Law Enforcement Authority in Indian Country

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INTRODUCTION

The protection order has proven to be an effective tool in the war against domestic violence. A protection order, however, is good only so long as it can be enforced, and enforcement has proven to be a problem when a person travels with a protection order to a different jurisdiction. In an effort to address these problems, and to further boost the effectiveness of protection orders, Congress included in the Violence Against Women Act[2] provisions that require full faith and credit for protection orders.

While the full faith and credit provisions are a good idea and can solve many problems, they do create some difficulties, especially for law enforcement. Although Congress mandated full faith and credit for protection orders, it left the details of how to accomplish this to each jurisdiction. The only real direction in the federal statute is that each jurisdiction must treat protection orders from other jurisdictions the same as it would its own protection orders.

This directive means that all police departments — state, county, and tribal – must examine their procedures and training for dealing with protection orders. After all, law enforcement officers are the front line in dealing with protection orders. Most calls to enforce a protection order or to deal with a violator are placed first to the police, who must then deal with the situation as it unfolds. Only after the police have dealt with the initial emergency does the case arrive on the prosecutor's desk.[3] Each law enforcement department must make sure that its procedures encompass foreign protection orders (that is, orders issued by another jurisdiction) and that its officers are trained in how to recognize and deal with such orders.

The federal statute presents special difficulties for tribal police officers, indeed any law enforcement officer working in Indian country, due to the fractured nature of criminal jurisdiction in Indian country. This article explores those difficulties and proposes some possible solutions.[4]

Before discussing the specifics of tribal law enforcement and foreign protection orders, however, this paper will first explore the relevant background. Part I looks at the federal statute and its requirements. Since

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[2] Pub. L. No. 103-322, 108 Stat. 1930 (1994).

[3] It is, of course, possible that the person seeking enforcement of a protection order may first call the district attorney's office. Such cases represent the exception, rather than the rule, and are not the focus of this article. In such cases, however, the basic directive of the federal statute still holds – the district attorney must treat the violation of a foreign protection order the same as it would a protection order issued by that jurisdiction.

[4] In other articles, I have taken a broader, more general look at the federal statute; *see* 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 (2001-2002); and have also explored the topic of establishing penalties for violations of foreign protection orders, see Melissa L. Tatum, *Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know*, 13 KAN. J.L. & PUB. POL'Y 123 (2003).

the authority of a police department is tied to the criminal jurisdiction of that government, Part II will examine the general rules for criminal jurisdiction in Indian country. Part III will build on that basic discussion by exploring the three basic types of police departments that have potential authority in Indian country. Part IV then turns to the specific topic of this paper and explores the challenges for tribal law enforcement in implementing the federal mandate. Part V explores one additional challenge for tribal governments and tribal police in this area – immunity.

I. A Look at VAWA's Full Faith and Credit Requirements and What They Require of Law Enforcement

Domestic violence is a pervasive and difficult problem; one that cuts across all levels of society.[5] The statistics regarding the extent of domestic violence are appalling. It is the leading cause of injury to women in this country, accounting for more injuries than auto accidents, stranger rapes, and muggings combined;[6] one quarter of all marriages have included physical abuse,[7] one-third of all women who seek treatment from hospital emergency rooms do so because of domestic violence,[8] and approximately one-third of all female homicide victims are killed by their husbands or boyfriends.[9]

Domestic violence is a problem among American Indians, just as with other ethnic groups, and the causes of domestic violence among Indians are similar to those for the rest of American society. These causes, however, are often complicated by the difficult social and economic conditions on reservations, as well as by the disruption of traditional

[5] Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 UNIV. HAW. L. REV. 375, 380 (1998); VIOLENCE AGAINST WOMEN GRANTS OFFICE, DOMESTIC VIOLENCE AND STALKINGS: THE SECOND ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 1, 5-6 (1997). It is interesting to note, however, that from 1976 to 1998, the number of intimate partner homicides fell for all racial and gender groups except white women. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 3 (May 2000). The number of white women killed by an intimate partner increased. *Id.*

[6] S. Rep. No. 103-138 (1993); S. Rep. No. 102-197 (1991); *see also* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 8 (1999); Woo, *supra* note 5, at 379-380; David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV.252, 256 (1998); Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIMONIAL LAW. 173, 174 (1999).

[7] Epstein, *supra* note 6, at 4; Woo, *supra* note 5, at 380; *see also* Karp & Belleau, *supra* note 6, at 174 (putting the figure at fifty percent).

[8] Epstein, *supra* note 6, at 8; Woo, *supra* note 5, at 381.

[9] S. Rep. No. 103-138 *supra* note 6; S. Rep. No. 102-197 (1991); *see also* BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, *supra* note 5, at 1 ("[t]he percentage of female murder victims killed by intimate partners has remained at about 30% since 1976."); Woo, *supra* note 5, at 381; Fine, *supra* note 6, at 256; Karp & Belleau, *supra* note 6, at 174; Johnathan Schmidt & Laurel Beeler, *State and Federal Prosecutions of Domestic Violence*, 11 FED. SENTENCING REP. 159 (1998).

cultures.[10] It is important to note that not all Indians live on reservations and not all people living on reservations are Indians. Many Indians live in urban centers, either as a result of a voluntary choice or a result of forced relocation.[11] Because this article focuses on tribal police and Indian country, urban Indians will not be considered further. Instead, this article will concentrate on those persons who live within Indian country.

"Indian country" is actually a legal term of art and is not limited to "reservations." This article will explore the definition of Indian country in more detail in Part II. For now, it is important to note that three categories of persons live in Indian country – members of the tribe, Indians who are members of other tribes, and non-Indians. These three groups of people are not isolated from each other – they live next to each other, go to school together, and become involved in relationships with each other. As demonstrated in Part II, the identity of the victim and the perpetrator have a significant impact on a tribe's criminal jurisdiction, and by extension, the authority of tribal law enforcement officers. It also potentially has a tremendous impact on the issuance and enforcement of protection orders.

Protections orders are used by both states and tribes as an important tool in combating domestic violence.[12] Protection orders are injunctive remedies and can be either civil or criminal.[13] 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.[14] Most states allow individuals to directly petition the court for a

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[10] *See* Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHNS L. REV. 69 (1995); John W. Zion & Elsie B. Zion, *Hozho' Sokee' - Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407 (1993); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, 16-32 (1999).

[11] For a brief look at domestic violence and urban Indians, see Valencia-Weber & Zuni, *supra* note 10, at 130-32. For a historical look, see Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433 (1998).

[12] Epstein, *supra* note 6, at 11; Woo, *supra* note 5, at 392-393; Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995). For a look at the process used by some tribal courts who issue protective orders, see THE TRIBAL COURT BENCH BOOK FOR DOMESTIC VIOLENCE CASES (Northwest Tribal Ct. Judges Ass'n 1999); *see also* Valencia-Weber & Zuni, *supra* note 10, at 122-123.

[13] For an overview of state laws regarding civil protection orders, see FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE §§ 4:1-4:41 (1997). For an overview of criminal protection orders, *id*. at §§ 8:2-8:5. 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 codes. 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 law, see Valencia-Weber & Zuni, *supra* note 10.

[14] Epstein, *supra* note 6, at 11; Woo, *supra* note 5, at 392-393; Barry, *supra* note 12, at 348. *See also* NAT'L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT, 1-3, 33-47 (1990). 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 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.[15] In this last situation, the court may include the protection order or keep away provisions as part of a pre-trial 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,[16] they are only as effective as the enforcement mechanisms that are in place.[17] 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.[18] Traditionally, protection orders were good only within the jurisdiction that issued the order. This limitation created significant problems for those individuals who were shielded by protection orders and who moved between jurisdictions. A woman may live in one jurisdiction, work in another, take a vacation, change jobs, or move to flee her attacker.[19] A woman in these circumstances would, at the very least, usually have to apply for a second (or sometimes a third or fourth) protection order, show up in court, and sometimes even pay additional fees.[20] Pursuant to the demands of due process, these additional proceedings also usually meant that the respondent was given notice of the petitioner's current location.[21] For the woman who has fled her attacker, this notification could prove deadly. It is

PROTECTION FOR BATTERED WOMEN: AN ANALYSIS OF STATE STATUTES AND CASE LAW (1993); *see also* LEHRMAN, *supra* note 13, at §§4:11-4:17 (civil) & §§8:2-8:3 (criminal). For a discussion of the terms and conditions of civil protection orders, see LEHRMAN, *supra* note 13, at §§4:19-4:31. For a state by state break down of civil protection order laws, see LEHRMAN, *supra* note 13, at Appendix 4A.

[15] *See, e.g.*, Celia Guzaldo Gamrath, *Enforcing Orders of Protection Across State Lines*, 88 ILL. BAR J. 452, 453-54 (2000); *see also* NAT'L INST. OF JUSTICE, *supra* note 14, at 1.

[16] S. Rep. No. 103-138, *supra* note 6. ("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.").

[17] 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 5, at 37-44.

[18] For an overview of the different types of sanctions for violating protection orders, see LEHRMAN, *supra* note 13, at §§ 4:33-4:40 (civil protection orders), §8:4 (criminal protection orders). For a state by state break down of the possible penalties for violating a civil protection order, see LEHRMAN, *supra* note 13, at Appendix 4A.

[19] Victoria Lutz & Cara M. Bonomolo, *Domestic Violence and the Law Symposium: How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection*, 16 PACE L. REV. 9, at 20-21 (1995). 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." Pamela A. Paziotopoulos, *Violence Against Women Act: Federal Relief for State Prosecutors*, 30 PROSECUTOR 20 (May/June 1996).

[20] Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 2, 254 (Summer 1995).

[21] Woo, *supra* note 5, at 395; Klein, *supra* note 20, at 254; Lutz & Bonomolo, *supra* note 19, at 13.

well documented that the most dangerous time for an abused woman is when she attempts to terminate the relationship.[22]

All these hassles presuppose that the petitioner would actually be able to obtain an additional protection order. In some cases, the new jurisdiction may be unable or unwilling to issue a new protection order. Obstacles to the new protection order include things ranging from different standards of proof, to different evaluations of the evidence, to 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 as to 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.[23] In addition, some courts may lack jurisdiction if no threat or harassment has occurred within its borders.[24]

In 1994, Congress moved to remedy these problems by enacting the full faith and credit requirements of the Violence Against Women Act.[25] The core of those requirements demands 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.[26]

This means that all states and all tribes must enforce any valid protection orders issued by any other state or any other tribe.[27] 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 civil and criminal courts (other than a support or child custody order issued pursuant to

[22] Woo, *supra* note 5, at 395; Fine, *supra* note 6, at 256-57. For a fuller treatment of this issue, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

[23] For an examination and comparison of different states' protection order statutes, see NAT'L INST. OF JUSTICE, *supra* note 14, at 7-18. For an overview of the different types of eligible relationships, see LEHRMAN, *supra* note 13, at §§ 4:4-4:10. For a state-by-state breakdown, see LEHRMAN, *supra* note 13, at Appendix 4A.

[24] Klein, *supra* note 20, at 254; Lutz & Bonomolo, *supra* note 19, at 13.

[25] Pub. L. No. 103-322, 108 Stat. 1796 (1994); *see also* S. Rep. No. 103-138, *supra* note 6. These provisions were amended by the Violence Against Women Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000). Unless noted otherwise, this article discusses the currently existing version of VAWA's full faith and credit requirements.

[26] 18 U.S.C. § 2265(a) (2000).

[27] 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.

> 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) 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.[28]

A valid protection order is one for which the issuing court possessed jurisdiction and provided due process to the respondent.[29] The VAWA's full faith and credit requirements also put limitations on the enforcement of mutual protection orders,[30] prohibit requiring registration of foreign protection orders as a prerequisite to enforcement,[31] and if a foreign protection order is registered, prohibit the enforcing state from notifying the respondent that the protection order was registered.[32]

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. These details can present a great deal of difficulty for law enforcement officers confronted with an allegation that someone is violating a protection order.

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[28] 18 U.S.C. § 2266(5).

[29] *See* 18 U.S.C. § 2265(b): "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."

[30] 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* 18 U.S.C. § 2265(c). For a discussion of mutual protection orders and their problems, see Jennifer Paige Hanft, *What's Really the Problem with Mutal Protection Orders?*, 22 WYOMING LAWYER 22 (Oct. 1999); Klein, *supra* note 20, at 266-68; Elizabeth Topliffe, *Why Civil Protection Orders are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not,* 67 IND. L.J. 1039 (1992).

[31] *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.").

[32] *See* 18 U.S.C. § 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.").

At its most basic, the VAWA's full faith and credit requirements mean that officers must now enforce all valid protection orders, not just the ones issued by their jurisdiction. Indeed, the effectiveness of the VAWA's full faith and credit provisions rest largely on the shoulders of officers, as they are usually the first ones called when someone violates a protection order. That means clear procedures and protocols are imperative, and officers must receive training on these new regulations.

A law enforcement officer must understand his or her jurisdiction's procedures for enforcing protection orders, and the officers must use the same basic procedures to enforce all protection orders. Because an officer's authority is limited by the criminal jurisdiction of the government for which the officer works, the next section will examine the general contours of criminal jurisdiction in Indian country.

II. General Rules for Criminal Jurisdiction in Indian Country

Complex rules allocate criminal jurisdiction in Indian country, much more so than in other parts of the United States.[33] Three basic types of governments exist in this country – the federal government, the state governments (which include local city and county governments), and tribal governments. The rules for federal and state criminal jurisdiction are relatively straightforward, at least outside the context of Indian country.

The federal government is, of course, one of limited powers. In the context of criminal laws, those limitations mean that the federal government lacks the authority to pass a general criminal code applicable throughout the nation. Rather, some federal interest must be implicated before Congress can make a particular type of conduct a federal crime. Congress uses the Assimilative Crimes Act[34] to close the gap in criminal laws for federal enclaves, such as national parks and military bases.

State governments, by contrast, do possess general police powers and can thus legislate more extensively when it comes to making particular activities a crime. State criminal jurisdiction is essentially very basic and is centered around a territorial principle.[35] A state may apply its criminal laws to any activities for which there is a significant local element, that is, when

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[33] The definition of Indian country is found at 18 U.S.C. § 115 (2000) and includes:

> (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, (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 (c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Despite the fact that this definition is found in the criminal code, it applies in both civil and criminal cases.

[34] 18 U.S.C. § 13 (2000).

[35] ROBERT A. LEFLAR, ET AL., AMERICAN CONFLICTS LAW 307-11 (1986); *see also* LEA BRILMAYER, CONFLICT OF LAWS 152 (1995).

some significant portion of the crime occurs within the state's boundaries.[36] Thus, a state's criminal jurisdiction extends to any criminal conduct that takes place in state territory.

At first glance, it would seem that tribal governments would possess similar criminal jurisdiction. That is, the tribe would be able to enact a criminal code to govern the conduct of all persons within its borders and would be able to prosecute anyone who violates those laws. After all, tribal governments are sovereign governments that pre-existed the United States. Their sovereignty flows from an independent source, just the way state sovereignty differs from the sovereignty of the federal government. The relationship between the federal government and the tribal governments, just like the relationship between the federal and state governments, would allow the federal government to prosecute people in tribal territory who violate some federal criminal law that applies throughout the nation.

Unfortunately, a complicated web of federal statutes and U.S. Supreme Court decisions has resulted in the federal, state, and tribal governments all possessing varying degrees of criminal jurisdiction over various people who commit varying types of crimes in Indian country. In other words, tribes have been deprived of their territorial sovereignty in a way that states have not.

Criminal jurisdiction in Indian country depends on first examining the identity of the defendant, the identity of the victim, and the nature of the crime. Because these are the operative factors, the rest of this section will use those elements as the method for organizing the discussion of who possesses criminal jurisdiction in Indian country.[37] The next part of the article will be organized around each government – tribal, federal, and state – whose officers possess authority in Indian country.

Since the distribution of criminal jurisdiction depends on the racial/political identity of the victim and the defendant, it is important to first know how the law distinguishes between an Indian and a non-Indian. Congress has not provided a statutory definition of "Indian" for purposes of criminal jurisdiction.[38] The federal courts have filled this gap by drawing on the U.S. Supreme Court's decision in *United States v. Rogers*[39] to create a two-part test. The first part of the test asks whether the person has some Indian blood, while the second part examines whether the

[36] LEFLAR, *supra* note 35, at 308.

[37] Because this article is focused on violations of protection orders, this section will not explore criminal jurisdiction over victimless crimes in Indian country. Every violation of a protection order has an identifiable victim.

[38] The only relevant federal statute states only that "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian", see Major Crimes Act, 25 U.S.C. § 1301(4) (2000). This provision overturns the U.S. Supreme Court's decision in *Duro v. Reina,* 495 U.S. 686 (1990), in which the Court distinguished between "member" and "non-member" Indians, holding that tribes lacked criminal jurisdiction over non-member Indians. The Supreme Court upheld the statute in United States v. Lara, 124 S. Ct. 1628 (2004).

[39] 245 U.S. (4 How.) 567 (1846).

person is recognized as an Indian.[40] In determining whether someone is "recognized" as an Indian, the courts focus on whether the person is a member of or is affiliated with a federally recognized tribe.[41]

This focus on political status is a result of the U.S. Supreme Court's decision in *United States v. Antelope*,[42] which raises questions about the constitutionality of a purely racial exercise of federal criminal jurisdiction. The second prong of the "Indian" test does not, however, require formal enrollment in a federally recognized tribe. In *St. Cloud v. United States*,[43] the district court of South Dakota established what is now a widely-accepted test to assist in evaluating whether a person satisfies the "recognized as an Indian" part of the test. That test looks at four factors. In declining order of importance, these are:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.[44]

Clearly, then, it can be difficult to determine whether a particular individual is or is not an Indian. Often, in the close-knit world of the reservation, the police may immediately recognize someone as a member of the tribe. The police, however, will not always possess such knowledge and it may take some investigation before a person's status is established. This greatly complicates the task of law enforcement officers in Indian country, although as discussed in the next part, there are some ways to compensate for part of the difficulty.

Before (finally) turning to the actual division of criminal jurisdiction in Indian country, one final caveat must also be made. This part assumes that a state possesses no special grant of criminal jurisdiction in Indian country. Congress has the authority to expand state criminal jurisdiction and has done so in certain states and with respect to certain tribes. The next section, which examines more specifically the authority of federal, tribal, and state law enforcement officers, will explore these special grants of jurisdiction and their effects on law enforcement.

A. Crimes Involving Only Indians

When an Indian commits a crime against the person or property of another Indian, the tribe certainly possesses criminal jurisdiction. Tribes are sovereign governments, and although their sovereignty has been limited

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[40] *See, e.g.*, *United States v. Lawrence*, 51 F.3d 150 (8th Cir. 1995); *United States v. Torres*, 733 F.2d 449 (7th Cir. 1984); *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988).
[41] *See, e.g.*, *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *St. Cloud v. United States* 702 F. Supp. 1456, 1461-66 (D.S.D. 1988); *State v. Sebastian*, 701 A.2d 13, 24-27 (Conn. 1997).
[42] 430 U.S. 641 (1977).
[43] 702 F. Supp. 1456 (D.S.D. 1988).
[44] *Id.* at 1461-62.

in some ways, it still extends to crimes involving Indians. In its 1990 decision in the case of *Duro v. Reina*,[45] the U.S. Supreme Court did split the universe of "Indians" into "member" and "non-member" Indians. The Court ruled that tribes lack criminal jurisdiction over non-member Indians. The Court reasoned that non-member Indians should be treated the same as non-Indians, since nonmembers were also, by definition, outside the internal governance structure of the tribe.[46] The Court had ruled twelve years earlier that tribes lost criminal jurisdiction over non-Indians as a part of their "dependent" status, that is, by virtue of the federal government's decision to fold tribes into the governmental structure of the United States.[47] Congress quickly passed a statute overturning the *Duro* decision, explicitly stating that tribes have always possessed criminal jurisdiction over all Indians, member and nonmember alike.[48] Thus, whenever an Indian commits a crime against another Indian in Indian country, the governing tribe possesses criminal jurisdiction to prosecute.

The federal government may also possess jurisdiction over these types of crimes, provided the crime is enumerated in the Major Crimes Act,[49] is covered by a federal statute of general applicability, or violates one of a small number of very specific federal statutes.

Congress passed the Major Crimes Act in 1885,[50] and the statute creates federal jurisdiction over certain enumerated crimes committed by Indians. More specifically, the federal government acquires criminal jurisdiction when

1) an Indian commits
2) within Indian country
3) one of the enumerated offenses
4) against the person or property of another person.[51]

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[45] 495 U.S. 676.

[46] *Id.* at 686-92.

[47] *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The Oliphant decision has been widely criticized. *See, e.g.*, Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); *see also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1595-99 (1996).

[48] The Defense Appropriation Act of 1991, Pub. L. 101-511, 104 Stat. 1856 (amending 25 U.S.C. § 1301). Questions have been raised about how to interpret this statute. Is the so-called "Duro fix" legislation a delegation of federal power to tribes to exercise criminal jurisdiction over nonmember Indians or is the statute simply a recognition of previously existing authority? The U.S. Supreme Court resolved this question with its decision in *United States v. Lara*, holding that Congress had the authority to enact the Duro fix legislation and that the statute should be read according to its plain language—as a recognition of inherent tribal sovereignty.

[49] 18 U.S.C. §§ 1153, 3242 (2000).

[50] Appropriations Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.

[51] The statute actually declares that it applies when an Indian commits one of the enumerated crimes "against the person or property of another Indian or other person." 18 U.S.C. § 1153(a). This awkward wording was the result of a floor amendment in the House of Representatives. 716 Cong. Rec. 934 (1885). *See* Robert N. Clinton, *Criminal Jurisdiction*

As currently amended, the offenses covered by the statute include murder, manslaughter, kidnapping, maiming, sexual abuse, several forms of serious assault or assault against a minor, arson, burglary, robbery, and embezzlement.

If the federal government lacks jurisdiction under the Major Crime Act, it might still possess criminal jurisdiction if the crime violated a federal statute of general applicability. The vast majority of federal criminal statutes do not mention Indians or Indian country. Some Indian defendants have attempted to argue that these general statutes do not apply to Indians in Indian country; rather, only the federal criminal statutes specifically mentioning Indians and Indian country reach such conduct. Federal courts have uniformly rejected such arguments and have held that federal criminal statutes of general applicability apply in Indian country unless those statutes would adversely impact rights reserved by treaty or statute or unless they would adversely impact matters essential to tribal self-governance, although if Congress has specifically indicated an intent that the statute apply, any intrusion on tribal self-government is immaterial.[52] These general federal crimes include things such as drug crimes,[53] conspiracy,[54] and felon in possession of ammunition.[55]

In addition to these federal statutes of general applicability, Congress has also enacted some specific statutes that apply to people who engage in certain conduct in Indian country.[56] These include matters such as embezzlement and theft from a tribe,[57] unauthorized hunting or fishing on tribal land,[58] and committing domestic violence in Indian country.[59] If an Indian commits one of these crimes and it impacts the person or property of another Indian, the federal government would also possess jurisdiction to prosecute.

States lack criminal jurisdiction in Indian country when the only parties involved are Indians. Thus, a state cannot prosecute an Indian who

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Over Indian Land: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503, 538 n.160 (1976).

[52] *See, e.g.*, United States v. Brisk, 171 F.3d 514, 520-21 (7th Cir. 1998); United States v. Begay, 42 F.3d 486, 499 (7th Cir. 1998); United States v. Yannott, 42 F.3d 999, 1003-05 (6th Cir. 1994); United States v. Blue, 722 F.2d 383 (8th Cir. 1983). The Second Circuit has held that these federal statutes of general applicability apply only when the crime is "peculiarly federal." United States v. Markiewicz, 978 F.2d 786, 799 (2d Cir. 1992). That circuit is alone in establishing this limitation, and the utility of the limitation is not clear. The federal government is one of limited powers and cannot constitutionally enact a criminal statute unless a federal interest is at stake.

[53] *See, e.g.*, Brisk, 171 F.3d at 520-21; Begay, 42 F.3d at 499.

[54] *See, e.g.*, Begay, 42 F.3d 486.

[55] *See, e.g.*, United States v. Gallaher, 275 F.3d 784 (9th Cir. 2001).

[56] Most of these statutes are codified in title 18, chapter 53, although some are scattered in other sections of title 18 and in title 25. In addition, some regulatory statutes such as the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq*. (2000), and the Archeological Resources Protection Act, 16 U.S.C. § 470aa-mm (2000), also contain criminal penalties.

[57] 18 U.S.C. § 1163 (2000).

[58] 18 U.S.C. § 1165 (2000).

[59] 18 U.S.C. §§ 2261-2262 (2000).

commits a crime in Indian country against the person or property of another Indian.[60]

B. Offenses Committed By an Indian Against the Person or Property of a Non-Indian

As a result of its inherent sovereignty, a tribe will possess criminal jurisdiction over all Indian defendants who commit crimes against the person or property of a non-Indian. The federal government may also prosecute, provided one of four circumstances is satisfied:

1) the crime is one enumerated in the Major Crimes Act;

2) the crime violates a federal statute of general applicability;

3) the crime violates one of the specific federal statutes criminalizing certain conduct on Indian lands or against a tribe; or

4) the crime violates the Indian Country Crimes Act.[61]

The first three of these circumstances were discussed above in section A and that same discussion applies whether the victim is Indian or non-Indian. The one new possibly relevant federal statute is the Indian Country Crimes Act.

Some version of the Indian Country Crimes Act has been around for almost 200 years. The statute is rooted in treaty provisions dealing with interracial law enforcement matters and has not been substantively amended since 1854.[62] Just as with the Major Crimes Act, the Indian Country Crimes Act reaches only conduct occurring in Indian country. That is, the situs of the crime is an element of the crime and a jurisdictional prerequisite.

Also akin to the Major Crimes Act, the racial/political identity of the defendant is an element of the crime.[63] But whereas the Major Crimes Act applies when the defendant is an Indian, the Indian Country Crimes Act requires that the crime be interracial – that is, the defendant is Indian and the victim is non-Indian or vice versa. The interracial requirement is not explicitly stated on the face of the statute, but rather is a result of a combination of the language of the statute and a judicial gloss created by the U.S. Supreme Court.

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[60] This is subject to the caveat that a state may acquire criminal jurisdiction if the federal government has granted such jurisdiction to the state. These special grants of jurisdiction are discussed in Part IIIC.

[61] 18 U.S.C. § 1152 (2000). This statute has no official title and is sometimes called the General Crimes Act, the Interracial Crime Provisions, the Federal Enclave Act or the Indian Country Crimes Act.

[62] For information about the history of the statute, see Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 958-62 (1975).

[63] *See, e.g.*, *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001); *but see United States v. Hester*, 719 F.2d 1041 (9th Cir. 1983) (holding that government must plead and prove victim was Indian and crime happened in Indian country, but that government did not have to allege and prove "the non-applicability" of the Indian-on-Indian exception by establishing that defendant was non-Indian).

To explain how the interracial requirement evolved, one must first examine the statute itself. The statute consists of two paragraphs. In the first paragraph, Congress declared that

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.[64]

The "general laws" referred to are the criminal statutes enacted by Congress to govern federal enclaves such as national parks and military installations.[65] Because Congress has not enacted a comprehensive criminal code, the gaps in these "general laws" are filled in by the Assimilative Crimes Act,[66] which borrows from state law when no federal crime has been defined. It is not clear, however, that the Assimilative Crimes Act is one of the "general laws" made applicable to Indian country by the Indian Country Crimes Act.[67] The Supreme Court has assumed without analysis that the Assimilative Crimes Act is incorporated through the Indian Country Crimes Act,[68] but since the Court provided no explanation for this assumption, the issue cannot be regarded as settled.

With or without the Assimilative Crimes Act, the first paragraph of the Indian Country Crimes Act make a broad and sweeping declaration about the reach of federal criminal jurisdiction into Indian country. That broad sweep, however, is greatly limited by the exceptions enumerated in the second paragraph of the statute:

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[69]

It is the first of these three exceptions that starts us along the path to the Indian Country Crimes Act's interracial requirement. The first exception declares that the statute does not reach crimes where both the offender and victim are Indian. That leaves interracial crimes and crimes in which both the offender and victim are non-Indian. In the *McBratney* line of cases, the Supreme Court excepted these latter offenses from the statute,

[64] 18 U.S.C. § 1152.
[65] 18 U.S.C. § 7 (1948, as amended through 2001) provides a more complete definition of these places.
[66] 18 U.S.C. § 13.
[67] *See* FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 290 (1982 ed.).
[68] *Williams v. United States*, 327 U.S. 711 (1946).
[69] 18 U.S.C. § 1152.

declaring that offenses between non-Indians lie with the state's criminal jurisdiction.[70]

The second and third statutory exceptions also limit the scope of the Indian Country Crimes Act, although the second is more important than the third. The second exception deprives the federal government of criminal jurisdiction when the tribe has already punished the offender, which may often occur since tribal dockets move faster than federal dockets. As a result of the third exception, which exempts any case where a treaty guarantees exclusive jurisdiction to the tribe, careful attention must be given to any relevant treaty between the tribe in question and the federal government.

Just as with crimes involving only Indians, the state will have no jurisdiction to prosecute an Indian who commits a crime against the person or property of a non-Indian in Indian country. Again, the legal principle is the same – absent a special grant of jurisdiction, states lack criminal jurisdiction over crimes involving Indians and occurring in Indian country.

C. Offenses Committed by a Non-Indian Against the Person or Property of an Indian

As a result of the U.S. Supreme Court's decision in *Oliphant v. Suquamish Tribe*,[71] tribes have lost criminal jurisdiction over non-Indians. Thus, whenever a non-Indian commits a crime against the person or property of an Indian, criminal jurisdiction rests solely with the federal government. In accordance with the general rule that a state lacks jurisdiction over crimes involving Indians in Indian country (whether the Indian is the defendant or the victim), the state will have no authority to prosecute these crimes.

Even though the federal government is the only one with jurisdiction in these cases, the federal government will still have to establish a statutory basis for its jurisdiction. Because the defendant is a non-Indian in these cases, the Major Crimes Act will not apply. That leaves the Indian Country Crimes Act, federal statutes of general applicability, and those specific federal statutes discussed above in section A such as unauthorized hunting and fishing on tribal lands and embezzling from tribal organizations.

D. Offenses Committed by a Non-Indian Against Another Non-Indian

Tribes lack criminal jurisdiction over offenses committed by non-Indians against the person or property of another non-Indian, again as a result of the U.S. Supreme Court's decision in *Oliphant*. Because the defendant in these cases is a non-Indian and because these crimes are not

[70] *United States v. McBratney*, 104 U.S. 621 (1882); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *Donnelly v. United States*, 228 U.S. 243 (1913).
[71] *Oliphant*, 435 U.S. 191.

interracial, neither the Major Crimes Act nor the Indian Country Crimes Act apply. Thus, if any federal criminal jurisdiction exists, it is only pursuant to a federal statute of general applicability or one of those limited, specific federal statutes discussed above.

The state, however, does possess criminal jurisdiction in these cases. The difference in these cases, as opposed to the three circumstances discussed above, is that no Indian party is a defendant or a victim. In the *McBratney* line of cases referenced above, the Supreme Court declared that since no Indians were involved, the tribe could have no interest in these cases. Although this line of reasoning is extremely questionable – it ignores the fact that a sovereign always has an interest in ensuring the safety of the community – this rule has been consistently followed and the U.S. Supreme Court has indicated that it views *McBratney* as settled precedent.[72]

It should be obvious by now that the rules governing criminal jurisdiction in Indian country present a great deal of difficulty for tribal police officers, especially since they will often be the first responders to a crime that takes place in Indian country. The tribal police will have to sort out what is happening and who has authority at a time when the identity of the victim and the defendant may be unclear. Indeed, it may not even yet be clear to the officers the full nature of the crime committed. The Supreme Court has recognized these difficulties and prescribed special rules and more general authority for tribal police to detain suspects. The next section will take these special rules, as well as the general rules for criminal jurisdiction in Indian country, and explore what they mean for the various types of law enforcement officers who operate in Indian country.

III. Authority of Law Enforcement Officers in Indian Country

A variety of different law enforcement officers operate in Indian country – federal, state, and tribal. For the most part, the authority of those officers is limited to the criminal jurisdiction of the government for whom they work. That jurisdiction was briefly described above. This section will build on that brief explanation by putting it in the context of each particular type of law enforcement officer.

A. Tribal Law Enforcement

Over 170 tribal law enforcement departments operate in Indian country.[73] These departments are organized in a variety of ways,[74] but they all have one thing in common. The officers who work for those

[72] *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 324 n.21 (1978).

[73] BUREAU OF JUSTICE STATISTICS FACT SHEET: TRIBAL LAW ENFORCEMENT 2000 (Jan. 2003) [hereinafter TRIBAL LAW ENFORCEMENT 2000].

[74] These usually revolve around the funding – some are fully funded by the tribe and some are run pursuant to "638" contracts with the federal government. *Id*; *See also* STEWART WAKELING ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS, A REPORT TO THE NAT'L INSTITUTE OF JUSTICE (2001).

departments are stretched thin and must handle a wide variety of crimes and offenders. For example, the Navajo police department covers approximately 22,000 square miles, while the comparably sized department in Reno, Nevada covers only 57.5 miles.[75] Because of the small size of tribal police department, it is rare to have officers who specialize in handling only certain types of crimes, such as robbery or sex offenses.

Domestic violence situations are potentially dangerous to any law enforcement officer, but tribal officers are in an even more difficult situation. They are less likely to have backup readily available should the problem escalate. In addition, determining the identity of the offender and the victim can be very difficult, although the officers may already be in possession of that information. After all, if a tribal officer's authority is restricted to the tribe's criminal jurisdiction, then there are many situations, specifically those involving non-Indians, where the police would have no authority to arrest the offender.

In recognition of this problem, the U.S. Supreme Court has broadened tribal law enforcement authority. Even in *Oliphant* and *Duro*, its decisions most restrictive of tribal criminal jurisdiction, the Court recognized the need for tribal police to be able to detain offenders and turn them over to the proper authorities for prosecution or even to exclude offenders from the reservation.[76] Lower federal courts, as well as state courts, have followed suit and recognized that tribal authorities have the ability to investigate all crimes in Indian country and to detain offenders.[77]

B. Federal Law Enforcement

Two major categories of federal officers operate in Indian country – federal officers who enforce federal law and Bureau of Indian Affairs officers specially delegated to operate in Indian country. The former include Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms and other similar categories of federal agents. The authority of these federal agents is essentially the same as the federal government's criminal jurisdiction. That means these agents operate throughout the entire United States enforcing federal laws of general applicability. Within Indian country, these officers also enforce the Major Crimes Act and the Indian

[75] TRIBAL LAW ENFORCEMENT 2000 *supra* note 73 at 2.
[76] *Duro*, 495 U.S. at 697; *Oliphant*, 435 U.S. 191.
[77] *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (tribal officer had authority to stop, search and detain non-Indian believed to be violating state or federal law on public roads running through the reservation); *Wash. v. Schmuck*, 850 P.2d 1332 (1993) (tribe retained power to stop a driver on the reservation for possible violation of tribal law and determine if driver is an Indian; upon learning speeding driver was non-Indian, tribal officer had authority to detain and turn him over to the Washington State police); *Montana v. Haskins*, 887 P.2d 1189 (1994) (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); *State v. Pamperien*, 967 P.2d 503 (1998) (upholding tribal officer's authority to stop, investigate, arrest and detain non-Indian for on-reservation violations of state speeding law).

Country Crimes Act. These officers are bound by federal laws and procedures governing how they operate.

As is probably obvious, federal agents will rarely be first responders to situations – usually the federal agents are called in by state, local, or tribal law enforcement departments. Federal agents are certainly not likely to respond to calls about violations of protection orders or domestic disturbances on the reservation. Federal agents and U.S. Attorney offices have limited resources and limited funds, and they are not going to be routinely available for calls regarding protection orders, particularly not in light of the new national priorities regarding the war against terrorism. It is possible, however, that these officials may respond to calls from the tribal police department seeking to have an already detained offender arrested on federal charges. That is much more likely to happen, however, if the domestic violence charges are coupled with "more serious"[78] charges of murder or infliction of serious bodily harm.

If the federal agents and federal prosecutors do decide to become involved, Congress has enacted a number of new federal crimes that can be the basis of federal action. In addition to the usual sources of federal law in Indian country (such as the Major Crimes Act and the Indian Country Crimes Act), new federal statutes regarding domestic violence include:

> 1) criminalizing travel across governmental boundaries[79] with the intent to kill, injure, harass, or intimidate a spouse or intimate partner if, in the course of or as a result of such travel, the perpetrator commits or attempts to commit a violent crime against the spouse or intimate partner;[80]
>
> 2) criminalizing the use of force, coercion or fraud to make a spouse or intimate partner cross a governmental boundary if, in the course of that activity, the perpetrator commits or attempts to commit a violent crime against the spouse or intimate partner;[81]
>
> 3) criminalizing travel across a governmental boundary to violate a protection order;[82]
>
> 4) criminalizing travel across a governmental boundary with the intent to kill, injure, harass or intimidate another person, and in the course of, or as a result of, such travel place that person in reasonable fear of the death of, or serious bodily injury to, that

[78] I put "more serious" in quotation marks because I do not mean to suggest that domestic violence and violations of protection orders are truly less serious offenses, but rather to indicate that many federal agents are likely to view these crimes as within the realm of local state or tribal jurisdiction, rather than federal matters. Given a limited budget and limited agents, a federal law enforcement agent is likely to prioritize murder and terrorism investigations.

[79] The federal statutes explicitly include entering or leaving Indian country as crossing a governmental boundary.

[80] 18 U.S.C. § 2261(a)(1).

[81] 18 U.S.C. § 2261(a)(2).

[82] 18 U.S.C. § 2262(a)(1); *See also* § 2262(a)(2), which criminalizes forcing someone to cross a governmental boundary if, in the process, the perpetrator violates a protection order.

person, a member of the immediate family, or the spouse or intimate partner of that person;[83]

5) prohibiting certain domestic abusers from possessing firearms or ammunition.[84]

It should be noted that the full faith and credit provisions of VAWA are directed at state and tribal governments, not at the federal government. Technically, then, the federal government is not bound to give full faith and credit to protection orders. It is unlikely Congress intended federal agents to ignore protection orders. More likely, the omission is because, generally speaking, federal courts are not in the business of issuing or enforcing protection orders. Accordingly, federal officers are not likely to be trained in how to handle protection orders. They should, however, be aware of the federal domestic violence laws, as those are within their authority to enforce.

The second category of federal officers who operate in Indian country are BIA officers. These are federal officers, but their function is to enforce law and order in Indian country. BIA officers enforce both federal and tribal laws, so they would be able to arrest for violations of both federal and tribal laws, although they would need to turn the offender over to the proper prosecutorial authority for the trial itself. In a sense, then, the authority of BIA officers is very similar to the authority of tribal law enforcement officers, in that both can detain any offender in Indian country. The primary differences between BIA and other officers (at least for purposes of this paper) lie in three areas.

First, BIA officers, unlike other federal officers, are likely to be first responders to requests for assistance in Indian country. That means BIA officers need the same training as tribal law enforcement regarding handling domestic disturbance calls and particularly in handling violations of protection orders. And since BIA officers are also in a sense tribal officers, they should consider themselves bound by VAWA's full faith and credit provisions.

Second, in carrying out their duties, BIA officers are likely to be bound by both federal and tribal laws and procedures. That means they need to be aware of all relevant provisions, including those imposed on federal officers by the U.S. Constitution. Tribal police are not bound by the U.S. Constitution, but rather are bound by the restrictions in the Indian Civil Rights Act, any tribal constitution, and any relevant tribal laws.

Finally, an additional set of charges may be available to BIA officers in volatile situations – assaulting a BIA officer is not just assault on a tribal law enforcement officer, it is also assault on a federal officer. Federal officers, like tribal officers, should stay flexible in handling situations and should take advantage of all available methods to keep the

[83] 18 U.S.C. § 2261A; *See also* § 2261A(2).
[84] 18 U.S.C. § 922(g)(8),(9) (2000).

peace and diffuse volatile situations.[85] That includes using the full array of possible charges.

C. State Law Enforcement

State law enforcement officers also potentially have authority to operate in Indian country, although their authority is much more limited. Three major questions must be asked to determine the extent of state authority:

1) Has the state been the recipient of any special grant of jurisdiction?

2) Did the crime occur in Indian country or outside Indian country?

3) Are both the victim and offender non-Indian?

As discussed in Part II, the general rule is that a state lacks criminal jurisdiction in Indian country unless the only parties to the crime are non-Indian. If the victim and defendant are both non-Indian, however, the state acquires exclusive jurisdiction (unless the defendant violated a federal statute of general applicability). That general rule is shunted aside if the state is the recipient of a special grant of jurisdiction, so in examining state law enforcement authority, the first question to answer is whether any such grant exists.

Special grants of jurisdiction can be made by Congress, and they come in two varieties. The first, and broader, grant came in a federal statute generally known as Public Law 280.[86] Public Law 280 was part of a brief, now abandoned, Indian policy pursued by Congress in the 1950's. In the statute, Congress gave several states the same criminal jurisdiction in Indian country that they possess outside Indian country.[87] The statute also created a mechanism whereby other states could also acquire such jurisdiction. The second variety of special grants of jurisdiction are often tied to specific treaties or settlement agreements. These can apply only to one tribe, one state, and/or one tribe within a state.[88] In most of these more specific grants, the state also acquired criminal jurisdiction within Indian country to the same extent as outside Indian country.

For purposes of this paper, that means if a state is a "special jurisdiction" state, that state's law enforcement officers will have the same law enforcement authority throughout the state, regardless of tribal boundaries. Tribes may still operate police departments, but those officers will possess concurrent, rather than exclusive, authority within Indian country. In other words, if a state is a special jurisdiction state, the identities of the victim and offender are irrelevant – state officers possess authority to investigate all crimes and to cross tribal borders at will.

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[85] *See* Section IV Tribal Police and the VAWA's Full Faith and Credit Requirements: Developing Workable Procedures.

[86] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360).

[87] *Id*.

[88] *See, e.g.*, The Kansas Act, 18 U.S.C. § 3253 (2003).

Most of the states in this country, however, are not special jurisdiction states. That means state officers must be aware of the boundaries of Indian country, as they possess no authority within Indian country except over non-Indian on non-Indian offenses. This, of course, makes life very difficult for both tribal and state police as they try to keep the peace and prevent crime. Non-Indians do live in Indian country and they do obtain protection orders. Some state and tribal police departments use cross-deputization or mutual aid agreements to help sort out the difficult rules. This can particularly ease the burden in densely populated areas where the police are less likely to know immediately who is an Indian and who is a non-Indian.

In light of the U.S. Supreme Court's decision in *Nevada v. Hicks*,[89] however, the rules regarding state law enforcement authority change if the crime occurs outside Indian country, but the offender then travels into Indian country. *Hicks* was actually a section 1983 case, but it concerned the scope of state law enforcement authority to execute a state warrant on tribal lands. State game wardens suspected Hicks of violating state game laws off the reservation and obtained a search warrant for his house, which was located on tribal land. The officers also used the state warrant to obtain a tribal search warrant, and the search was conducted by both state and tribal officers. No charges were brought against Hicks, but he brought a civil rights action contesting the authority of the state officers. The U.S. Supreme Court ruled that the interests of state law enforcement in preventing off reservation crime were sufficient to allow the state officers to intrude onto tribal land and conduct the search. Thus, after *Hicks*, state officers may have authority to enter a reservation, investigate off-reservation crime, and arrest the offender. While this is a tremendous intrusion on tribal sovereignty, it does expand the authority of state law enforcement to pursue and arrest those who violate protection orders.

IV. Tribal Police and the VAWA's Full Faith and Credit Requirements: Developing Workable Procedures

It should be clear by now that tribal, state, and federal officers all have at least some authority to operate in Indian country and thus all (or at least state, tribal, and BIA officers) must be trained in how to recognize and enforce protection orders, including those issued by other jurisdictions. That will entail creating new regulations and new training procedures. This section will focus on tribal governments and tribal police departments and the decisions they must make in establishing regulations and procedures for enforcement of protection orders.

These rules and procedures can take the form of tribal statutes and/or police department regulations. Each individual tribe must make its own decision about the best approach. Regardless of the specific approach taken, however, some common questions and cautionary statements do

[89] 121 S. Ct. 2304 (2001).

exist. Tribes must keep two limitations in mind no matter what approach they choose.

First, the tribe cannot create separate procedures for enforcement of its own protection orders and enforcement of foreign protection orders. This requirement derives from the language of the federal statute itself, which requires that the enforcing state or tribe enforce a foreign protection order "as if it were the order of the enforcing State or tribe."[90] Thus, all governments must create only one set of procedures for enforcement of protection orders, and those procedures must be flexible enough to encompass both its own protection orders and those of other jurisdictions.

The second cautionary statement derives from the combination of limitations on tribal criminal jurisdiction and the parameters of tribal civil jurisdiction. As discussed above, tribes lack criminal jurisdiction over non-Indians, although tribal police possess the authority to detain offenders and turn them over to either the state or federal government, whichever one possesses jurisdiction to prosecute. Tribal civil jurisdiction, however, is broader than tribal criminal jurisdiction, as tribes do possess civil jurisdiction over non-Indians in some circumstances.[91] Thus, some tribes may choose to address violations of protection orders as civil, rather than criminal matters. Taking either a civil approach, or a combined civil and criminal approach, maximizes tribes' ability to deal with non-Indians who violate protection orders.[92] While tribal law enforcement officers are used to handling crimes and arresting offenders, they should not forget that law enforcement officers can also act to enforce the civil laws of the tribe.[93] Tribal police and tribal legislative bodies will need to work together to structure the best approach for the culture and resources of each tribe.

In structuring the best approach, some matters are more likely to be handled by tribal statute or ordinance. These fall into two general categories. The first is the authority given by the tribal government to tribal law enforcement. These include questions such as

1) What authority is given to officers to enforce civil regulations?

2) Can officers arrest for a civil regulation? Issue a citation only?

3) Can officers make a warrantless arrest for a civil regulation or for a crime? Under what circumstances?

Once these questions are answered, they provide the basic framework for the second category of statutes – ones specific to protection orders. Within this context, the tribe will need to ask question such as

1) Is the violation of a protection order a crime or a civil offense or both?

2) Does the tribe want to use a statute (as opposed to a police department regulation) to provide the basic framework for handling enforcement of foreign protection orders?

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[90] 18 U.S.C. § 2265(a).

[91] I have discussed the differences between tribal civil and criminal jurisdiction elsewhere, as well as the implications those differences have for compliance with VAWA's full faith and credit mandates. *See*Tatum, *supra* note 4.

[92] *See id*; *see also* Tatum, *supra* note 4.

[93] *Cf. New York v. Burger*, 482 U.S. 691 (1987).

Tribes may want to consider overhauling their general laws regarding authority of tribal police as part of creating specific procedures for handling enforcement of protection orders.

For instance, in Anglo-American common law, officers were generally not allowed to make a warrantless arrest for a misdemeanor unless the misdemeanor occurred in the officer's presence.[94] Most states make violation of protection order a misdemeanor.[95] This can present problems for law enforcement officers responding to calls that a protection order has been violated. If they do not witness the violation, they may have to first obtain a warrant to arrest the offender, which can lead to dangerous delays in enforcing the protection order. If tribes follow the same general rules, they would also be in the same difficult position, not to mention the complications in dealing with non-Indians who violate protection orders. Given the lack of tribal criminal jurisdiction over non-Indians, if a tribe has no civil penalties on the books for violating a protection order, the tribe would be limited to excluding the offender from the tribe's territory (virtually impossible if the offender owns land on the reservation) or turning the offender over to the state or federal government for prosecution (depending on the identity of the victim and the conduct of the offender). Tribes may want to ensure they have given their officers sufficiently flexible authority to deal with all categories of persons who violate protection orders.

From 2000-2002, I had the privilege of serving on the Michigan Working Group on Full Faith and Credit. The Working Group consisted of representatives from state, tribal, and federal governments who dealt with some aspect of protection orders and enforcement of protection orders.[96] As co-chair of the tribal jurisdiction subcommittee, I was involved in drafting a model tribal code for enforcement of foreign protection orders. In drafting the model code, the committee had to make decisions about what should be in the statute and what should be left to the tribal police department to handle as part of its regulations. While the committee designed the model code for the use of tribes in Michigan, the end result can be easily adapted to use by many tribes. In addition, the decision making process will be similar, even if different decisions are reached.

The first decision the committee had to make was how much detail to include in the model code. We opted to establish a general framework for officers to use in approaching enforcement of foreign protection orders, for two primary reasons. First, many written tribal codes are still in their infancy. Although tribal governments have exists for hundreds of years, the "modern" era of tribal governments is only about forty years old. This results in "gaps" in the tribal code, where laws have not yet been codified. Second, many tribes operate using unwritten laws and customary approaches to handling problems. While neither the written nor the unwritten format is "better," the written format has virtue of being

[94] LAFAVE, ET AL., CRIMINAL PROCEDURE § 3.5(a), at 179-80 (3d ed. 2000).
[95] *See* LEHRMAN, *supra* note 13.
[96] *See* Tatum, *supra* note 4, at 198-227.

more available to outsiders. Thus, the committee decided that even if the tribe did not have a written code for enforcement of its own protection orders, it might be beneficial to have a written code for enforcement of foreign protection orders. In addition, despite the federal mandate to "treat foreign protection orders as you would your own," as a practical matter, some differences must be permitted. For example, if an officer is required to verify the existence of a protection order, she cannot verify a Navajo protection order by checking the state of Michigan's registry.

With respect to the section on tribal law enforcement, the committee decided to structure the model code in a way that was designed to indicate to officers the need to use the same general procedures for all protection orders, while at the same time providing some direction in the areas of difference. The section of the model code dealing with tribal law enforcement has six subsections. The first one is clear and straightforward, and is designed to be a general statement of principle and compliance with the federal law:

> 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.[97]

The next four sections were designed to walk the officers through the specifics of dealing with an unfamiliar protection order. They direct officers that the officers can rely on copies of foreign protection orders;[98] that the officers should enforce a foreign protection order if it appears authentic;[99] that if the person claiming to be covered by a protection order does not have a copy of the order, the officers shall make reasonable efforts to verify the existence and contents of the order;[100] and that if the officer cannot verify the order, the officer should take action to maintain the

[97] *Id*. at 202.

[98] *Id*. ("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.").

[99] *Id*. ("If a copy of a 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 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 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.").

[100] *Id*. at 202-203 ("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 order 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.").

peace, which may, of course, include enforcing the protection order if the officer believes the order does indeed exist.[101]

The final subpart of the model code addresses mutual protection orders. A mutual order is one that directs both parties to stay away from each other (and perhaps places other mutual restrictions on them). Some courts issue mutual orders as a matter of course.[102] Congress made special provisions for mutual protection orders in the VAWA's full faith and credit sections. These orders are not automatically entitled to full faith and credit as applied against the petitioner (they are entitled to full faith and credit against the respondent). Mutual orders are entitled to full faith and credit against the petitioner only if the respondent filed a pleading requesting a protection order and the judge made findings that both parties were entitled to a protection order.[103]

In addition to the provisions regarding mutual protection orders, VAWA also provides that to be a "valid" protection order entitled to full faith and credit, the court issuing the order must have possessed jurisdiction and the respondent must have received due process. The subcommittee decided that law enforcement officers did not need to sort out issues regarding jurisdiction and due process. Those issues are better suited to be raised as affirmative defenses before a court, which has the time and the training to conduct the necessary investigation and make determinations about them. The subcommittee did decide, however, that law enforcement officers must address mutual protection orders. Thus, the model code directs officers to enforce a mutual protection order against the respondent, but not to enforce it against the petitioner unless the respondent filed a pleading seeking a protection order and the issuing court made specific findings that the respondent was entitled to a protection order.[104] This requirement means that officers must be trained in how to recognize and interpret mutual protection orders.

The model code did not go into more detail about how the officers should handle protection order situations, as the subcommittee decided that the police department was better situated to issue guidelines about how the officer should exercise his discretion. Some of the questions that need to be addressed include a list of the options available to the officer for handling the situation and how to choose between those options. For example, options can include arresting the offender, issuing a citation, using some other mechanism to bring the offender before the tribal court, escorting the

[101] *Id*. at 203 ("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.").

[102] For a discussion of mutual protection orders and their problems, *see* Hanft, *supra* note 20; Klein, *supra* note 30; Topliffe, *supra* note 30.

[103] 18 U.S.C. § 2265(c).

[104] Tatum, *supra* note 4 ("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.").

offender off the reservation, or detaining the offender and turning them over to another jurisdiction for prosecution. If the officer decides to detain the offender, the police department will need regulations for handling the detention and the turn over. This could include bringing the offender to the tribal jail, taking him directly to the other department, or other methods depending on manpower and geography.

Regardless of tribal law regarding protection orders, it is imperative that officers be trained to stay flexible when dealing with these situations. Officers should remember they may have other options. For example, one or more tribal laws may have been violated in addition to any protection order violation, such as trespass, assault, public drunkenness, and/or breach of the peace. There may also be an independent violation of federal law, such as the Major Crimes Act, the Indian Country Crimes Act, and the new federal domestic violence laws. A tribal police officer can detain a person for violating federal law until federal authorities arrive to take custody of the offender.

V. One Last Issue: Immunity

The law enforcement community is inextricably bound up in the success or failure of the VAWA's full faith and credit requirements.[105] Police are often the first called when there are allegations that a protection order has been violated. Since the passage of the VAWA, police have been concerned about a whole new wave of liability stemming from enforcement of foreign protection orders.[106] 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.[107]

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 unused to liability for failure to act, especially after the U.S. Supreme Court's decision in *DeShaney v. Winnebago County*,[108] which declared that state officials cannot be held liable for failure to act unless they are under a legal duty to take action.[109] The difference under the VAWA, however, is that jurisdictions are statutorily bound to enforce foreign protection orders as they would

[105] Klein, *supra* note 20.

[106] *See, e.g.*, Klein, *supra* note 20. 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.

[107] Woo, *supra* note 5, at 409.

[108] 489 U.S. 189 (1989).

[109] *Id*. at 199-202.

their own. This may very well be the type of legal duty that gives rise to liability for failure to act. That is, 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 the statutory duty imposed under federal law.

Accordingly, law enforcement officers perceive themselves to be stuck 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 explicit statements of immunity for their actions with respect to foreign protection orders.[110] 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.[111]

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? Many attorneys working in the field argue strongly that any immunity provision should protect only those who in good faith take action to enforce a foreign protection order.[112] 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 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

[110] Many states also provide statutory immunity for actions police take pursuant to domestic violence statutes. *See* Klein, *supra* note 20, at 264-65.

[111] For example, the model tribal code provided:

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 of its officials, employees, and agents retain all available immunity in all settings, unless specifically and explicitly waived in writing.

[112] Letter from Mary Malefyt, senior attorney for the Full Faith and Credit Project to Gail Kreiger, Michigan Coalition Against Domestic and Sexual Violence (March 6, 2001) (on file with author).

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 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 these 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. 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.[113] 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.

VI. Conclusion

[113] For a start on that analysis, see *Penn. v. United States*, 335 F.3d 786 (8th Cir. 2003); *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *United States v. Bettelyoun*, 16 F.3d 850 (8th Cir. 1994); *See also* The Indian Law Enforcement Act, 25 U.S.C. § 2804(f) (2000), and The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (2000).

The full faith and credit provisions of the VAWA have great potential to close some of the gaps in cross-jurisdictional enforcement of protection orders. Unfortunately, when it enacted the VAWA, Congress did not focus on the difference between tribal and state jurisdictions, while at the same time leaving the details of enforcement up to each tribe and each state. As a result, tribal governments, and particularly tribal law enforcement officials, must make many decisions about how to establish procedures that can be applied both to protection orders issued by the tribe and protection orders issued by other jurisdictions.

These decisions are complicated by the limitations both Congress and the U.S. Supreme Court have placed on tribal criminal jurisdiction. This article has posed some suggestions about how to resolve some of the issues. Other possibilities that tribes might wish to consider include cross-deputization or other similar types of mutual aid agreements. These inter-governmental compacts help patch together methods of law enforcement that stay within the confines of the law, but still cope with practical realities faced by law enforcement officers in Indian country.