

Domestic Violence on the Reservation:

Imperfect Laws, Imperfect Solution

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I. INTRODUCTION

My case happened four years ago (1996). I was living with a man who was well-known to the local police as an offender and so violent that they would not respond alone.

He started beating me when I tried to leave him with my children. My son, [who] was not yet three years old, came into the room and wanted to make him stop hurting [me]. My partner kicked him in the groin so hard my son flew backward and hit the wall. I grabbed him and ran to the Fire Station which, along with the gas station, had the only public phones on the reservation. I had to leave my baby daughter sleeping in the house. None of the neighbors wanted to get involved—they knew how violent this person was—and I was not originally from that reservation, so I couldn't go to them for help or even ask to use their phone.

It took the Sheriff's Department nearly one hour to respond. . . .

It was really difficult after that. No charges were filed and my boyfriend was out of jail after only two days, because at that time his violence was considered just a misdemeanor. He continued to watch my every move and make threats against me and my son. . . . I was taken to live at a safe house temporarily and then to a battered woman's shelter.

To their credit, members of the Sheriff's Department tried to assist me in

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*getting new charges filed against my abuser because of the injuries he gave my son. Unfortunately, the District Attorney wouldn't accept the child abuse charges at that time. I still have a restraining order against the abuser. The problem on reservations is that the close proximity of the community makes it impossible to hide from anyone. So a restraining order is not much protection.*¹

This true story, narrated by an anonymous woman, illustrates some of the unique problems American Indian victims of domestic violence face on reservations.² Like the narrator, many women feel unprotected, even with a restraining order. The small and isolated communities typically found on reservations serve as poor protection for individuals who have sought protective orders. Although the narrator was an outsider who apparently could not seek help from her neighbors, she was able to acquire a protective order. Had she or her boyfriend been non-Indian, however, jurisdictional barriers may have proved much more significant than the informal barriers apparently in place for outsiders on the reservation.

These jurisdictional barriers are one factor that may prevent adequate enforcement of protective orders on reservations. Sandra J. Schmieder's *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*³ points out that the section of the Violence Against Women Act⁴ ("VAWA") that requires tribes and states to honor foreign protective orders lacks an enforcement mechanism. This piece will evaluate Schmieder's proposal to allow civil suits for prospective injunctive relief against Indian law enforcement officials who fail to enforce protective orders from other states or tribes.⁵ Such a proposal attempts to address the vulner-

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1. INDIAN HEALTH COUNCIL, INC., IMPROVING FIRST RESPONSE TO DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING ON INDIAN RESERVATIONS, SCENARIOS TO LEARN BY, available at <http://www.indianhealth.com/domesticviolence/PDF/Scenarios.pdf>.
 2. A government study of crime among American Indians indicates that American Indian women experience a disproportionate amount of intimate violence. For every 1,000 Indian women, 124 are the victims of some form of violence each year, and they are twice as likely to be raped as women of any other race. LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 3, (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aig.pdf>; NATIVE AMERICAN CIRCLE, LTD., DOMESTIC VIOLENCE DYNAMICS, SECTION 1: PREVENTION AND INTERVENTION PROGRAMS IN NATIVE AMERICAN COMMUNITIES 14, available at <http://www.nativeamericancircle.com/pdf/1DomesticViolence.pdf> (last visited Nov. 30, 2003). Generally, American Indians experience over twice the national average of violent victimizations, of which 9% is intimate and family violence. GREENFIELD & SMITH, *supra*, at 2. The study also demonstrates that at least 70% of violence experienced by Indians is committed by non-Indians. *Id.* at 7. For intimate victimizations, the percentage jumps to 75%, while 25% of family victimizations are interracial. *Id.* at 8. A significant flaw in the study, however, is its failure to clarify whether these figures are constant for both reservation- and urban-dwelling Indians. This will be important when I consider jurisdiction (which only applies on reservations), since tribes cannot prosecute non-Indians, who apparently commit the overwhelming majority of intimate violence against Indians. See *infra* Part II.
 3. 74 U. COLO. L. REV. 765 (2003).
 4. 18 U.S.C. § 2265 (2003).
 5. Schmieder, *supra* note 3, at 769.

ability of women such as the narrator above, but it assumes that tribes deliberately refuse to enforce protective orders as a matter of course.⁶ Rather, as this recent development will show, jurisdictional and financial obstacles are of far greater significance than the will of tribal authorities in protecting victims of domestic violence.

In this recent development piece, I will argue that jurisdictional and financial challenges are so essential to protecting the survivors of domestic violence that Schmieder's failure to consider them is fatal to her proposal. In Section II, I discuss the jurisdictional complexities particular to Indian reservations, which combine with practical barriers to confound law enforcement. In Section III, I discuss another practical reality: financial resources—which many tribes sorely lack. I discuss Schmieder's proposal in Section IV, within the context of Sections II and III. After demonstrating that Schmieder's evidence is either non-existent or inappropriate, I demonstrate that her suggestion does not adequately address the essential realities of reservation life.

II. JURISDICTION IN INDIAN COUNTRY

The distinction between urban-dwelling and reservation-dwelling Indians is important because tribal sovereignty only exists in Indian country.⁷ On one hand, tribes hold the status of "domestic dependent nations,"⁸ distinct from independent nations in that tribes may not freely alienate their land or make treaties with foreign nations.⁹ On the other hand, tribes are distinct from states in that they possess sovereign power over "internal relations," which include regulating membership and domestic relations among members, prescription of inheritance rules, and punishment of tribal criminal offenders.¹⁰

A. Criminal Jurisdiction

Pursuant to 18 U.S.C. section 1153, tribes possess exclusive jurisdiction over crimes of domestic abuse between Indians in Indian country,¹¹ but if the

6. *See id.* at 767.

7. "Indian country" is defined as:

(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.

18 U.S.C. § 1151 (2003). I use the term synonymously with "reservation," although technically they differ.

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

9. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 69-70, 72 (3d ed. 1998).

10. *Montana v. United States*, 450 U.S. 544, 564 (1981).

11. *See* 18 U.S.C. § 1153(a) (2003); CANBY, *supra* note 9, at 168.

perpetrator has committed a major crime,¹² the federal government shares jurisdiction.¹³ In the selection prefacing this piece (assuming that the narrator and her boyfriend were both Indians), the tribe has exclusive jurisdiction over those crimes not listed in section 1153; the narrator could go to the district attorney only for the major crimes committed by her boyfriend.¹⁴ The federal government also shares jurisdiction with tribes over crimes committed by Indians against non-Indians, so even if the narrator had not been Indian, she could seek help from both the tribe and the federal government.¹⁵ However, the simultaneous tribal and federal jurisdiction often results, ironically, in a complete lack of enforcement.¹⁶ The narrator's case illustrates this point: for unknown reasons, the district attorney refused to help her, and the tribe may have assumed it was the federal government's problem.

Further impeding tribal maintenance of order, the Indian Civil Rights Act ("ICRA")¹⁷ limits tribes to criminal punishments of only up to one year in prison, a \$5000 fine, or both, even for major crimes.¹⁸ These insignificant penalties hamper tribal efforts to effectively deter or punish major crimes that are neglected by state or federal authorities.¹⁹ Again, in the example above, the narrator likely took her child abuse charges to the district attorney in the first place because she wanted her boyfriend's imprisonment to last longer than one year, which is the longest sentence available to the tribe under the ICRA.²⁰ As she indicated, the narrator felt unprotected by the restraining order and likely wanted stronger measures taken against her boyfriend; but if strong measures involved more than a \$5000 fine and year in prison, then her sole recourse was to federal

12. These include:

murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, . . . an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country.

18 U.S.C. §1153(a) (2003).

13. The statute's text is not explicit about this, but the limits on tribal criminal penalties effectively prevent tribal criminal jurisdiction over major crimes. *See* CANBY, *supra* note 9, at 161.

14. *See id.*, at 160.

15. *Id.*

16. *See* Stewart Wakeling et al., *Policing on American Indian Reservations*, NAT'L INST. JUST. J. 5-6 (2001) ("Often, when law enforcement is ineffective in Indian Country, it is because of overlapping jurisdictions. . . . [C]ases slip through the cracks because of a lack of coordination, cooperation and communication between tribal police, BIA police, FBI agents, local law enforcement, and U.S. Attorneys."); *see also* 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, 196 (2001/2002) (stating that "[f]ew U.S. Attorneys have the budget or the inclination" to pursue domestic violence offenses, and that "[d]omestic violence often ranks below terrorism, drugs, and white collar crime on the U.S. Attorney priority list").

17. 25 U.S.C. § 1302 (2003).

18. *Id.* § 1302(7).

19. *See id.*; *see also* CANBY, *supra* note 9, at 161.

20. *See* 25 U.S.C. §1302(7) (2003).

authorities.²¹

Had the narrator's boyfriend been non-Indian, she would have had no choice but to seek federal prosecution; even if they live on the reservation, non-Indians are not subject to tribal criminal jurisdiction.²² As 75% of intimate violence against Indians is committed by non-Indians, this law renders tribes powerless to prosecute the overwhelming majority of intimate violent crimes.²³

B. Civil Jurisdiction

Despite restrictions on criminal jurisdiction, tribes may use civil laws to protect domestic violence survivors. Some examples include instituting civil contempt proceedings against batterers who refuse to comply with a protection order or excluding such persons from tribal land.²⁴ Challenges once again arise, however, when tribes must exercise jurisdiction over non-Indians.

Generally, tribes possess exclusive jurisdiction over suits between Indians that arise in Indian country.²⁵ For non-Indian parties, however, the Supreme Court in *Montana v. United States* established that tribes lack regulatory jurisdiction,²⁶ with two important qualifications now known as the "*Montana* exceptions":²⁷ tribes retain authority over nonmembers²⁸ who have entered into consensual relationships with the tribe or its members (the "consensual relationship" test), or when the conduct being regulated threatens or directly affects "the political integrity, the economic security, or the health or welfare of the tribe" (the direct effects test).²⁹

Montana thus forces tribes to prove their authority over non-Indian batterers despite, and in some sense contrary to, the convincing argument that domestic violence is a subset of domestic relations over which tribes should be sover-

21. *See id.*

22. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

23. *See GREENFIELD & SMITH, supra* note 2, at 8. Federal or state officials possess exclusive jurisdiction, but they may often be unresponsive to tribes' needs. *See Part III infra* Section C.

24. *See* 18 U.S.C. § 2265(e)(2003).

25. *CANBY, supra* note 9, at 187. A much more complicated set of principles governs nonmember fee land within a reservation. *See Nevada v. Hicks*, 533 U.S. 353 (2001). The Supreme Court's decisions on tribal civil jurisdiction have made for an incomprehensible body of caselaw. I do not discuss the cases here, but for an excellent exposition on current Indian law, see *Tatum, supra* note 16, at 144-65.

26. *Montana v. United States*, 450 U.S. 544 (1981). Legislative, or regulatory, jurisdiction refers to a government entity's power to apply its law in a case before it. *See Tatum, supra* note 16, at 142. Adjudicative jurisdiction refers to a court's ability to hear a case. Practically, there is no difference between adjudicative and regulatory jurisdiction for tribal governments because the test is the same for both. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

27. Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 44 (1999).

28. The Supreme Court has equated non-Indians to nonmembers of a particular tribe. *See Duro v. Reina*, 495 U.S. 676 (1990). For the purposes of criminal jurisdiction, Congress overruled this. *See* 25 U.S.C. § 1301(4) (2003). In civil matters, however, the issue has not been explicitly resolved.

29. *Montana v. United States*, 450 U.S. at 566; *see Tatum, supra* note 16, at 195.

eign.³⁰ Mere residence on a reservation fails to satisfy the consensual relationship test;³¹ in *Montana*, the Court mentions formal agreements as examples of consent.³² The Court similarly resists entertaining direct effects claims, although common sense would dictate that a non-Indian batterer undoubtedly threatens the political integrity, economic security and health or welfare of a tribe.³³ Because there is “no doubt” that courts construe both *Montana* exceptions very narrowly, it is wise to consider other avenues.³⁴

As codified in 18 U.S.C. section 2265(e), VAWA grants tribal courts “full civil jurisdiction to enforce protection orders” from other tribes or states “in matters arising within the authority of the tribe.”³⁵ The last phrase of this provision either limits tribal enforcement of protection orders to those individuals over whom the tribe already has civil jurisdiction, or extends jurisdiction to all individuals present within Indian country, regardless of race or tribal membership.³⁶ In her discussion of these possible interpretations, Professor Tatum argues that the latter, expansive interpretation is stronger and more desirable because this interpretation protects more women, which is in the spirit of the VAWA.³⁷ The broader interpretation would authorize the tribe in the prefatory narrative to, for instance, exclude the speaker’s boyfriend from tribal land for violating a protective order.³⁸ His race and membership status would be irrelevant. Under the narrower reading, however, the tribe would have to satisfy the direct effects test in order to assert authority over a non-Indian.³⁹

A further potential problem would arise if courts decided to literally interpret the language of *Montana* to mean that even Indian nonmembers are generally beyond tribal authority. Since Indian nonmembers constitute a significant proportion of the population on some reservations,⁴⁰ they may pose a more substantial danger to women in Indian country under such a narrow interpretation. Tribes would be powerless to prevent civil injuries by Indian nonmembers or to enforce civil orders against them. Once again, without a broad interpretation of section 2265(e), the difficult-to-prove *Montana* exceptions would provide the

30. See *Montana v. United States*, 450 U.S. at 565.

31. See Frickey, *supra* note 27, at 44 (discussing *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (holding that a tribe may not regulate nonmember hunting and fishing in an open part of a reservation)).

32. *Montana*, 450 U.S. at 565-66.

33. See Frickey, *supra* note 27, at 43-57 (providing for a thorough analysis of the Supreme Court’s post-*Montana* rulings); see also Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573 (2001).

34. See CANBY, *supra* note 9, at 279; see also Tatum, *supra* note 16, at 195.

35. 18 U.S.C. § 2265(e).

36. See Tatum, *supra* note 16, at 195.

37. See *id.* at 195-96.

38. See 18 U.S.C. §2265(e) (2003).

39. See Tatum, *supra* note 16, at 195.

40. According to Professor Allison M. Dussias, “Some estimates indicate that as many as half of the Indians on some reservations are not enrolled tribal members.” See Allison M. Dussias, *Geographically-Based and Membership-Based Views of Tribal Sovereignty: The Supreme Court’s Changing Vision*, 55 U. PITT. L. REV. 1, 97 (1993).

only relief from nonmembers defying the law with impunity.⁴¹

C. Public Law 280

In certain states,⁴² an entirely different set of rules applies: Public Law 280 ("PL 280") governs both criminal and civil jurisdiction in Indian country. States that have adopted PL 280 share⁴³ jurisdiction over criminal and civil matters with tribal courts, but tribes are still barred from prosecuting non-Indians.⁴⁴ These states have jurisdiction over crimes "by or against Indians."⁴⁵ Therefore, while tribes may prosecute Indian perpetrators for domestic violence offenses, non-Indians are left to the state. Unfortunately, PL 280 states often choose only to pursue those crimes on reservations that are victimless, or those that do not involve Indians.⁴⁶ Under these circumstances, a non-Indian batterer may literally be unstoppable in a PL 280 state: the tribe has no authority over him, and the state may decline to exercise its authority.⁴⁷

III. FUNDING

Because of states' responsibilities under PL 280, the Bureau of Indian Affairs has stopped providing funds for tribal police and judicial systems in PL 280 states.⁴⁸ This affects a significant portion of American Indians, as some of the highest populations of Indians reside in California and Alaska, both PL 280 states.⁴⁹ Such poor funding must stretch amongst states with the highest concentrations of Indians as a result of PL 280.⁵⁰

41. See Tatum, *supra* note 16, at 195.

42. These states include Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. 18 U.S.C. § 1162(a) (2003).

43. The statute is not explicit, and it could be read to grant exclusive jurisdiction to the state, but general principles of sovereignty require that tribes maintain criminal jurisdiction over their own members. See CANBY, *supra* note 9, 220-21.

44. The Supreme Court has held that tribes need not hold jurisdiction over non-Indians as a matter of tribal sovereignty. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

45. 18 U.S.C. § 1162(a) (2003).

46. *Wakeling et al.*, *supra* note 16, at 9.

47. See *id.*

48. Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333, 1368-69 (1999).

49. According to the 2000 census, California has the most Indians of any state, with 627,562. In Alaska, there are 119,241 American Indians or Alaska Natives. As the census explains:

The term 'American Indian and Alaska Native' refers to people having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment. It includes people who reported 'American Indian and Alaska Native' or wrote in their principal or enrolled tribe.

STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 2 (Feb. 2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>. The census compiled data on the geographical distribution of American Indians based on the respondents who reported their race as American Indian, whether or not they marked another race as well. *Id.*, at 3-4.

50. The census also noted that, for all big cities in the nation, Los Angeles has the second-

The problem of inadequate funding is not unique to PL 280 states.⁵¹ The National Institute of Justice ("NIJ") conducted a study of law enforcement in Indian country and documented extensive problems within and outside of tribes, coming to some grim conclusions.⁵²

According to NIJ, the biggest challenge to effective law enforcement in Indian country is lack of funding.⁵³ For instance, tribal police forces only have between 55%-75% of the funds available to non-Indian communities.⁵⁴ This is likely the reason for scant police coverage: on average, a tribal police department serves 500,000 acres.⁵⁵ Typically only one to three officers patrol an area, with two officers per 1000 residents.⁵⁶ Because tribal police departments are understaffed and lack adequate backup, comprehensive police coverage is almost impossible.⁵⁷ And the practical realities of life on the reservations further exacerbate the policing problem: tribal communities are comprised of "small populations that are scattered over a wide geographic area."⁵⁸ This mirrors the narrator's characterization of her own situation. The sheriff's department to which she referred was presumably the tribe's, which likely responded slowly because of these deficiencies.

NIJ also identified organizational problems in tribal police departments. Often, officers perform multiple police and administrative functions.⁵⁹ Officials from as many as five different, uncoordinated agencies attempt to work together, making uniformity an impossible goal.⁶⁰ The lack of coordination and uniformity, along with the myriad authorities involved in tribal law enforcement, thwarts attempts at comprehensive and accurate data collection and tracking systems.⁶¹

The NIJ study also identified numerous other difficulties plaguing Indian law enforcement agencies. For instance, police departments "often have difficulty hiring and training qualified personnel," and hiring persons outside of the tribal community may result in low community support.⁶² Similar difficulties appear to afflict the judiciary and prosecution and defense bars in Indian country, which have a greater proportion of nonprofessionals than those outside reserva-

highest American Indian population, so not every individual Indian is necessarily a member of a tribe. *Id.* at 6.

51. NATIVE AMERICAN CIRCLE, LTD., *supra* note 2, at 14. ("For example, a Department of Health and Human Services report presented to a Senate committee in 1995 stated in part that: 'In 15 of the 24 states with the largest Native American populations, eligible tribes received nothing in 1993 from the more than \$3 billion in federal funds . . . the states received. In the other nine states, Indians received less than 3%.')")

52. *Wakeling et al.*, *supra* note 16, at v-x.

53. *Id.* at vii.

54. *Id.*

55. *Id.* at 9.

56. *See id.* at 26.

57. *See id.*

58. NATIVE AMERICAN CIRCLE, LTD. (2002), *supra* note 2, at 7.

59. *Wakeling et al.*, *supra* note 16, at 23-24.

60. NATIVE AMERICAN CIRCLE, LTD. (2002), *supra* note 2, at 10.

61. *Wakeling et al.*, *supra* note 16, at vii.

62. NATIVE AMERICAN CIRCLE, LTD. (2002), *supra* note 2, at 11.

tions.⁶³

Another problem for law enforcement on reservations is the recent development of semi-urban communities. Reservations are typically characterized as rural areas, so the substantial portion of crime occurring in new semi-urban areas requires law enforcement to adopt innovative solutions that are appropriate for an urban area. Additionally, although, Indian country lacks accurate crime data, the NIJ study indicates that demands for police intervention have been significantly increasing.⁶⁴ Nevertheless, “police departments in Indian Country often lack a sense of ‘partnership’ with their service populations.”⁶⁵ Finally, Indian country must manage with a severe shortage of jail space and treatment programs.⁶⁶

In a 1999 survey, North San Diego County Reservation residents identified similar problems to those found by the NIJ study.⁶⁷ Respondents believed that law enforcement services would improve with cultural awareness training.⁶⁸ Additionally, residents complained of the slow response time of law enforcement.⁶⁹ The survey identified such other problems as confusion regarding jurisdiction, overly harsh officers, cultural insensitivity, scarcity of patrol units, and lack of adequate referral system.⁷⁰

It is apparent from the NIJ study that adequate funding would dramatically improve tribal law enforcement’s efficacy.

IV. SCHMIEDER’S PROPOSAL

Schmieder’s approach to the national epidemic of domestic violence involves a cohesive, national response.⁷¹ She exposes a potentially significant flaw in VAWA—enforcement of the full faith and credit provision—as well as the tension between altering VAWA and maintaining tribal sovereignty.⁷² Although VAWA mandates granting foreign protective orders full faith and credit, Schmieder claims that tribes have failed to comply.⁷³ Therefore, in order to compel tribal governments to comply with VAWA’s mandate, Schmieder argues for amending the VAWA to allow individuals to sue tribal officials for prospective injunctive relief.⁷⁴ Schmieder argues that this move would protect women without unduly interfering with tribal sovereignty.⁷⁵

63. *Wakeling et al.*, *supra* note 16, at 10.

64. *Id.* at vii.

65. *Id.*

66. *Id.* at 10.

67. INDIAN HEALTH COUNCIL, INC., *supra* note 1, at *Introduction*.

68. *Id.* at 6-7.

69. *Id.* at 6.

70. *Id.*

71. Schmieder, *supra* note 3, at 768.

72. *Id.* at 766-68.

73. *Id.* at 767.

74. *Id.* at 769.

75. *Id.*

Specifically, Schmieder proposes that Congress should amend section 2265 to allow *Ex parte Young* suits against tribal officials, creating both a federal right and a private cause of action.⁷⁶ *Ex Parte Young* suits allow individuals to sue individual law enforcement officials for prospective injunctive relief.⁷⁷ Schmieder argues that an amendment is necessary, because a cause of action to sue tribal officials must be express.⁷⁸ The amendment, she claims, would maintain tribal sovereignty, while encouraging greater enforcement of foreign protection orders.⁷⁹

Schmieder, however, ignores the circumstances surrounding domestic violence on reservations. Jurisdictional complexities and economic and social realities particular to Indian country defy any generic approaches to domestic violence.⁸⁰

In addition, Schmieder's argument concerning tribal compliance with VAWA's full faith and credit provision lacks support. She asserts that "many tribes simply do not pass resolutions giving full faith and credit to foreign protection orders," and further, "many tribes ignore [VAWA] because they view it as an infringement on tribal sovereignty."⁸¹

Schmieder provides no citation for her assertion that tribes do not pass full faith and credit resolutions.⁸² And the evidence she provides in order to claim that tribes ignore VAWA does not readily support her claim.⁸³ The evidence consists of written testimony before the House Judiciary Committee's hearing on the Crime Prevention and Criminal Justice Reform Act.⁸⁴ Helen Elaine Avalos, assistant attorney general with the Navajo Department of Justice, recommended that the proposed bill differentiate between states and Indian tribes⁸⁵ and make tribal recognition of foreign protection orders discretionary rather than mandatory.⁸⁶ Avalos testified as to the importance of not equating tribal sovereignty with state sovereignty; she stated that this was why the Navajo Nation disagrees with the full faith and credit language of such statutes as the VAWA.⁸⁷

Avalos's testimony, offered on behalf of the Navajo Nation, certainly does

76. *Id.* at 792 (referring to *Ex parte Young*, 209 U.S. 123 (1908)).

77. *Id.* at 774.

78. *Id.* at 792.

79. *Id.* The problem of state noncompliance with tribal protection orders would also be resolved by this amendment, which would allow individuals to sue tribal *and* state judges for non-compliance.

80. See discussion of the term "Indian country," *supra* note 7.

81. Schmieder, *supra* note 3, at 767.

82. *Id.*

83. *Id.* at 767; *and* at 794 n.12.

84. *Id.* at 794 n.12.

85. The bill under consideration defined states to include Indian tribes. *Crime Prevention and Criminal Justice Reform Act: Hearing on H.R. 3315 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 12 (1994) (written testimony of Helen Elaine Avalos, Assistant Attorney General, Navajo Department of Justice, on behalf of Peterson Zah, President, Navajo Nation).

86. *Id.* at 12-13.

87. *Id.*

not indicate that “many tribes” deliberately ignore the full faith and credit provision of VAWA. Schmieder’s use of Avalos’s testimony is therefore somewhat misleading. Furthermore, since VAWA distinguishes between Indian tribes and states by listing them as distinct entities, Avalos’s concern regarding the absence of this distinction does not even apply to VAWA.⁸⁸ More importantly, Avalos’s concerns about tribal sovereignty, even in light of the Navajo Nation’s disagreement with full faith and credit language, do not clearly support the proposition that *many tribes* willfully disobey federal law in order to maintain the integrity of their sovereignty.

As it stands, Schmieder’s article fails to establish an evidentiary basis for its claims; her assertions about tribes’ failure to enforce foreign protection orders therefore highlight *potential* problems with VAWA and Indian country. While Schmieder did not prove actual failures, it is still worth considering her suggestions, especially in light of the factual context provided above, because the possibility still exists that tribes inadequately enforce foreign protective orders for a variety of reasons.

It has already been established that domestic violence is a significant problem in the American Indian community. If tribal enforcement of foreign protection orders proves to be inadequate, then women are indeed in danger. The threat of lawsuits could induce tribal officials to diligently enforce protection orders; such a threat could also diminish complacency towards victims of domestic violence, or the temptation to flout federal law, on the part of tribal authorities. But, as I will explain below, the enactment of an express amendment to VAWA will likely have minimal effect.

While it may be reasonable to seek temporary gains through Schmieder’s amendment, without the means to enforce *any* protection orders, tribal recognition of foreign orders loses relevance. It may be radical to demand that Congress grant tribes blanket jurisdiction over all offenses occurring on reservations, regardless of the alleged perpetrator’s identity.⁸⁹ Nevertheless, such demands are no less than necessary for tribal sovereignty to have any meaning. Congress should augment this power for tribes with funds for effective law enforcement.

As I have pointed out, the realities of reservation life—small, close communities on isolated rural terrain—complicate any efforts to protect victims of domestic violence.⁹⁰ Even when they have jurisdiction, tribes have difficulty enforcing their own protection orders, because of shortages of funding, staff, and technological support in police departments. Furthermore, without an adequate computer system to track protection orders, warrants, and other data, the orders are meaningless.⁹¹ Schmieder fails to realize that in order to truly address do-

88. 18 U.S.C. § 22659(a)(2003). However, its full faith and credit provision is mandatory for both states and tribes.

89. The plenary power doctrine grants Congress general authority over many Indian affairs. See CANBY, *supra* note 9, at 85-87.

90. See Wakeling et al., *supra* note 16, at vii.

91. See *id.*

mestic violence on reservations and effect real reform, the law alone is critically inadequate. Tribes need money, technology, qualified individuals, and coordination with other law enforcement agencies, in order to begin surmounting the most significant challenges to law enforcement.

While it is laudable that Schmieder attempts to balance the issues of tribal sovereignty with protecting victims of domestic violence, her approach to the latter issue is misguided. Her proposal—as part of a “cohesive, nationwide response” to the national epidemic of violence—incorrectly assumes that Indian survivors of domestic violence face identical problems as all other survivors of domestic violence.⁹² In choosing to adopt this “nationwide,” one-size-fits-all strategy, Schmieder ignores substantial intertribal differences, as well as the differences between reservations and the dominant society.⁹³ With such extensive differences in mind, the idea that an amendment allowing suit against tribal officials would significantly increase victims’ protection is superficial.

V. CONCLUSION

Domestic violence is a critical problem in Indian country, and tribes face significant obstacles in combating it. Legal complexities and insufficient resources are the major impediments, and each exacerbates the other.

Sandra Schmieder’s proposed amendment to the Violence Against Women Act would allow individuals to sue tribal officials for failing to grant foreign protection orders full faith and credit. She argues that the amendment is necessary because tribal governments deliberately ignore the full faith and credit provision of VAWA. Even if Schmieder had substantial evidence to back up her proposal, its practical effect would be minimal at best. With insufficient funds to enforce protection orders, tribes’ recognition of foreign orders would be irrelevant.

Simply subjecting tribal officials to suit will not alleviate the structural problems with Indian law enforcement. On a basic level, tribes must have jurisdiction over a given batterer. Furthermore, tribes must first have adequate funds to issue and enforce their own restraining orders, before they can focus handle foreign ones. By restoring to tribes both the freedom and resources to exercise true sovereignty, Congress can empower tribes to combat domestic violence effectively and to protect both tribal members and residents.

92. Schmieder, *supra* note 3, at 768.

93. These differences include law, geography, and culture. I have already discussed jurisdiction, *supra* notes 13-53 and accompanying text, and the particularities of reservations, *supra* note 1 and accompanying text. For a chart identifying major cultural differences between traditional American Indian and European American values and styles of communication, see *Historical and Socio-cultural Factors 7*, in *IMPROVING FIRST RESPONSE*, *supra* note 1. Indeed, urban-dwelling Indians who are survivors of domestic violence describe their uneasiness with mainstream shelters, and their disinclination to avail themselves of the help that these shelters offer. Gloria Valencia-Weber & Christine Zuni, *Women's Rights as International Human Rights: Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 130-31 (1995).