

ESSAY

TRIBAL EFFORTS TO COMPLY WITH VAWA'S FULL FAITH AND CREDIT REQUIREMENTS: A RESPONSE TO SANDRA SCHMIEDER

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In 1994, Congress enacted a sweeping change in the law of protection orders when it passed the full faith and credit provisions of the Violence Against Women Act (VAWA).¹ The key portion of the statute bluntly 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.²

With this statute, Congress intended to make one protection order valid throughout the United States. The “one order” system would allow those persons holding a protection order to avoid the hurdles and hassles of obtaining multiple protection orders, one for each jurisdiction in which the person travels, lives, or works.

Although VAWA's mandate is broad, Congress left the details of how to accomplish that mandate up to each state and each tribe. As a result, each jurisdiction can use different procedures, so long as the congressional objective is achieved. Law

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1. Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994).

2. 18 U.S.C. § 2265(a) (2000). Subsection (b) requires that the issuing court possess jurisdiction and provide the respondent with due process. *Id.* § 2265(b).

professors, attorneys, judges, victim advocates, and police officers are all struggling to understand the federal requirements. As part of this process, the changes prompted by VAWA's full faith and credit procedures have spawned a wealth of law review articles and conferences addressing this issue.

Sandra Schmieder is the author of one such piece, a comment entitled *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*.³ In that comment, Schmieder argues that VAWA's full faith and credit provisions are ineffective in Indian country, largely because tribal governments are refusing to enact the required implementing legislation.⁴ According to Schmieder, "many tribes ignore the statute because they view it as an infringement on tribal sovereignty."⁵ Schmieder then proceeds to consider several methods to correct this problem and ultimately proposes that "Congress should amend [VAWA's full faith and credit provisions] to expressly create both a federal right and a private cause of action that allows individuals to sue tribal officials for prospective injunctive relief if a tribe fails to enact full faith and credit legislation."⁶

We have worked in this area of law for several years, and our experiences are not consistent with the premises of Schmieder's comment. Accordingly, we write to explain our experiences and explore the areas in which we disagree with Schmieder's analysis. In Part I of this essay we explore our differences of opinion as to the relevant law. Part II turns its attention to disagreements on factual issues, after which Part III examines Schmieder's proposed solution. After exploring the areas in which we disagree with Schmieder, we turn our attention in Part IV to examining the sources of our disagreement. Despite our differences with Schmieder, we do agree with her that problems exist with the cross-jurisdictional enforcement of protection orders in Indian country. We explore those problems in Part V.

I. THE LEGAL ISSUES

At its heart, Schmieder's argument rests on the premise that VAWA's full faith and credit requirements are not self-executing.⁷ Rather, she contends that each state and each tribe must first enact implementing legislation before the full faith and credit provisions become effective. Schmieder does not support this assertion with any analysis or any citation. This lack of analysis is troubling, given that the conclusion seems counterintuitive.

VAWA's full faith and credit requirements are a clear federal command—qualifying protection orders "shall be accorded full faith and credit."⁸ The statute does

3. Sandra J. Schmieder, Student Author, *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*, 74 U. Colo. L. Rev. 765 (2003).

4. *Id.* at 767.

5. *Id.* (citing H.R. Subcomm. on Crime & J. of the Comm. on Jud., *Crime Prevention and Criminal Justice Reform Act: Hearing on H.R. 3315*, 103d Cong. (1994) [hereinafter *Hearing on H.R. 3315*] (written testimony of Helen Elaine Avalos, Asst. Atty. Gen., Navajo Dept. of J., on behalf of Peterson Zah, Pres. of the Navajo Nation)) (footnote omitted).

6. *Id.* at 792.

7. *Id.* at 766.

8. 18 U.S.C. § 2265(a).

not instruct tribes and states to enact legislation to provide full faith and credit, nor is VAWA structured as an option tied to federal money (for example, “any jurisdiction wishing to receive VAWA grants must provide full faith and credit to qualifying protection orders”). Under the laws of the United States, federal law has supremacy over both state and tribal law. When Congress validly commands, tribes and states must comply, even if the federal law contradicts existing tribal or state law.⁹

It is true that Congress did not include in VAWA a specific set of procedures for achieving its objective. The statute does, however, declare that a qualifying protection order “shall be . . . enforced as if it were the order of the enforcing State or tribe.”¹⁰ Technically, then, both states and tribes can simply use their existing procedures, extending them to cover foreign protection orders as well as their own.

Since nothing in the statute says anything about implementing legislation, and under U.S. law the federal command takes precedence, it is not clear why Schmieder contends that implementing legislation is required. It is true that almost all states have chosen to enact some sort of implementing legislation. This choice is, perhaps, the source of the confusion. But just because states have opted to use legislation to spell out their own procedures does not mean that implementing legislation is a federal requirement. It is simply one method to comply with VAWA’s requirements.

Schmieder’s narrow focus on implementing legislation also causes her to overlook the fact that the relevant issue is whether state and tribal law actually provides enforcement for foreign protection orders—not the rigid form of that law. While a statute is one way to implement VAWA’s full faith and credit requirements, it is also possible to achieve that same result through court decisions, court rules, police procedures, or other types of regulations. Tribes are not required to use the same legal form as states. Rather, they are required only to achieve the federal mandate—give full faith and credit to qualifying protection orders.

In addition to her assertion that VAWA’s full faith and credit provisions are not self-executing, Schmieder makes two other related arguments in her introduction. The first is that no uniform full faith and credit code exists for states.¹¹ Although she does not fully articulate her point, Schmieder seems to imply that despite this deficiency, states have managed to enact the required legislation. She does, however, note that approximately half the states have not enacted implementing legislation that fully complies with VAWA by explicitly requiring enforcement of tribal protection orders.¹²

While Schmieder is correct that most states have enacted implementing legislation, she is incorrect about some of the details. In particular, in 2000, the National Conference

9. The validity of the application of the Supremacy Clause to tribal governments is itself the subject of much debate. See e.g. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113 (2002); Robert Laurence, *Indian-Law Scholarship and Tribal Survival: A Short Essay, Prompted by a Long Footnote*, 27 *Am. Indian L. Rev.* 503 (2002-2003). For purposes of this essay, we assume that VAWA does validly apply to tribes.

10. 18 U.S.C. § 2265(a).

11. Schmieder, *supra* n. 3, at 767.

12. *Id.* It is interesting that Schmieder fails to carry this statement through to its logical conclusion—that the failure of these states to explicitly call for enforcement of tribal orders puts women at risk in exactly the same way as the alleged failures on the part of tribal governments. Yet she does not call for Congress to allow suits against state officials.

of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act¹³ for states to use as a model. Even before the NCCUSL put forward its model code, however, the National Center on Full Faith and Credit¹⁴ had promulgated a model state code.¹⁵ And if states did not want to use one of the model codes, the National Center on Full Faith and Credit provided assistance and advice as to methods of complying with the federal requirements.

Schmieder's second related argument is that "Congress extended the civil jurisdiction of tribal courts to allow them to fully enforce protection orders issued in other jurisdictions."¹⁶ This statement conceals a wealth of complexity and is true, false, potentially false, and certainly misleading, all at the same time. To comprehend the reality of the tribal jurisdiction situation, one must first understand that tribal governments and tribal courts originally possessed civil jurisdiction over all persons and all actions within their territory as a consequence of the tribe's own sovereignty.¹⁷ Although the U.S. Supreme Court has placed limitations on tribal civil jurisdiction in some areas with respect to non-members of the tribe, the remaining jurisdiction flows from the tribe's existence as a sovereign government, not from any action by Congress.

Schmieder footnotes her assertion about Congress's grant of jurisdiction to Title 18 United States Code Section 2265(e), a subsection that was part of the VAWA 2000¹⁸ amendments. In that subsection, Congress declared 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."¹⁹

This amendment became necessary as a result of an ambiguity in VAWA's original full faith and credit requirements. In the original statute, Congress appeared to assume that tribes and states were governed by the same jurisdictional rules, which is not necessarily true.²⁰ The U.S. Supreme Court has developed a special set of jurisdictional rules for tribes, rules which result in tribes lacking jurisdiction in situations where states possess jurisdiction. The Supreme Court has consistently recognized, however, that Congress can alter the basic rules and expand tribal jurisdiction. One pervasive question in the wake of the original VAWA was whether Congress simply forgot about the different rules, or whether Congress intended to change the default jurisdiction rules for

13. Unif. Interstate Enforcement of Domestic-Violence Protection Orders Act (Natl. Conf. of Commrs. of Unif. St. Laws 2000) (available at <<http://www.law.upenn.edu/bll/ulc/uiedvoa/dvsty-2k.pdf>>).

14. The National Center on Full Faith and Credit (NCF&C), located in Washington, D.C., is a project of the Pennsylvania Coalition Against Domestic Violence. The Center is funded by the U.S. Department of Justice, Office on Violence Against Women.

15. The NCF&C promulgated its model code in 1999, and the current version can be found at <<http://www.vaw.umn.edu/documents/ffc/modelffc/modelffc.html>>.

16. Schmieder, *supra* n. 3, at 766.

17. For more on tribal civil jurisdiction, see *infra* Part V and Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 Ky. L.J. 123, 149-65 (2001-2002).

18. *Violence Against Women Act of 2000*, Pub. L. No. 106-386, Div. B, 114 Stat. 1491 (2000).

19. 18 U.S.C. § 2265(e).

20. Due to the constraints of the essay format, we have not fully explored all the nuances of this issue. For a complete exploration, see Tatum, *supra* note 17, at 168-72, 193-97.

tribes, giving tribes the same jurisdiction as states with respect to enforcing protection orders. Giving tribes jurisdiction co-extensive with states would require increasing both tribal civil and tribal criminal jurisdiction.

In VAWA 2000, Congress attempted to resolve this controversy by enacting what is now Title 18 United States Code Section 2265(e). It is clear from this amendment that Congress meant no change for tribal criminal jurisdiction. It is not clear, however, what effect the amendment has on tribal civil jurisdiction, as the new subsection is a bit circular in declaring that “tribal court[s] shall have full civil jurisdiction . . . in matters arising within the authority of the tribe.”²¹ The problem is in knowing whether this means the authority of the tribe as established in the Supreme Court’s default rules of jurisdiction, or the authority of the tribe in terms of its geographic borders. As Tatum has argued elsewhere, Schmieder’s assertion that this subsection is intended to extend tribal civil jurisdiction should be the correct conclusion.²² It is not, however, as clear-cut as Schmieder’s declaration would suggest.

Despite all of these ambiguities and difficulties, tribal governments have been active in complying with the federal requirements. As we discuss in the next Part, tribes are enacting codes, changing their law enforcement procedures, and training their judges to follow VAWA’s mandate of full faith and credit.

II. THE FACTUAL ISSUES

Schmieder repeatedly claims that tribal governments have refused to honor foreign orders, but she provides little to no evidence to support such assertions. The comment includes at least five separate assertions that tribal governments refuse to abide by the provisions in Title 18 United States Code Section 2265.²³ However, the only footnote which directly supports these assertions is footnote 12, a reference to congressional testimony from a former tribal leader representing a single tribe—testimony which predated passage of VAWA.²⁴ One tribal leader’s testimony arguing against passage of the statute does not mean that all tribes agree or even that the tribe in question would necessarily refuse to follow the federal law once it was enacted.

Schmieder’s attempts to categorize tribal governments as hostile to VAWA and the full faith and credit provisions are also shortsighted when placed in historical context, given the longstanding history of tribal legal systems in promoting the health and safety of all citizens. Tribal nations have a strong history of protecting women from domestic

21. See 18 U.S.C. § 2265(e).

22. See Tatum, *supra* n. 17, at 168-72, 193-97.

23. Examples of Schmieder’s assertions include: “Much of VAWA’s ineffectiveness in Indian country results from non-compliance by tribal governments,” Schmieder, *supra* n. 3, at 767, “[M]any tribes ignore the statute because they view it as an infringement on tribal sovereignty,” *id.*, “[T]ribes and proponents of tribal sovereignty maintain that . . . VAWA’s requirement . . . infringes on tribal self-governance,” *id.* at 768, “shortage in tribal initiative to enact legislation consistent with . . . VAWA’s full faith and credit requirement,” *id.* at 792, “[Congress] must now recognize that the protections of . . . VAWA’s full faith and credit provision will not be effective in Indian country until a statutory enforcement mechanism compels the tribes to comply.” *Id.* at 792.

24. See Schmieder, *supra* n. 3, at 767 n. 12 (citing *Hearing on H.R. 3315*, *supra* n. 5 (written testimony of Helen Elaine Avalos, Asst. Atty. Gen., Navajo Dept. of J., on behalf of Peterson Zah, Pres. of the Navajo Nation)).

violence and other criminal acts.²⁵ This historical background has been contrasted with the Anglo-American systems of jurisprudence, which have an arguably weaker history when it comes to crimes of domestic violence.²⁶

Indeed, numerous tribal nations and tribal organizations have exhibited strong proactive stances on the issues concerning domestic violence and protection orders. While there has been no nationwide survey to assess the opinions of all tribal leaders on this matter, there is ample evidence that many tribal governments have expressed support for laws that provide safety to women. Tribal governments have developed national leadership on the topic of full faith and credit and have dedicated numerous resources and attention to this matter. At least two major conferences have been sponsored by tribal organizations as part of an effort to ensure that protection orders are enforced across state and tribal lines. In May 2001, the Sitka Tribe of Alaska sponsored a conference entitled "Alaska's Full Faith and Credit Conference: Working Together for the Safety of Victims," in Anchorage, Alaska. Listed goals of the conference included increasing understanding of the requirements of the full faith and credit provisions of the Violence Against Women Act, identifying and reducing barriers to enforcement, sharing technological and other innovative approaches to enforcement, coordinating relevant tribal and state governments and community organizations, providing opportunities for establishing contacts across all regions of the state, encouraging continued information sharing, and supporting the development of cooperative plans among neighboring tribal and state jurisdictions.²⁷

Almost two years later, in March 2003, the American Indian Law Center, an Indian-controlled non-profit organization, held an event entitled "Full Faith and Credit, The Key to Protection: A National Conference on VAWA Applications in Indian Country" in Albuquerque, New Mexico.²⁸ At least twenty-three tribal governments were represented at this national conference, including the Governor of Zuni Pueblo, a member of the Muscogee (Creek)²⁹ Tribal Council, and other elected tribal leaders. Tribal governments who were attempting to evade binding federal law would not likely put a great deal of effort into finding ways to comply with that law and educate their officials about it.

Schmieder's assertion that tribal governments are hostile to the notion of full faith and credit is also nullified by the fact that numerous tribal governments have passed full faith and credit enabling legislation. While there is no uniform clearinghouse or database for all tribal codes, and thus no way to confirm the precise number of tribal governments that have passed full faith and credit enabling legislation, a review of statutory law at the tribal level reveals several enabling statutes passed pursuant to Title 18 United States Code Section 2265. Three examples are listed below: the Oglala Sioux

25. See generally Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 St. John's L. Rev. 69 (1995).

26. See Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 Okla. City U. L. Rev. 433 (1998).

27. Conference materials on file with authors.

28. Conference materials on file with authors.

29. Although the "legal" name of the tribe is the Muscogee (Creek) Nation, the traditional name was Mvskoke, and many tribal members prefer the traditional spelling.

Tribe (located in South Dakota), the Nez Perce (located in Idaho), and the Muscogee (Creek) Nation (located in Oklahoma).

The Oglala Sioux Tribe has a strong history of providing effective services for survivors of domestic violence.³⁰ The recent updates to the Oglala Sioux Domestic Violence Code, passed in May 2003, include strong provisions on the enforcement of foreign protection orders:

Section 314. Enforcement of foreign orders for protection.

1. A copy of an order for protection issued by another tribal, state, county, or other court jurisdiction, shall be given full faith and credit by Oglala Sioux tribal law enforcement authorities as having the same force and effect as one issued by the Oglala Sioux Tribal Court.
2. Law enforcement officers shall attempt to verify the existence and/or validity of any foreign order for protection by any means available. In the event that the victim does not have a copy of the order, the officer cannot verify the order or the copy is not clear enough to determine its validity, the officer should arrest the subject on an applicable violation of the OST Code and shall assist the victim in obtaining verification of the order and/or explaining the procedure for obtaining an OST Order for Protection. The law enforcement officer shall also offer other assistance as provided in Section 204.
3. Valid foreign orders for protection shall be upheld as to the conditions of the foreign order whether or not those remedies or conditions are available through the OST Code.
4. Under this section, the court shall utilize the penalties and procedures provided in Chapter 2 for the enforcement of orders for protection.
5. In accordance with Section 206, any violations of a foreign order for protection shall be acted upon in the same manner as if the order for protection were issued by the Oglala Sioux Tribal Court and in accordance with the full faith and credit provisions of Title 18 USC 2265.[]
6. Law enforcement and criminal justice system personnel shall enter valid foreign orders for protection in the tribal registry.
7. Law enforcement and criminal justice system personnel shall encourage persons possessing foreign orders for protection to file the foreign order with the tribal registry and with the OST Court.
8. Facsimile copies which meet the requirements of Title 18, United States Code, Section 2265 shall be recognized as valid verification of foreign orders for protection for the purpose of enforcement under this section.³¹

The Oglala Sioux Tribal Code also requires that all law enforcement officers, including tribal and BIA criminal investigators, receive training on domestic violence law, including training on the full faith and credit statute.³²

30. Cangleska, Inc., the domestic violence program serving the Oglala Sioux Tribe, has received national recognition for its work, including the Innovations in American Government Award, sponsored by the Ford Foundation and Harvard University's Kennedy School of Government. See Will Woodward, *HUD Program for Homeless, CDC Honored: 8 Indian, State, Local Agencies Also Win Awards*, Wash. Post A27 (Oct. 15, 1999) (available in LEXIS, News & Bus. library, ALLNWS file).

31. Oglala Sioux Tribal Domestic Violence Code ch. 3, § 314 (2003).

32. *Id.* ch. 2, § 233.

The Nez Perce Tribal Code also explicitly addresses the enforcement of orders issued by a State or another Indian tribe, consistent with § 2265:

7-3-6 Full Faith and Credit Given to Domestic Protection Orders.

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

(b) A domestic 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.

(c) A domestic protection order issued by a State or Tribal Court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a domestic household member is not entitled to full faith and credit if:

(1) no cross or counter petition, complaint or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the Court did not make specific findings that each party was entitled to such an order.³³

Many tribal codes choose to specifically reference § 2265 in their domestic violence codes.³⁴ In 2001, the Muscogee (Creek) Nation passed its comprehensive set of full faith and credit laws, which are largely based on the model code for Michigan tribes developed by a subcommittee of the Michigan Working Group on Full Faith and Credit.³⁵ The Muscogee (Creek) Code includes specific references to § 2265, obviously signaling the tribe's intent to comply with federal law.³⁶ Other tribal codes may not be as explicit in addressing § 2265, but close reading reveals that foreign orders will be fully enforced in tribal court. The White Mountain Apache Tribal Code, for instance,

33. Nez Perce Tribal Code § 7-3-6 (2003).

34. See e.g. E. Band of Cherokees Tribal Code § 50B-14 (2003) ("Valid protective orders that are entered by the courts of a state or another Indian Tribe and are consistent with 18 U.S.C. 2265 shall be accorded full faith and credit by the Cherokee Court . . . and shall be enforced by the Cherokee Court and the Cherokee Police Department . . ."). The Native Village of Tetlin (population 117) has a similar short reference to the federal law: "In accordance with the full faith and credit provision of the Violence Against Women Act, 18 U.S.C. Section 2265 . . . [a]ny valid Protective order issued by the State of Alaska, another state, or another tribe shall be accorded full faith and credit by the Tetlin Tribal Court." Tetlin Tribal Code ch. 6, § 2 (2001).

35. Professor Tatum was one of the principal authors of this model code. A copy of the code can be found as an appendix to Tatum, *supra* note 17, at 198-227.

36. Muscogee (Creek) Nation Code Ann. tit. 6, §§ 3-415 to 3-418 (West 2003).

indicates that any person who violates *any* protection order, whether it was issued by the Tribe or not, shall be guilty of a crime.³⁷

In short, even a cursory review of existing tribal statutes and practices reveals that tribes are not, by and large, exhibiting resistance to the full faith and credit provisions in VAWA. Indeed, many tribal governments may view the federal legislation as further promoting tribal sovereignty, insofar as the states are required to honor and enforce tribal protection orders.³⁸

Tribal organizations have also provided ample evidence that tribal governments are interested in abiding by any and all laws and policies that provide safety to victims. These organizations include the National American Indian Court Judges Association (NAICJA), the Northwest Tribal Court Judges Association, and Sacred Circle: The National Resource Center to End Violence Against Native Women.

The National Tribal Justice Resource Center, an organization affiliated with the National American Indian Court Judges Association, recently published a Tribal Criminal Court Benchbook, which is available for download from the Resource Center website.³⁹ This benchbook includes an entire chapter dedicated to domestic violence issues, including an explanation and analysis of § 2265.⁴⁰ The benchbook recommends that tribal court judges enforce valid orders issued by other courts, indicating that “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.”⁴¹

A Tribal Court Bench Book for Domestic Violence Cases, prepared in 1999 by the Northwest Indian Tribal Court Judges Association, provides the full text of the Violence Against Women Act’s full faith and credit provisions as passed in 1994, and offers this important analysis: “Victims of domestic violence, whether Native American or not can now realize that they can be protected while they reside on an Indian reservation or off of the reservation.”⁴²

Other tribal organizations have worked to provide education and training on the full faith and credit issues to tribal officials and the general public. For example, some tribal organizations have developed brochures on VAWA’s full faith and credit provisions.⁴³ The Tanana Chiefs Conference, an organization made up of tribal leaders

37. White Mt. Apache Crim. Code § 6.8(G)(1) (2000) (“[A] person, who knowingly violates, or a person who aides and abets another person to knowingly violate an Order of Protection is guilty of an offense . . .”).

38. Indeed, the National Congress of American Indians, the oldest and largest tribal government organization encompassing over 250 tribal governments, has issued a resolution calling for reauthorization of VAWA. *Support for the 2005 Reauthorization of the Violence Against Women Act Including Enhancements for American Indian and Alaska Native Women*, Res. PHX-03-034, Natl. Cong. Am. Indians (June 18, 2003) (available at <<http://216.135.185.26/clanstar/dl/phx-03-034.pdf>>).

39. *Tribal Criminal Court Benchbook* (Natl. Tribal J. Resource Ctr. 2002) (available at <<http://www.ntrjc.org/resources/publications/benchbook.pdf>>).

40. *Id.* at 127-28.

41. *Id.* at 128.

42. *Tribal Court Bench Book for Domestic Violence Cases* 69 (N.W. Tribal Ct. Judges Assn. 1999).

43. In 2003, Sacred Circle: The National Resource Center to End Violence Against Native Women published a brochure entitled “Enforcing Orders for Protection: What Every Native Woman Should Know About Full Faith and Credit.” The International Association of Chiefs of Police, through a cooperative agreement with the Violence Against Women Grants Office, published a 2001 brochure entitled “Protecting Victims of Domestic Violence: A Law Enforcement Officer’s Guide to Enforcing Orders of Protection

from forty-two tribes in interior Alaska, released a report analyzing ways in which Alaska village governments could benefit from VAWA's full faith and credit provisions.⁴⁴ Several model codes have also been developed to aid tribal governments in complying with the full faith and credit requirements. The model code for tribes in Michigan, mentioned above, and a model code drafted by B.J. Jones of the Northern Plains Tribal Judicial Training Institute⁴⁵ are two notable examples.

While Schmieder admits that not all state enabling laws have explicitly required enforcement of tribal orders,⁴⁶ an underlying theme of her paper is that states have complied with VAWA's full faith and credit requirements and enacted the required enabling legislation.⁴⁷ Indeed, Schmieder asserts that the refusal of tribal governments to follow federal law has resulted in "geographical holes"⁴⁸ in restraining order enforcement.⁴⁹ Schmieder fails to address the opposite scenario; that is, a victim could rely on the statute and suffer unfortunate consequences when a tribal order is not enforced in a state jurisdiction. At least one study has indicated that a state's failure to enforce tribal orders of protection can present serious danger to Native women who are survivors of domestic violence.⁵⁰ Another recent research project report indicated that the Anglo-American legal system fails to provide adequate protection to indigenous women for a variety of reasons.⁵¹

During the past few years, some state governments have openly expressed hesitation or outright refusal to honor tribal court orders. The executive branch of government in Alaska, for example, recently challenged a state judge's decision allowing

Nationwide." Both brochures are on file with the authors, and copies are maintained on file with *Tulsa Law Review*.

44. Lisa Jaeger, *Domestic Violence and the Full Faith and Credit Provisions of the Violence Against Women Act (VAWA) for Alaska Tribes* (Tanana Chiefs Conf. 2000).

45. Model Tribal Dom. Violence Full Faith & Credit Ordinance (2000) (available at <<http://www.vaw.umn.edu/documents/ffc/ffctribal/ffctribal.html>>).

46. Schmieder, *supra* n. 3, at 767.

47. In addition to the problems identified by Schmieder, some states have enacted enabling legislation that requires prior registration of foreign protection orders. Such requirements violate federal law. *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."). Alaska's statutes do not comply with this federal requirement. Alaska Statutes § 18.66.140 declares:

(a) A certified copy of an unexpired protective order issued in another jurisdiction may be filed with the clerk of court in any judicial district in this state.

(b) A protective order filed in accordance with (a) of this section has the same effect and must be enforced in the same manner as a protective order issued by a court of this state.

(c) When a protective order is filed with the court under this section, the court shall have the order delivered to the appropriate local law enforcement agency for entry into the central registry of protective orders under AS 18.65.540.

Alaska Stat. § 18.66.140 (Lexis 2002) (emphasis added).

48. Schmieder, *supra* n. 3, at 767 n. 13.

49. *Id.* at 767 & n. 13.

50. Eileen M. Luna et al., *Impact Evaluation of STOP Grant Programs for Reducing Violence against Women among Indian Tribes* 115 (Tribal L. & Policy Program 2002).

51. Thomas Peacock et al., *Community-Based Analysis of the U.S. Legal System's Intervention in Domestic Abuse Cases Involving Indigenous Women* 61, 312 (Minn. Program Dev. 2002) (available at <<http://www.ncjrs.org/pdffiles1/nij/grants/199358.pdf>>).

enforcement of a banishment order issued by the Native Village of Perryville.⁵² In early 2003, the Supreme Court of Minnesota declined to adopt a proposed statewide court rule which would have ensured the consistent enforcement of all tribal court orders, seemingly contradicting the state full faith and credit enabling statute.⁵³ Schmieder's article simply ignores the possibility that state officials will express resistance and lack of support for tribal court orders. This possibility is just as problematic as any potential tribal refusal to enforce state orders, and Schmieder's proposed solution does not address this problem.

III. SCHMIEDER'S SOLUTION

As we make clear in Parts I and II, Schmieder's assertion of a problem with tribal enforcement of protection orders in Indian country is not supported by a close examination of the law and the facts. Thus, it follows that there is little to no justification for her proposed amendment to VAWA, and as a result, her proposal would unduly and dangerously erode tribal sovereignty for no substantive improvement. Even assuming that appropriate justification could be developed for implementing Schmieder's proposed VAWA amendment, there are several practical and philosophical problems with her solution.

After reviewing a number of possible amendments to VAWA, Schmieder settles on a so-called "compromise" which purports to provide a solution to the problem of tribes refusing to honor state orders. Schmieder's proposed solution as outlined in her article would offer women who have been victimized by violence the opportunity to sue their tribal government in order to require them to recognize her order.⁵⁴ This solution is short-sighted for several reasons. First, it assumes that the problems associated with the enforcement of protection orders can be resolved via prospective injunctive relief. Problems associated with the non-enforcement of protection orders usually arise in the context of dangerous, emergency situations. Should a hypothetical tribal government refuse to honor a foreign protection order, it is likely that the victim would not have advance notice of this problem. Rather, the tribal lack of enforcement may not be apparent until after an incident of violence has occurred.

Second, Schmieder's solution assumes that victims of violence have access to attorneys and monetary resources. In order to take advantage of the tools that would be available via the Schmieder VAWA amendment, victims would need to have access to the resources necessary to hire legal counsel and initiate federal litigation. For many survivors of violence, this solution is simply not practical.⁵⁵ In addition, survivors of

52. Sheila Toomey, *Trouble in Perryville: Village Banished Their Problem Resident, but State Officials Say They Had No Right*, 57 Anchorage Daily News A1 (Nov. 2, 2003). A superior court judge ultimately rejected the state's attempt to avoid enforcing the tribal court order. Sheila Toomey, *Judge Upholds Tribal Court's Banishment of Dangerous Villager*, 57 Anchorage Daily News A1 (Nov. 20, 2003).

53. See Or., *In re Hrg. on Proposed Amends. to the Gen. Rules of Prac. for the Dist. Cts.*, CX-89-1863 (Minn. Mar. 5, 2003) (available at <http://www.courts.state.mn.us/cio/public_notices/Order_MN_Tribal_Crt.rtf>).

54. Schmieder, *supra* n. 3, at 792-93.

55. Several studies have noted the frequency with which domestic violence survivors are also faced with the challenges posed by poverty. See generally e.g. Demie Kurz, *Women, Welfare, and Domestic Violence*, 25

violence who have fled to a tribal community as a refuge from a particularly dangerous batterer may not want to advertise their location by filing suit in federal court.

Schmieder's solution raises a third and more delicate issue that concerns the philosophy of safety and accountability in Indian country. The proposed amendment, by allowing women to sue tribal officials for injunctive relief, leads to the awkward development of an adversarial relationship between a Native woman and her tribal leadership. By filing a lawsuit in federal court against her own tribal officials, it is possible that a Native woman may be seen as promoting the federal intrusion into tribal laws and affairs. The resulting antagonism could be counter-productive to the goal of ensuring enforcement of protection orders.

Perhaps a better solution would be to remove the impediments to tribal prosecution and other responses to domestic violence. These impediments are explored more fully below in Part V, but first we turn to an examination of the possible reasons why legal and factual arguments so often go astray in matters of Indian law.

IV. SOURCES OF MISUNDERSTANDING

Neither of us knows Schmieder personally, nor have we discussed with Schmieder her analysis and conclusions. But similar disagreements often arise in Indian law, and those disagreements can usually be traced to the same fundamental problems that frequently recur. Indian law is a complicated field, requiring knowledge of the federal law governing the relationship between tribal, state, and federal governments, as well as knowledge of tribal law itself. While a significant number of law schools offer one basic class in Indian law, relatively few law schools provide more. As a result, many attorneys and judges are undereducated in the fundamental principles of Indian law. And if lawyers and judges are not aware of the basics, they will often miss issues and fail to conduct necessary research.

It is unquestionable that tribal governments are legitimate governments, possessing powers of sovereignty that predate the existence of the United States. Despite the fact that tribal governments are legitimate governments, they do not operate under the same jurisdictional rules as state governments. States will generally possess jurisdiction over all persons and activities that occur within the state's borders. Tribes, however, do not possess such full territorial sovereignty. Part V will explore these jurisdictional differences more fully, but in some circumstances a tribe will lack jurisdiction even though a state in the same circumstances would possess jurisdiction. These differences can lead a lawyer trained in standard conflicts of law, but not Indian law, to assume that the tribe is failing to appropriately prosecute offenders or enforce protection orders, when in actuality the problem is that the tribe has been deprived of the necessary jurisdiction. In other words, the tribe would often like to prosecute or enforce, but is prevented from doing so by federal law.

Indeed, one of the major problems with VAWA's original full faith and credit provisions was that they assumed state and tribal jurisdiction are co-extensive.⁵⁶ In

Soc. J. 105 (1998); Diane M. Purvin, *Weaving a Tangled Safety Net: The Intergenerational Legacy of Domestic Violence and Poverty*, 9 *Violence Against Women* 1263 (2003).

56. See *supra* nn. 16-19 and accompanying text.

reality, tribes lack criminal jurisdiction over non-Indians, and tribes possess civil jurisdiction over non-members only if a complex calculus is satisfied. Congress partially addressed this failure with VAWA 2000 but did not fully correct the problem.⁵⁷ As is often true when a legal ambiguity exists, a large body of literature has developed exploring various aspects of the issue, including domestic violence and native women,⁵⁸ general issues with respect to VAWA's full faith and credit requirements,⁵⁹ and issues that arise more specifically regarding tribal implementation of VAWA's full faith and credit provisions.⁶⁰

This literature is not helpful, however, if attorneys and judges are not aware of its existence. One possible cause of our disagreements with Schmieder is our different exposure to and awareness of this body of literature. We have worked in this area for years. As a result, we are not only intimately familiar with these articles, we have contributed to the literature in a number of ways.⁶¹ In addition, our involvement leads us to attend or speak at a number of regional and national conferences, where we can interact with tribal legislators, judges, attorneys, police officers, and victim advocates. This interaction means we have exposure to what is happening on the ground in Indian country and what problems tribes are encountering. We discuss those problems in the next Part.

V. THE TRUE PROBLEMS IN INDIAN COUNTRY

Despite our disagreements with Schmieder, we do agree that problems exist that hamper tribal efforts to protect victims of domestic violence. Those problems, however,

57. See *supra* nn. 16-19 and accompanying text.

58. See e.g. Luna et al., *supra* n. 50; Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. Rev. 1, 16-32 (1999); Murray, *supra* n. 26; Valencia-Weber & Zuni, *supra* n. 25; James W. Zion & Elsie B. Zion, *Hozho' Sokee' – Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 Ariz. St. L.J. 407 (1993).

59. See e.g. David M. Fine, Student Author, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 Cornell L. Rev. 252, 261, 291-94 (1998); Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders under the Violence Against Women Act of 1994*, 29 Fam. L.Q. 253 (1995); Victoria L. Lutz & Cara M. Bonomolo, *How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection*, 16 Pace L. Rev. 9 (1995); Susan B. Carbon et al., *Violence Against Women Online Resources, The Role of Judges in Enforcing Full Faith and Credit* <<http://www.vaw.umn.edu/documents/ffc/chapter6/chapter6.html>> (last modified Sept. 15, 2003).

60. Many of the articles referenced *supra* note 59 as discussing generally the full faith and credit provisions also contain some reference to or discussion of tribal governments. More specific articles, however, do exist. See e.g. Tatum, *supra* n. 17; Edward Reina, Jr., *Domestic Violence in Indian Country: A Dilemma of Justice*, 5 Domestic Violence Report 33, 47 (Feb./Mar. 2000). Professor Stacy Leeds has also contributed to this discussion as part of a more general article on cross-jurisdictional enforcement of tribal court orders (not just protection orders). See Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311 (2000) (exploring enforcement of tribal orders more generally).

Additionally, more articles have been or will be published in the time since Schmieder's comment went to press. See e.g. Melissa L. Tatum, *Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know*, 13 Kansas J.L. & Pub. Policy 123 (2003) [hereinafter Tatum, *Establishing Penalties*]; Melissa L. Tatum, *Law Enforcement Authority in Indian Country: Challenges Presented by the Full Faith and Credit Provisions of the Violence Against Women Acts*, 4 Tribal L. J. ___ (forthcoming 2004) <<http://tlj.umn.edu/index.htm>>.

61. In contrast, Schmieder cited one general VAWA full faith and credit article, Schmieder, *supra* n. 3, at 765 n. 1 (citing Klein, *supra* n. 59), one article about tribal governments and full faith and credit, *id.* at 767 n. 14 (citing Leeds, *supra* n. 60), and no articles about domestic violence and Native women.

are not tribal truculence about VAWA's full faith and credit provisions, but rather are a result of other federal intrusions on tribal sovereignty coupled with a lack of resources.

Between Congress and the U.S. Supreme Court, the federal government has imposed a number of restrictions on tribes that seriously hinder tribal efforts to combat domestic violence. As a result of several U.S. Supreme Court decisions, tribal criminal and civil jurisdiction has been seriously eroded, and Congress has enacted limitations on the punishment tribes can impose even when they possess jurisdiction.⁶²

The rules governing state criminal jurisdiction are very simple—when a significant portion of the crime occurs within the state's borders, the state will possess criminal jurisdiction over the crime and the offender. The rules are not so simple for tribal criminal jurisdiction. Perhaps the most serious limitation in the context of domestic violence and protection orders is that the U.S. Supreme Court has deprived tribes of criminal jurisdiction over non-Indians.⁶³

Most states punish domestic violence as a crime, and most states handle protection order violations as either a misdemeanor or as criminal contempt. Tribes cannot follow suit, at least not when the offender is a non-Indian. Tribes do still possess criminal jurisdiction over Indians in most situations, but even when the tribe does possess jurisdiction to prosecute, the Indian Civil Rights Act limits the penalties that can be imposed to a maximum of one year in jail and a \$5,000 fine.⁶⁴

It is possible that tribes may use their civil jurisdiction to enforce protection orders and redress violations thereof. The problem, however, is a combination of the tribal civil jurisdiction rules developed by the U.S. Supreme Court and the ambiguities introduced by Congress in the original VAWA and VAWA 2000. According to the basic rules of tribal civil jurisdiction, if the alleged violator is a member of the enforcing tribe, and the violation occurred within the geographic boundaries of the tribe, the tribe will have full civil jurisdiction over the offender.⁶⁵ The rules are not so clear, however, when the alleged offender is not a member of the enforcing tribe.

62. These jurisdictional restrictions and punishment limitations are briefly discussed here. For a fuller discussion, see Tatum, *supra* note 17, at 145-49 and Tatum, *Establishing Penalties*, *supra* note 60.

63. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The lack of jurisdiction over non-Indians is particularly alarming given that Native women are much more likely to be victimized by a non-Indian than by an Indian. See Lawrence A. Greenfeld & Steven K. Smith, *American Indians and Crime* 8 (U.S. Dept. J. 1999).

64. 25 U.S.C. § 1302(7) (2000). ICRA does not, however, limit other forms of punishment such as restitution and community service.

The punishment limitations imposed by ICRA are roughly synonymous with the misdemeanor punishments imposed by states. Since most states treat violations of protection orders as misdemeanors, it would seem that even in light of ICRA, tribes have the ability to impose similar sanctions on Indians. A deeper examination, however, reveals two problems. First, some states deal with protection order violations, particularly repeat violations, as felonies. For an overview of state laws concerning protection order violations, see Fredrica L. Lehrman, *Domestic Violence Practice and Procedure* §§ 4:33-4:40, 8:4 (West 1997 & Supp. 2003). ICRA removes this option from tribes. Second, and perhaps more important, ICRA's punishment limitations apply across the board to all crimes; they do not apply only to violations of protection orders. If a man violates a protection order in a state and in the process rapes the woman protected by the order, the state can charge and convict him of the protection order violation and the rape. Even if the protection order violation is a misdemeanor, the rape will carry serious felony penalties. If the man commits the same acts in Indian country, the tribe will be restricted to misdemeanor-level penalties for both the violation of the protection order and the rape.

65. Tatum, *supra* n. 17, at 150-53, 163-65.

To determine whether a tribe has civil jurisdiction over a non-member, the tribe must demonstrate that the non-member either engaged in consensual relations with the tribe or an individual member or that the non-Indian's actions have a direct effect on the core integrity of the tribe.⁶⁶ As part of this calculus, it is also important to establish the status of the land where the violation occurred. If the land is tribal trust land, then the tribe is more likely to possess jurisdiction. If the land is fee land, then the tribe is less likely to possess jurisdiction. As should be apparent, all of these determinations take time and research. Those are two things that are often non-existent or in short supply when an officer is called to a scene to enforce a protection order.

If the VAWA 2000 amendments are properly interpreted, however, this confusing calculus is simplified to basically asking whether the violation of the protection order took place within the tribe's geographic boundaries.⁶⁷ If so, the tribe can enforce the protection order. Note, however, that the enforcement must be through the civil—not the criminal—process. Examples of civil enforcement include things such as civil contempt, civil infractions, and removal from the tribe's territory.

Even when tribes have jurisdiction and can punish an offender, their efforts to effectively address domestic violence are hampered by inadequate funding. While some tribes have experienced an economic resurgence and are beginning to fund their own basic governmental infrastructure, the vast majority of tribes have not recovered from federal policies intended to eliminate tribal governments and tribal legal systems. As a result, these tribes are often dependent on federal funding to provide basic governmental services.

A recent report issued by the United States Commission on Civil Rights documented a lack of basic governmental resources throughout Indian country.⁶⁸ In documenting the United States' failure to provide adequate resources for effective law enforcement in Indian country, the report indicated that tribal law enforcement departments have between fifty-five and seventy-five percent of the resources available to comparable non-Indian communities.⁶⁹ Moreover, the Commission documented the lack of resources for tribal courts, reporting, "In 1993, with the passage of the Indian Tribal Justice Act, tribes were to receive \$58.4 million per year to create and expand their justice systems. By the time the act expired in 1999, only \$5 million had actually been appropriated."⁷⁰

VI. CONCLUSION

Essentially, at a general level, Schmieder is somewhat correct—tribes are not doing everything states are doing to prevent domestic violence, enforce protection orders, and comply with VAWA's full faith and credit provisions. It is in the details of

66. *Id.* at 153-65, 174-76.

67. For more on the proper interpretation, see *supra* notes 16-20 and accompanying text.

68. *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (U.S. Commn. on Civ. Rights 2003) (available at <<http://www.usccr.gov/pubs/na0703/na0731.pdf>>) [hereinafter *Quiet Crisis*]; see Stewart Wakeling et al., *Policing on American Indian Reservations* 9, 26-28, 57 (U.S Dept. J. 2001).

69. *Quiet Crisis*, *supra* n. 68, at 77.

70. *Id.* at 79 (footnotes omitted).

Schmieder's position, however, where we part company. While VAWA's full faith and credit requirements do impose on tribal sovereignty, they impose equally on state sovereignty by also requiring that states provide full faith and credit for tribal protection orders. In this sense, VAWA actually honors and promotes tribal sovereignty by putting tribal protection orders on par with state orders.

Contrary to Schmieder's assertions, an examination of tribal efforts demonstrates that tribes are actively complying with the federal mandates. Thus, Schmieder's conclusion that tribal sovereignty must be abrogated and individuals given the ability to sue tribal officials to force compliance is simply unnecessary and counter-productive. The safety and well-being of Native women would be much better served by addressing the jurisdictional gaps and resource issues that limit the ability of tribal governments to adequately protect all women in accordance with their customs, traditions, and contemporary judicial interventions.