisdiction over non-Indians, although as
with criminal jurisdiction, Congress can authorize tribes to exercise jurisdiction over non-Indians. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (limiting Indian tribes' civil adjudicatory jurisdiction over non-Indians); *Montana v. United States*, 450 U.S. 544 (1981) (limiting Indian tribes' civil regulatory jurisdiction over non-Indians). One question initially surrounding the VAWA's full faith and credit provision was whether Congress intended to authorize tribes to exercise jurisdiction over all persons who violate protection orders, regardless of their identity. The language Congress used in the 1994 VAWA was ambiguous; it could be interpreted to authorize tribes full jurisdiction in this area, and it could also be interpreted not to expand tribal jurisdiction further than that allowed by the Supreme Court in *Hicks, Oliphant, Montana* and *Strate*.

The 2000 amendments to VAWA provide some clarification. Those amendments declare that "tribal court[s] shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe." 18 U.S.C. § 2265(e). This language is somewhat unclear and apparently circular. It offers no guarantee that courts will interpret the amended statute to expand either the civil or criminal jurisdiction of tribes.

Basically, this means that before a tribe can enforce a foreign protection order, it must first determine whether it has jurisdiction over the person who has allegedly violated the order. In the context of imposing penalties, the tribal court must determine whether the violator is Indian or non-Indian, which will determine whether the court can impose criminal penalties. If the alleged violator is an Indian, then the tribal court can likely apply the full panoply of possible penalties, both civil and criminal, that it has enacted for violators of its own protection orders. If the alleged violator is non-Indian, then the tribal court must proceed to use the analysis discussed above to determine whether it has civil jurisdiction over the alleged violator. See Commentary, Subsections I(A) and I(B). For these reasons, a tribe that has not already done so may want to consider providing both civil and criminal penalties for a violation of a protection order.

It is up to the tribe whether it wants to impose criminal penalties for violation of a protection order. The tribe may already do so. If it does not already impose those penalties, it should decide whether criminal penalties are consistent with tribal tradition and culture. Despite the limitations on its jurisdiction with respect to non-Indians, a tribe possesses criminal jurisdiction over many potential offenders. If a tribe decides to allow for criminal penalties, it must keep two things in mind. First, any criminal penalty cannot exceed the limitations in the Indian Civil Rights Act, 25
U.S.C. § 1302(7), which limit a tribe's ability to impose criminal penalties to a maximum of $5000 or one year in jail. Second, those criminal penalties probably cannot be applied to non-Indians. Tribes that have criminal penalties should also have civil penalties, as the civil penalties create an enforcement mechanism against any person over whom the court has jurisdiction. The subcommittee was not able to locate information about criminal penalties imposed by tribes. States, however, impose a wide variety of criminal penalties, making a violation of a protection order punishable by penalties ranging from criminal contempt to misdemeanors or felonies. Under current Michigan law, criminal contempt penalties for violation of a personal protection order are imprisonment for not more than ninety-three days, and the possibility of a fine of not more than $500. M.C.L.A. §§ 600.2950(23), 600.2950a(20).

For any violator, Indian or non-Indian, Congress has explicitly stated that once the tribe determines that it has jurisdiction, it may exercise the full range of civil penalties, including civil contempt powers, exclusion from tribal lands, and other civil penalties authorized by the tribe. 18 U.S.C. § 2265(e). Civil contempt powers generally include both fines and imprisonment, although imprisonment is less common for civil contempt. See M.C.L.A. § 600.1715 (Michigan’s general penalty provisions for civil contempt, which subject persons found guilty of civil contempt for violation of a personal protection order to a fine of not more than $250, or imprisonment, or both, at the discretion of the court). A tribe that chooses to impose imprisonment upon a non-Indian for civil contempt may run the risk of having that action overturned by the federal courts, which have authority to review the tribal court’s action through the habeas corpus provisions of the Indian Civil Rights Act, 25 U.S.C. § 1303. The Supreme Court has expressed great reservations at the prospect of tribes putting non-Indians in jail. See Duro v. Reina, 495 U.S. 676, 697 (1990) and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). On the other hand, incarceration is an accepted penalty for civil contempt in several circumstances, and the 2000 amendments to the VAWA explicitly recognize that tribal courts can impose penalties for civil contempt. That statement, coupled with existing law on tribal civil jurisdiction, should be sufficient to support a tribal court’s decision to impose jail time. “Should,” however, does not always carry the day in federal Indian law decisions. In any event, the tribe may want to provide civil penalties other than imprisonment, so that it will have a penalty to impose upon a non-Indian who violates a foreign protection order.

It is still not clear, however, that a tribe will always have the civil jurisdiction to enforce a foreign protection order against a non-Indian.
Before a tribe can impose civil penalties on a non-Indian, it must first
determine whether it has jurisdiction over the violator under the Montana
exceptions (the consensual relations and direct effects tests). At this point,
the "purpose" language discussed above in Section I will become particu-
larly important, as will the nature of the land (trust or fee) where the
violation occurred. See Commentary, Subsections I(A) and I(B). If the tribe
determines it does not have jurisdiction to enforce the protection order
itself, it may have the ability to arrest/detain the alleged violator and turn
him or her over to the appropriate state or federal authorities. See
Commentary, Subsection IV(A).

SECTION VII. OPTIONAL REGISTRATION

The model code does not contain a procedure by which a person
holding a foreign protection order can register it with the tribe. The
omission was a conscious decision. For those tribes that wish to offer such
an option, proposed language follows along with a brief discussion of the
advantages and disadvantages of a registration procedure.

On the advantages front, a registration procedure creates a method for
both law enforcement and persons holding protection orders to avoid
uncertainty about the existence of a protection order. A registration
procedure would create a recognizable paper trail for police officers and
courts.

On the disadvantages front, a registration process presents one more
hurdle for a battered person to overcome in seeking protection to which he
or she is otherwise entitled. Police and persons protected by foreign
protection orders could become overly reliant on the registration proce-
dures. In particular, police could be reluctant to enforce a valid foreign
protection order simply because it is not accompanied by the registration
form. This reluctance would undercut the protections put in place by the
VAWA, and indeed would be illegal under the VAWA.

If a tribe chooses to offer the option of registration, the tribe should be
aware that as part of the VAWA 2000, Congress explicitly mandated that
if a jurisdiction decides to create an optional registration procedure, it
cannot notify the respondent that a protection order has been filed in the
enforcing jurisdiction unless the petitioner explicitly requests it. 18 U.S.C.
§ 2265(d)(1). Tribes that are utilizing the LEIN to enter their protection
orders should proceed with particular caution before creating a registration
procedure for foreign protection orders because entry into the LEIN under
Michigan law in place prior to the 2001 legislative amendments resulted in
the issuance of the "gun letter," see M.C.L.A. § 28.422b, which effectively
provides notice to the respondent. Section 28.422b has been amended
effective April 1, 2002 to alter the timing of the firearms restriction notice required by this statute. The notice should not be sent by the Department of State Police until the Department receives notice that the respondent has been served with or received notice of the protection order. See H.B. 5278, PA 1999 (Mich. 2001). The tribal jurisdiction subcommittee recommends that a tribe simply prohibit notification, and that a tribe avoid entering foreign protection orders into LEIN as long as doing so results in issuance of the "gun letter" to a respondent before that respondent has notice of the protection order.

Finally, the proposed Section VII omits a procedure for a petitioner to affirm that the protection order is still valid. The tribal jurisdiction subcommittee considered requiring an affidavit or some other form, but did not come to a consensus on handling this issue. If the tribe chooses to create a form for the petitioner to use in registering a foreign protection order, the tribe may want to consider including a section in which the petitioner affirms that to the best of the petitioner's knowledge, the protection order is still valid.

SECTION VII. OPTIONAL FILING AND REGISTRATION

A. As indicated in Subsection III(B), above, a person protected by a foreign protection order does not need to register it with our Tribal court. However, a petitioner may do so. To register a foreign protection order, a petitioner gives a certified copy, a true copy, or a copy with some other indication of authenticity to a clerk of our Tribal court. There is no fee for this service.

B. Notice to the respondent that a foreign protection order was filed with the Tribal court shall not be provided by the Tribal court or any other Tribal employee.

C. When a foreign protection order is filed with the Tribal court, a judge of the court shall promptly review the order to determine whether it, (1) bears the name of an issuing court, the persons to whom it applies, terms and conditions against the respondent, and a judge’s signature or an equivalent sign; and (2) does not bear an expiration date that has passed or any other obvious indication that it is not authentic. If so, the judge shall enter the order of our Tribal court recognizing the foreign protection order.

D. A clerk of our Tribal court shall give the petitioner a copy of the recognition order.

E. A clerk of our Tribal court shall give our Tribal law enforcement officers a copy of the recognition order attached to a copy of the foreign protection order.