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INTRODUCTION

Jill, a member of the Penobscot Nation in Maine, obtained an Order for Protection (Order) from the Penobscot Tribal Court against her abusive ex-husband Mark.[1] Mark is not a member of the Penobscot Nation, but the two were married and lived on the Penobscot Nation Reservation for several years before Jill was finally able to escape the abusive relationship and obtain an Order. Both Mark and Jill were living on the Penobscot Nation Reservation when Jill obtained the Order. To obtain the Order, Jill had to file an application with the Tribal Court, and then Mark, Jill, the Penobscot Nation Tribal Police, and an advocate for victims of domestic violence were each served with written notice of the time, date, and place of the hearing.[2] A tribal law

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1. These facts are entirely fictitious and are meant only to illustrate a common scenario among American Indian domestic violence victims and to highlight issues they may face. The Order of Protection procedure was established in the first six chapters of the Penobscot Nation Domestic Violence Code. Penobscot Nation Domestic Violence Code, ch. 1–6 (2019), https://www.narf.org/nill/codes/penobscot/ch14.PDF [perma.cc/3EKM-Q5X3].

2. *See id.* § 2-2(3).

enforcement officer served Mark with his written notice one week before the hearing was scheduled.[3] The hearing was conducted in an "informal manner" and the judge made factual findings.[4] Jill had the burden of proof and both Jill and Mark subpoenaed witnesses to testify on their behalf.[5] Mark had the right to be represented by counsel, but instead chose to represent himself.[6] Mark had opportunity to be heard in the hearing and was able to testify on his own behalf.[7] Although Mark denied the allegations, the Tribal Court found in favor of Jill and granted the Order, valid for one year.[8] At the end of the year, Jill may request a renewal for additional periods of time.[9] Mark received the Order at the hearing. The Order included a No Contact Provision, which prohibited Mark from contacting Jill directly or indirectly, including phone calls, emails, and text messages.[10] The Order also excluded Mark from Jill's residence and enjoined him from being in close proximity to Jill or her place of work.[11]

A few days later, Jill visited a friend in Orono, Maine. While at her friend's home, Jill looked out the window and saw Mark's car parked outside. Fearful for her safety, Jill immediately called the local police who came to the friend's home and arrested Mark after looking at the Order. Mark was subsequently charged with violating the Order. Before the enactment of the Violence Against Women Act (VAWA), the police likely would not have made an arrest at all, because the protection order issued by the tribal court would not have been accorded full faith and credit.[12]

Following Mark's arrest, a state court then had to make a determination as to the validity of the protection order issued by the Penobscot Tribal Court. Despite the fact that Mark received notice and participated in the hearing, after examining the protection order, the state court determined that Mark was not

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3. *See id.*
4. *See id.* § 2-2(4).
5. *See id.* § 2-2(5).
6. *See id.* § 2-2(6).
7. *See id.* §§ 2-2(8)–(9).
8. *See id.* §§ 2-2(9)–(10).
9. *See id.* § 2-2(10).
10. *See id.* § 2-4(3).
11. *See id.* § 2-4(5).
12. Violence Against Women Act, 18 U.S.C. § 2265 (2013).

given due process by the Penobscot Tribal Court and released Mark, deeming the Order unenforceable in the state jurisdiction. The state court's decision appeared to rest solely on its belief that tribal courts generally do not give due process to any defendant and the state court's unfamiliarity with tribal court orders. The judge stated that although the Penobscot Trial Court had jurisdiction over Mark, the Tribal Court did not meet the requirements of VAWA because Mark was not truly given an opportunity to be heard and was denied due process.[13] The judge went on to say that tribal courts' reliance on "mystical, unwritten law . . . 'defies common understanding by non-Indians.'"[14] Under VAWA, the tribal order should have been granted full faith and credit;[15] however, the state court judge clearly relied on misconceptions and stereotypes regarding tribal courts and had never before seen a protection order from this or any other tribal court. Jill is now fearful that if she leaves the Penobscot Nation Reservation, Mark will again follow her and potentially attack her, and state law enforcement will do nothing to protect her.

Jill, like many women throughout the country, faced, and will likely continue to face, terrifying and dangerous situations relating to intimate partner violence. More than one third of women experience rape, physical violence, or stalking by an intimate partner in their lifetime.[16] However, this statistic rises to nearly half of American Indian and Alaska Native women, making the risk of domestic violence even greater for Native women.[17] Eighty-eight percent of domestic violence perpetrators on tribal grounds are non-natives.[18]

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13. Under the 2013 Reauthorization of VAWA, tribal courts have "full civil jurisdiction" to issue protection orders for instances of domestic violence on tribal land. *Id.* § 2265(e).

14. James T. Meggesto, *At a Crossroads: Promises and Puzzles for Tribal-State Relations After VAWA 2013*, EMERGING ISSUES IN TRIBAL-STATE RELATIONS 106 (Thomson Reuters, Aspatore, Apr. 2014). In this article, Meggesto describes the belief of state judges generally as similar to the quote presented here. *Id.*

15. *See* 18 U.S.C. § 2265.

16. SHARON G. SMITH ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010–2012 STATE REPORT 2 (Apr. 2017).

17. *Id.* at 3.

18. Mary K. Mullen, Comment, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of*

Civil protection orders offer protection and security for many victims of domestic violence. Protection orders can award custody of children or child support to victims or order the abuser to stay away from particular locations, such as the victim's place of work or the children's school.[19] Violators of protection orders can be held in civil contempt or be charged criminally with a misdemeanor or felony, depending on the violation.[20] This Comment discusses past issues with state courts enforcing protection orders issued by tribal courts including tribal jurisdictional issues and states not giving tribal protection orders full faith and credit. VAWA and its subsequent reauthorizations attempted to rectify these issues by clearly stating the full faith and credit requirement regarding tribal protection orders and explicitly granting tribal courts civil and criminal jurisdiction over non-Indians under particular circumstances. However, issues enforcing tribal protection orders remain pervasive. Although some state courts have improved their relations with tribal courts and better prepare judges to enforce protection orders, others still refuse to enforce protection orders because of a misunderstanding regarding the procedure used in tribal courts.

In Part I, this Comment examines the potential issues regarding protection orders issued by tribal courts, including concerns about Constitutional Due Process and jurisdictional issues. In Part II, this Comment focuses on Congress's most recent reauthorization of VAWA in 2013, which explicitly granted tribal courts "full civil jurisdiction" to issue domestic violence protection orders when domestic violence occurs on tribal lands. In Part III, this Comment examines states' current approaches to enforcing protection orders issued by tribal courts and discusses which of these policies are required under VAWA and which are most effective in accomplishing Congress's goals in enacting VAWA. Finally, in Part IV, this Comment concludes that VAWA requires state courts to enforce all valid protection orders issued by tribal courts regardless of conflicting state statutes, and that states should enforce an order as if it were issued by that state. In

Regaining Cultural Independence, 61 ST. LOUIS U. L. J. 811, 814 (2017).

19. NANCY MCKENNA, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 4:1 (2018), Westlaw (database updated August 2018).

20. *Id.*

order to resolve still existing issues, states should improve relations between tribal and state courts by encouraging relationships and more frequent interactions between the two. Further, tribal protection orders should be given a presumption of validity by both police officers and state courts. Lastly, state courts and tribal courts should participate in Project Passport, which creates a uniform first page for all protection orders so that it can be easily recognized by law enforcement officers in any jurisdiction.[21]

I. ISSUES SURROUNDING TRIBAL COURTS INCLUDING JURISDICTIONAL CHALLENGES, DUE PROCESS, AND FEDERAL RECOGNITION

A. The Evolution of Tribal Jurisdiction

The United States government considers Native American tribes to be "domestic dependent nations."[22] Thus, while the tribes are generally treated as their own sovereigns, the federal government can still exercise some authority over them, particularly with regard to criminal jurisdiction.[23] This concurrent criminal jurisdiction has created various issues over the past century between the federal government and tribes.[24]

Although tribal nations were self-governed for centuries, in the late nineteenth century, the federal government began taking away their power and jurisdiction.[25] Prior to the colonization of America, tribes "lived amongst one another in organized societies with their own unique forms of government."[26] Although each tribe had a unique governmental structure, a notable commonality

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21. *See infra* notes 155–65 and accompanying text.

22. Christian M. Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L. J. 831, 833–34 (1997); Dan St. John, Comment, *Recognizing Tribal Judgments in Federal Courts Through the Lens of Comity*, 89 DENV. U. L. REV. 523, 526 (2012). Each of these selections references *Cherokee Nation v. Georgia*, which describes "domestic independent nations" as those who "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases . . . [thus, the] relation to the United States resembles that of a ward to his guardian." 30 U.S. 1, 17 (1831).

23. *See* Meggesto, *supra* note 14, at 103; St. John, *supra* note 22, at 526.

24. Meggesto, *supra* note 14, at 102; *see* St. John, *supra* note 22, at 526.

25. *See* Mullen, *supra* note 18, at 816.

26. *Id.* at 814.

among tribes was the presence of "tribal councils," which sought to reconcile disputes by emphasizing rehabilitation or compensation as a means to redress the rights of victims.[27] This focus was emphasized by tribes in the hopes of maintaining peace throughout the tribe.[28] Over time, however, Europeans began taking control of native land, sometimes through peaceful treaties, but with increasing frequency through force.[29] In doing so, Europeans attempted to assimilate natives into Anglo-American culture, particularly in their legal systems.[30] These Europeans particularly saw the lack of retribution as a deficiency in the tribal legal systems and sought to correct it.[31]

Congress passed the Indian Major Crimes Act in 1885, which granted the federal government concurrent jurisdiction over "major crimes" that were committed by "Indians" in "Indian country."[32] Federal law defines Indian country as: "(1) all land within the limits of a reservation, whether owned in fee or in trust; (2) 'dependent Indian communities'; and (3) Indian allotments."[33] Although the term Indian country was originally used in a criminal statute, it also now applies to civil jurisdiction.[34] The federal government then tried to create court systems within tribes that replicated Anglo-American tradition in an attempt to legitimize them; however, this instead led to resentment by tribal members.[35]

Tribal governments regained some control over criminal and civil proceedings with the passage of the 1934 Indian Reorganization Act.[36] This allowed tribes to establish and develop their own laws and tribal court systems.[37] The tribal courts

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27. *Id.* at 814–15.
28. *See id.*
29. *See id.* at 815–16.
30. *See id.*
31. *See id.*
32. Indian Major Crimes Act, 18 U.S.C. § 1153 (2006); Meggesto, *supra* note 14, at 102.
33. Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1, 5 (2005) (quoting 18 USC § 1151 (2000)).
34. *Id.* at 5.
35. *See* Meggesto, *supra* note 14, at 102.
36. Mullen, *supra* note 18, at 816.
37. *Id.*

created after the passage of this Act reflected the traditional court-like system that tribes historically had in place, with a judge or small panel of judges who were focused on rehabilitation for the victim and promoting harmony in tribal lands.[38] These tribal courts are nearly identical to many of the tribal courts in place today.[39]

The federal government, however, again attempted to exercise further control over tribal courts in 1968 through the passage of the Indian Civil Rights Act (ICRA).[40] Several members of Congress became increasingly alarmed by the perceived lack of civil rights given to individuals by tribal courts.[41] The ICRA restricted sentences that tribal courts could give in criminal cases to no more than one year.[42] It also prevented the courts from acting as they traditionally had by requiring them to ensure certain rights to defendants, such as those guaranteed to American citizens by the Bill of Rights in the United States Constitution.[43] However, Congress intentionally did not include the First Amendment Establishment Clause and placed limitations "on a criminal defendant's right to counsel."[44] Some tribes opposed the ICRA due to its forceful integration of Anglo-American values in tribal tradition.[45] Congress, however, hoped this Act would strike a balance: By not requiring all of the traditional civil rights granted by the Constitution, the tribal courts had leeway to act as they traditionally had, but the rights that were included helped to prevent abuse in the tribal courts.[46] Since then, the United States Supreme Court has held that tribal courts alone have the power to vindicate individual civil rights claims.[47]

Congress amended the ICRA in 2010 through the Tribal Law and Order Act to grant tribal courts more control over criminals in

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38. *See id.*
39. *Id.* at 817.
40. *Id.*; *see* Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (2012).
41. Freitag, *supra* note 22, at 836–37.
42. Mullen, *supra* note 18, at 817; Meggesto, *supra* note 14, at 104.
43. Mullen, *supra* note 18, at 817.
44. Freitag, *supra* note 22, at 837–38.
45. *Id.* at 838.
46. *Id.*
47. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

"Indian country."[48] This amendment increased the maximum amount of sentencing time that tribal courts could give from one year to three years.[49] However, the Tribal Law and Order Act did not give tribal courts significantly more power, and they still could not prosecute many major crimes.[50] The 2013 Reauthorization of the Violence Against Women Act (VAWA 2013) again amended the ICRA by giving tribal courts special domestic violence jurisdiction over non-Indians and complete civil jurisdiction to issue domestic violence protection orders against non-Indians in certain circumstances.[51] Extending civil jurisdiction was particularly important because tribal courts generally do not have civil jurisdiction over nonmembers.[52]

In an effort to balance traditional tribal conflict resolution and the requirements created by federal law, some tribes have two options for resolving conflicts: a Peacemaking path and an adversarial court system.[53] The Peacemaking path uses a trained facilitator who works with the parties in navigating "the problem and finding an acceptable solution."[54] This method does not focus on a party winning or one side being deemed the "bad guy," but instead looks to resolve the issue at its core and facilitate reconciliation between the parties.[55] On the other hand, the adversarial system used in tribal courts is similar to those employed by federal and state governments, in large part due to its regulation by the federal government.[56]

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48. Mullen, *supra* note 18, at 819.

49. Id.

50. Id.

51. Meggesto, *supra* note 14, at 109; Washington State Supreme Court Gender & Justice Commission, *Domestic Violence Bench Guide for Judicial Officers* 13-8 (June 2016), www.courts.wa.gov/content/manuals/domViol/Complete%20Manual%202015.pdf [https://perma.cc/5KBA-6M96] [hereinafter *Bench Guide*]. To exercise special domestic violence jurisdiction, the tribes must meet all criteria of VAWA as described in Part II of this Comment. *See infra* notes 77–105 and accompanying text.

52. JANE M. SMITH, CONG. RESEARCH SERV., 7-7202, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 12 (2013).

53. Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 34 YALE L. & POL'Y REV. 351, 361 (2016).

54. Id.

55. *Id.* at 361–62.

56. *See id.* at 361.

B. Due Process and Other Constitutional Concerns

Legislators and scholars have expressed concern over "the structural and procedural adequacy of certain Native American courts" regarding the due process given to defendants.[57] Tribal courts have been required to give minimum due process in all proceedings since the enactment of the ICRA in 1968 and generally do so.[58] However, tribal courts are not required to use the same process and procedure as state courts.[59] Accordingly, due process may be applied differently by tribes around the country and many of these tribes have their own tribe-specific civil rights code in addition to the ICRA.[60] Some tribal courts recognized due process before the implementation of the ICRA, focusing on fundamental fairness, including notice and an opportunity to be heard.[61] Tribal courts also sometimes look to federal applications of due process as advisory to their own application of due process, while other tribal courts feel forced to look to federal standards as the only way to ensure they comply with these imposed "Anglo-American concepts."[62] Regardless of tribal views on the imposition of due process by the federal government, there appears to be unanimous agreement by tribal courts that due process should be applied with their cultural identity in mind.[63]

Although tribal courts are the "primary, and in most cases sole, arbiter of individual Indian civil rights claims"[64] in the context of protection orders, states may have to evaluate the civil rights protected in tribal hearings before enforcing the order.[65] State courts must ensure that the person who the protection order is against was given reasonable notice and opportunity to be

57. David S. Clark, *State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization*, 23 OKLA. CITY U. L. REV. 353, 370 (1998).
58. *Id.* at 371.
59. St. John, *supra* note 22, at 544.
60. Freitag, *supra* note 22, at 845–46, 850, 855.
61. *Id.* at 846–50, 852, 857.
62. *Id.* at 850–53, 857.
63. *Id.* at 866.
64. *Id.* at 858.
65. *See* Clark, *supra* note 57, at 371.

heard.[66] When state courts examine tribal orders, this determination is made on a case-by-case basis, looking at the specific facts of a hearing or trial in tribal court.[67]

C. Issues with Federal Recognition of Tribes and Tribal Courts

Congress has the power to grant federal recognition to tribes through the Commerce Clause of the United States Constitution;[68] however, Congress has also delegated this power to the Office of Federal Acknowledgement within the Bureau of Indian Affairs, a part of the Department of the Interior.[69] With an increase in requests for federal recognition, the federal government enacted a set of policies and procedures for tribes to gain recognition in 1978.[70] There are currently over 550 federally-recognized tribes, which include over 1.4 million Alaska Natives and American Indians.[71] However, groups who were formerly part of a recognized tribe that subsequently separate from that tribe may not gain separate federal recognition, and those groups whose petitions have been denied cannot reapply in the future.[72] Federal recognition has a variety of benefits including jurisdiction granted by VAWA.[73] Under existing law, only federally-

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66. *Id.*

67. St. John, *supra* note 22, at 544.

68. U.S. CONST. art. 1, § 8, cl. 3.

69. Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 870, 873–74 (2005). Native American tribes historically gained recognition through treaties with the United States government; however this generally ceased to be the case in 1871. *Id.* at 871. The judicial branch also plays a role in recognizing tribes. *Id.* at 891. In the past, the courts have determined that the delegation of authority to the executive branch is lawful and the courts will dismiss actions requesting judicial tribal recognition when the tribe has not exhausted its administrative remedies. *Id.* at 891–92. Tribes can also challenge their recognition process or denial of recognition but often face a high bar in doing so. *Id.* at 892. To challenge an unreasonable delay in the recognition of a tribe, the tribe must "demonstrat[e] that lack of resources and competing considerations are not the principal reason for delay." *Id.* To challenge a denial of tribal recognition the tribe must "demonstrat[e] that the Department's decision was arbitrary, capricious, an abuse of discretion, or in violation of law . . . ." *Id.*

70. *Id.* at 872–73.

71. *Id.* at 873–74.

72. *Id.* at 874–75.

73. *See id.* at 867.

recognized tribes are given full faith and credit for protection orders, whether or not the tribal protection order meets the other requirements under VAWA.[74] Thus, a protection order from a tribe that is not federally recognized will not be enforced by state courts.[75] This is particularly problematic in places like Alaska, where the tribal status of Alaska Native communities has been frequently challenged.[76]

II. THE EVOLUTION OF THE VIOLENCE AGAINST WOMEN ACT AND ITS EXTENSION OF THE FULL FAITH AND CREDIT PROVISION

A. Enactment of VAWA and the Full Faith and Credit Provision

Congress passed VAWA in 1994 to address the national concern regarding violence against women.[77] Further, there was a focus on intimate partner violence and the government wished to offer federal support to "strengthen protections" for those women.[78] An essential provision of VAWA was to grant full faith and credit in every state to protection orders issued by any other state.[79] This was necessary to close a loophole in the law that allowed people with protection orders against them to avoid their enforcement by violating those orders in another jurisdiction.[80]

There are further provisions that create certain requirements for protection orders to receive full faith and credit.[81] These requirements include the issuing state having jurisdiction over the parties and providing reasonable notice and an opportunity to be heard for the accused.[82] The original VAWA thus established the foundation under which tribal protection orders are granted full

74. *See* NAT'L CTR. ON PROT. ORDERS AND FULL FAITH & CREDIT, A PROSECUTOR'S GUIDE TO FULL FAITH AND CREDIT FOR PROTECTION ORDERS: PROTECTING VICTIMS OF DOMESTIC VIOLENCE, 2 (2011) [hereinafter NAT'L CTR. ON PROT. ORDERS AND FULL FAITH & CREDIT].

75. *See id.*

76. Strommer & Osborne, *supra* note 33, at 2–3.

77. Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 829 (2004).

78. *Id.* at 838.

79. *Id.*

80. *Id.* at 885–86.

81. *Id.* at 839.

82. *Id.*

faith and credit. However, after its enactment some states legislatively created more requirements for enforcing protection orders that were issued in other states or refused to enforce the foreign orders based on some other reason.[83]

This issue prompted Congress to include in the 2000 reauthorization of VAWA (VAWA 2000) specific provisions in an attempt to force states to enforce these foreign protection orders.[84] This included a clarification that protection orders issued in other states did not have to be registered in the enforcing state in order to receive full faith and credit, without regard to a conflicting state law.[85] Some states still refused to update their laws to comply with VAWA 2000, but the reason for the noncompliance still remains unclear.[86] Congress again reauthorized VAWA in 2006 (VAWA 2006), extending the Full Faith and Credit Provision to all United States territories, instead of merely states.[87] VAWA 2006 also clarified the meaning of "protection order" and added "sexual violence" as one type of conduct these orders were meant to prevent.[88] These clarifications in subsequent VAWA reauthorizations resolved several issues regarding protection orders issued by both state and tribal courts.

B. The 2013 Reauthorization of the Violence Against Women Act and Full Faith and Credit

VAWA 2013 was, in part, enacted to provide federal support to tribal courts to have their protection orders applied with equal force as state-issued protection orders.[89] VAWA 2013 gave tribal

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83. *Id.* at 830.

84. *Id.* VAWA has been reauthorized three times since its establishment and was up for reauthorization again in 2018. *The Need to Reauthorize the Violence Against Women Act: Hearing Before the H. Comm. on the Judiciary,* 115th Cong. (2018) (Statement of Sen. Chuck Grassley, Chairman, S. Judiciary Comm.). The Committee for the Judiciary has already begun hearings regarding the authorization and extension of VAWA, focusing particularly on DNA backlog reduction programs and extending funding for programs to support victims of domestic violence. *Id.*

85. Sack, *supra* note 77, at 849.

86. *Id.* at 850.

87. NAT'L CTR. ON PROT. ORDERS AND FULL FAITH & CREDIT, *supra* note 74, at 2.

88. *Id.*

89. *See* 18 U.S.C. § 2265(e) (2013).

courts civil jurisdiction to issue protection orders against anyone, native or non-native, who commits domestic violence on tribal land.[90] The relevant portion of VAWA 2013 states:

> For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.[91]

This section of VAWA 2013 provided clarity about the individuals covered by tribes' civil jurisdiction, as it was left ambiguous under VAWA.[92]

VAWA 2013 also recognized that tribal courts have "special domestic violence criminal jurisdiction," granting tribes criminal jurisdiction over non-Indians in particular circumstances.[93] This allowed tribes to prosecute non-Indians who committed domestic violence, dating violence, and violations of protection orders in "Indian country."[94] This criminal jurisdiction is only given under certain circumstances: a non-Indian defendant must have a dating or spousal relationship with the victim, the defendant must have been sufficiently connected to the issuing tribe, and the domestic violence must occur in "Indian country."[95] One of the parties, either the victim or the abuser, must also be a native for a tribal court to exercise this jurisdiction.[96] Further, the tribal court must give non-Indian defendants all the rights guaranteed under the ICRA.[97] This limits the ability of tribal courts to act as they

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90. *Id.*

91. *Id.*

92. *Bench Guide*, *supra* note 51, at 13-8.

93. 18 U.S.C. § 2265 (2013); Meggesto, *supra* note 14, at 109.

94. Alfred Urbina & Melissa Tatum, *On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe*, 55 JUDGES' J. 8, 8 (2016).

95. 18 U.S.C. § 2265.

96. *Id.*

97. Urbina & Tatum, *supra* note 94, at 9.

traditionally did, assimilating their culture with American "constitutional norms."[98]

Although VAWA 2013 did not go into full effect until 2015, a pilot project was created to begin the implementation of VAWA 2013 before it was required nationally.[99] Eight tribes participated in this pilot program.[100] During the first year of the pilot program, the Pascua Yaqui Tribal Court saw nineteen different non-Indian domestic violence defendants, ranging widely in age and racial background.[101] Additionally, under the pilot program, for the first time in decades, the Pascua Yaqui tribe in Arizona convicted a non-Indian defendant for a domestic violence charge.[102] The large number of non-Indian defendants evidences the need for tribal nations to have jurisdiction over these defendants because without it there would be little tribes could do to prevent the domestic violence from reoccurring. The number of defendants that these tribes were able to prosecute during the pilot program also shows the immediate effect of VAWA 2013.[103] However, this does not address the issue of tribal protection orders being enforced outside of Native American territory. As the pilot program exemplified, many of the domestic violence perpetrators on tribal lands are non-Indian, and therefore, it is important for tribal protection orders to be recognized outside of the Tribal Territory.[104] However, even after VAWA 2013 was passed, tribal leaders have continued to struggle with state courts refusing to recognize tribal-court-issued domestic violence protection orders.[105]

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98. Mullen, *supra* note 18, at 823.

99. *Id.* at 823–24.

100. Mullen, *supra* note 18, at 823; Urbina & Tatum, *supra* note 94, at 8. The following tribes participated in the pilot project: Pascua Yaqui Tribe, Confederated Tribes of the Umatilla Indian Reservation, Tulalip Tribe, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Eastern Band of Cherokee, Little Traverse Bay Bands of Odawa Indians, Seminole Nation of Oklahoma, and Sisseton Wahpeton Oyate of the Lake Traverse Reservation. Mullen, *supra* note 18, at 823.

101. Urbina & Tatum, *supra* note 94, at 10.

102. *Id.*

103. Mullen, *supra* note 18, at 823.

104. The cases described accounted for twenty-five percent of all domestic violence cases filed with the tribe in the first year of the pilot program. Urbina & Tatum, *supra* note 94, at 10.

105. Meggesto, *supra* note 14, at 105.

III. CURRENT ENFORCEMENT OF TRIBAL DOMESTIC VIOLENCE PROTECTION ORDERS IN STATE COURTS AND FUTURE RECOMMENDATIONS

States currently take a variety of approaches to ensure state courts and state law enforcement are properly enforcing tribal protection orders. However, these efforts have frequently fallen short. In some cases, states are doing the bare minimum to educate state law enforcement and judges and to enforce the orders; they declare in theory that the state will enforce valid tribal protection orders but in practice fail to enforce the orders due to misunderstandings regarding tribal courts. Other states have taken meaningful strides by educating judges about tribal protection orders and helping establish relationships between state court and tribal court judges to create a better understanding of the processes of both courts. All states must continue to move in this direction, enforcing all valid tribal protection orders and guaranteeing that state courts have a full understanding of tribal courts and their processes in issuing protection orders.

A. States Must Give Tribal Protection Orders Full Faith and Credit Under VAWA 2013 Regardless of Conflicting State Laws

The Full Faith and Credit Provision of VAWA 2013 is now generally accepted by states as a federal requirement that preempts any contrary state laws.[106] This includes VAWA's due process requirements, which must be met before any order is enforced.[107] States must recognize that under the Supremacy Clause of the United States Constitution, federal law clearly preempts state law when Congress intends it to do so.[108] Congress also expressly stated when enacting VAWA that the Full

106. RONALD B. ADRINE & ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW § 14:17 (Dec. 2017 Update); Letter from Craig W. Richards, Attorney Gen. of Alaska, to Gary Folger, Comm'r of the Alaska Dep't of Pub. Safety (July 30, 2015) (on file with author); *Bench Guide*, *supra* note 51, at 13-12.

107. ADRINE & RUDEN, *supra* note 106; Richards, *supra* note 106, at 9; *Bench Guide*, *supra* note 51, at 13-11.

108. Richards, *supra* note 106, at 2.

Faith and Credit Provision "must be enforced regardless of the enforcing state's registration requirements."[109] The intent of VAWA "is to ensure that dangerous individuals cannot evade a protection order simply by following the victim to a different jurisdiction."[110]

Some states also have their own statutory requirement for full faith and credit.[111] Washington's Foreign Protection Order Full Faith and Credit Act "provides that protection orders issued by tribal courts are to be given full faith and credit by Washington courts."[112] These tribal protection orders must be valid, meaning that the issuing court must have had jurisdiction, and the person subject to the protection order must have had notice and an opportunity to be heard.[113] The Court of Appeals of Washington also determined that a defendant could be convicted for violating a tribal protection order even if the order was inconsistent with state requirements for protection orders.[114] Further, this Full Faith and Credit Act also provides a presumption of validity for all orders that appear authentic on their face.[115]

Other states determine how to address implementing VAWA 2013 purely through enforcement policies.[116] In the summer of 2015, the Attorney General of Alaska, Craig Richards, wrote an opinion to the Commissioner of the Alaska Department of Public Safety describing how he would enforce tribal protection orders to comply with VAWA.[117] Alaska law requires that all tribal protection orders be registered with the State of Alaska in order to be enforced.[118]

As the statute was written, the state could only prosecute any foreign protection orders if the orders were "filed" in state court.[119] However, Richards stated that VAWA specifically

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109. *Id.* at 3.
110. *Id.*
111. *Bench Guide*, *supra* note 51, at 13-9.
112. *Id.*
113. *Id.* at 13-9, 13-10.
114. State v. Esquivel, 132 P.3d 751, 757-58 (Wash. Ct. App. 2006); *Bench Guide*, *supra* note 51, at 13-10.
115. *Bench Guide*, *supra* note 51, at 13-10.
116. Richards, *supra* note 106, at 3.
117. *See id.*
118. *Id.* at 1.
119. *Id.* at 3. Under current Alaska law, all protective orders must be

preempts this statutory requirement through the Full Faith and Credit Provision.[120]

Further, Richards determined that under VAWA, tribal and other foreign protection orders must be enforced just like an order issued by an Alaskan court; thus, Alaska law enforcement authorities may enforce foreign protection orders by arrest.[121] VAWA's mandate requiring a tribal protection order to be enforced as if issued by Alaska means that "the same enforcement tools" must be available for all protection orders, regardless of whether it was issued by Alaska, a tribe, or another foreign jurisdiction.[122]

Whether Alaska enforces protection orders through arrest is determined by the type of order and the provisions included in the protection order.[123] Therefore, although tribal protection orders will not have identical provisions as those described in the Alaska statutes, language similar to the described provisions should determine whether the protection order allows or requires the arrest of a person in violation of the protection order.[124] Similarly, regardless of where the order is issued, a violation of a protection order that meets the statutory requirements does not require a warrant for arrest.[125] Further, if the circumstances of the violation of a protection order would require an arrest if it was an Alaska-issued protection order, an arrest is also required in the same circumstances with a violation of a tribal protection order.[126]

However, Alaska recognizes limitations in enforcing tribal protection orders.[127] Most importantly, the protection orders must be consistent with VAWA: The issuing court must have jurisdiction over the parties, and the offender's due process rights—reasonable notice and opportunity to be heard—must be sufficiently maintained.[128] The state has the power to review

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"issued or filed under" the statute. ALASKA STAT. § 11.56.740(a)(2) (LEXIS through 2018, SLA, chapter 106).

120. Richards, *supra* note 106, at 1.
121. *Id.* at 4.
122. *Id.*
123. *Id.* at 5.
124. *Id.* at 6.
125. *Id.* at 7.
126. *Id.*
127. *Id.*
128. *Id.*

tribal protection orders to ensure the orders meet this criteria before the State enforces them.[129] Although not specifically stated by Alaska, presumably this determination would be made by state courts and not some other entity such as law enforcement agents. The Alaska Supreme Court opined that in deciding whether a party was denied due process, superior "courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to recognize the practical limits experienced by smaller court systems."[130]

The enforcing jurisdiction also clearly has broad discretion when it comes to how protection orders are enforced, whether law enforcement is required to make an arrest, whether to detain the perpetrator and notify the victim if the perpetrator is released, and in assessing penalties for violations of protection orders.[131] In its Prosecutor's Guide, the National Center on Protection Orders and Full Faith & Credit recommended that all protection orders issued in other jurisdictions should be enforced by law enforcement as if they were issued in the enforcing state.[132] The benefit of enforcing an out-of-state protection order as if it were an in-state order is that the court is familiar with the procedure and can more easily establish how to enforce protection orders that are similar to in-state orders. On the other hand, tribal protection orders may contain provisions that are not used in state orders and it may not easily fit into one of the categories established by states. However, the benefit of enforcing tribal protection orders as if they were issued by the enforcing state far outweighs any difficulty the court may have in doing so because it provides consistency throughout the state and ensures that all victims are being protected equally.

Ohio, like many other states, also acknowledges that VAWA requires state courts to give full faith and credit to orders of protection issued by tribal courts; however, Ohio law and policy is much less detailed than Alaska's.[133] Ohio state courts also

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129. Id.

130. *Id.* at 9 n.49 (citing John v. Baker, 982 P.2d 738, 763 (Alaska 1999)).

131. NAT'L CTR. ON PROT. ORDERS AND FULL FAITH & CREDIT, *supra* note 74, at 6–7.

132. *Id.* at 3.

133. ADRINE & RUDEN, *supra* note 106, § 14:17.

require under VAWA that the issuing tribal court have jurisdiction and that the parties' due process rights be preserved.[134] State courts and police officers are instructed to enforce tribal protection orders "in accordance with the terms of the orders."[135] This includes enforcing provisions that Ohio's protection order statute does not contain, if the tribal protection order so provides.[136] Further, some tribal protection orders are enforceable in certain situations where state protection orders would not be enforcable, such as when people are dating.[137] However, the Ohio courts also cannot expand tribal protection orders to include provisions or remedies available to the victim in Ohio that were not available in the issuing tribal court.[138] Conversely, Ohio will enforce the protection order against the violator in accordance with procedures and remedies in its state courts.[139]

State courts clearly recognize that, under VAWA, states are required to enforce protection orders issued by tribal courts. This requirement includes enforcing any provisions in the order that would not be valid in state court protection orders. Although most states recognize that they must enforce valid orders, there are still issues with states not in fact enforcing valid tribal protection orders.

B. States Should Provide Opportunities for State and Tribal Courts to Improve Their Relations and for State Court Judges to Gain Knowledge About Tribal Courts

State courts continue to act on misconceptions and

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134. *Id.*

135. *Id.*

136. *Id.* This includes remedies granted by the foreign jurisdiction. For example, "if an out-of-state protection order grants the use of an automobile and that remedy is not available in the enforcing court, the enforcing court must still enforce the out-of-state protection order according to its terms." *Id.*

137. *Id.*

138. *Id.*

139. *Id.* "For example, if mandatory arrest provisions and penalties apply to violations of protection orders issued in the enforcing jurisdiction, then mandatory arrest must occur if a foreign protection order is violated in the enforcing jurisdiction, regardless of whether or not the issuing jurisdiction has a comparable mandatory arrest law." *Id.*

stereotypes regarding the processes and procedures used in tribal courts. To combat these misconceptions, there must be opportunities for state court judges to develop relationships with tribal courts and for state court judges to educate themselves about tribal courts. State and tribal court judges should work together to improve communication and education surrounding tribal courts and tribal communities to ensure that tribal court procedures are not misunderstood. There are some challenges in accomplishing increased communication, including language barriers and jurisdictional budget issues that limit resources.[140]

In Washington, there are twenty-nine federally recognized tribes, each with its own governing body.[141] Further, Washington has the ninth-highest population of Native Americans and Alaska Natives of any state in the country.[142] Twenty-eight tribal courts serve these twenty-nine federally recognized tribes.[143] A major issue facing tribal courts is the misunderstanding or outdated views of tribes, including state courts' and law enforcement's lack of knowledge about tribal courts and tribal governments.[144] This issue appears to be unaddressed by most states; however, Washington attempts to close this gap in knowledge by improving the relationships of judges in state and tribal courts.[145] Washington also has a bench guide that provides not only guidance on enforcing domestic violence protection orders issued by tribal courts, but also a description of tribal government and law, creating a better understanding of tribal courts for judges who may otherwise be unfamiliar with it.[146] This guide also specifically describes several tribal procedures for issuing domestic violence protection orders, creating further awareness for state court judges.[147] The description of the procedures used in tribal courts can be important to state court judges who

140. B.J. JONES & LISA JAEGER, WALKING ON COMMON GROUND: TRIBAL-STATE-FEDERAL JUSTICE SYSTEM RELATIONSHIPS 11 (Christine Folsom-Smith ed., 2008).
141. *Bench Guide*, *supra* note 51, at 13-1.
142. *Id.* at 13-1, 13-2.
143. *Id.* at 13-3.
144. Meggesto, *supra* note 14, at 105.
145. *See Bench Guide*, *supra* note 51.
146. *Id.*
147. *Id.* at 13-11.

otherwise have no experience with or understanding of how a tribal court may proceed. Thus, with this information, state court judges are more likely to better understand tribal courts and their procedures.

Washington has also stressed the importance of the relationship between tribal courts and state courts and has made several attempts to strengthen the connection between the two.[148] The Washington State Forum to Seek Solutions to Jurisdictional Conflicts issued a report in 1990, recommending that tribes and states attempt to "create agreements resolving and reducing jurisdictional conflicts."[149] The report further urged that the best way to accomplish this was by creating interpersonal relationships between state judges and tribal judges.[150] The Conference of Chief Justices adopted Resolution 27 in August of 2002, "To Continue the Improved Operating Relations Among Tribal, State and Federal Judicial Systems."[151] This resolution encouraged continuing efforts to enforce protection orders across the tribal and state jurisdictions.[152] The resolution ultimately resulted in the initiation of Walking on Common Ground, starting with three national meetings in 2005 and another national meeting in 2008.[153] Since then, there has been a series of regional symposiums to educate judges on tribal, state, and federal court systems.[154]

C. States and Tribes Should Implement Programs like Project Passport to Ease the Ability of Law Enforcement to Identify Valid Protection Orders

Many states across the country now participate in Project Passport, a program in which member states agree to issue

148. *See generally id.*
149. *Id.* at 13-17.
150. *Id.*
151. *Id.*
152. *Id.*
153. Walking on Common Ground: Resources for Promoting and Facilitating Tribal-State-Federal Collaborations, *Background on Walking on Common Ground*, https://walkingoncommonground.org/background.cfm [https://perma.cc/X78Z-ML82] (last visited Sept. 1, 2018) [hereinafter Walking on Common Ground].
154. *Id.*

domestic violence protection orders with uniform first pages.[155] This program started in New Mexico to establish greater consistency for protection orders.[156] Project Passport establishes a uniform first page for all domestic violence protection orders, making it easier for any law enforcement officer to immediately recognize the order and accordingly enforce it.[157] This front page includes "common data elements jointly identified by multi-disciplinary teams."[158] Another aspect of Project Passport is the promotion and encouragement of states and tribes to use "Extensible Markup Language" technology to "improve the comparability of data entered in protection order registries across jurisdictions."[159] This could potentially be helpful to courts because protection order data could be easily transferred between jurisdictions and just as easily understood by courts in the enforcing jurisdiction as they were in the issuing jurisdiction.[160] In states that do not have Project Passport, law enforcement agents that view the tribal protection order may not recognize it or understand what it is, making it less likely that police will enforce the order.

States also generally have procedures to register protection orders issued by other jurisdictions and encourage those with protection orders to do so. Ohio, for example, has a procedure to register tribal protection orders with the State.[161] The person wishing to register must obtain a certified copy of the protection order from the tribal court and present it to the clerk of any Ohio municipal court.[162] The clerks of court and local law enforcement agencies maintain a registry of all of the registered out-of-state protection orders.[163] Alaska also encourages domestic violence victims with tribal and foreign protection orders to register the

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155. JONES & JAEGER, *supra* note 140, at 9 (approximately thirty-one states and countless tribes from all regions of the U.S. have adopted the model template for their orders of protection).
156. *See* Walking on Common Ground, *supra* note 153.
157. *Bench Guide*, *supra* note 51, at 13-12.
158. JONES & JAEGER, *supra* note 140, at 9.
159. *Id.*
160. *Id.*
161. ADRINE & RUDEN, *supra* note 106, at § 14:17.
162. *Id.*
163. *Id.*

orders with the Alaska courts.[164] Registration can give several benefits to victims, including the registry's accessibility throughout the State.[165]

Although it would be helpful for victims to register their protection orders with surrounding states, and registration would allow law enforcement to easily identify and enforce protection orders, there are a large variety of reasons that could make doing so very difficult for certain victims. This could include lack of transportation out of a large reservation, unfamiliarity and confusion about state courts and proceedings, and community pressure to keep tribal affairs within the tribe. Further, it would be unreasonable to require every victim to register their protection order any time she or he traveled anywhere off of tribal land. Thus, again, although this could be helpful, it expressly cannot be required under VAWA.

CONCLUSION

It is imperative that, first and foremost, tribal protection orders are accorded full faith and credit as required by VAWA 2013. This inherently means that when due process is properly accorded in tribal courts, the state courts must enforce the orders. However, many state courts are not doing so at this time. In order to avoid any judicial misunderstandings regarding tribal court processes, states should encourage interpersonal relationships between state and tribal court judges. These relationships can be established through forums and conferences that include both state and tribal courts to discuss jurisdictional issues. Further, there should be guidelines for judges that describe the role and procedures used by tribal courts to further eliminate confusion.

State courts should enforce tribal protection orders as they would a similar state order. This provides consistency and assurance for victims and those whom protection orders are against, regardless of where their protection orders are issued. By enforcing the order in accordance with state policies and procedures, state courts can ensure that victims of domestic violence on tribal land are supported by the full force of the law

164. Richards, *supra* note 106, at 11.
165. *Id.*

and are protected as any other person would be. Thus, if the state court requires arrest under particular circumstances, and the protection order is violated under those circumstances, the result should be the arrest of the violator. Whereas, if the tribal order calls for some lesser enforcement, the state court could still protect all victims as best as possible in that state. Thus, violators of protection orders will always be fully aware of what their violation could lead to and victims will know how they will be protected through enforcement.

States should also take measures to create better awareness within the state judiciary about tribal courts. National and regional conferences and symposiums have already been established for this very purpose, and state and tribal judges should be encouraged to attend them and educate themselves about processes in other jurisdictions. This could be particularly helpful in regard to state court understandings of tribal courts because many state court judges may otherwise never have any experience with tribal courts. Education would ensure that the first time a judge learns about, or even considers, tribal procedures would not be the first time a tribal protection order must be enforced in their court, and would make them less likely to have misconceptions about tribal courts.

Both tribes and states should be encouraged to participate in Project Passport. This is a straightforward way for both state and tribal law enforcement agents to recognize protection orders immediately and make prompt decisions about enforcement. This is particularly important in domestic violence situations where the situation can escalate and become dangerous rather quickly. Requiring only a uniform first page also allows tribes to maintain the rest of the order and issue it as they always have. Although tribal protection orders should be enforced regardless of their participation in Project Passport, this adds to the ease of understanding the order and helps ensure it will be enforced. The easier state courts can make it for all victims of domestic violence to be protected through domestic violence protection orders, the more we can ensure the safety of women across the United States.