Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective

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I. INTRODUCTION

Susan C. sued Sam E. for divorce in the local district court and sought custody of the couple's only child.[1] Each parent accused the other of sexually abusing the child.[2] The local district court appointed a guardian ad litem and engaged expert assistance to determine the truth of the allegations.[3] During this investigative period, the court granted the divorce, but maintained continuing jurisdiction over the child custody matter, pending conclusive findings as to the alleged abuse.[4]

Susan C. then fled the jurisdiction, hiding both her whereabouts and that of her child.[5] Fearing the likelihood of further abuse, the district court issued a writ of habeas corpus ordering her to return the child to the jurisdiction.[6] The guardian ad litem retained a private investigator and eventually located Susan C. and the child in Washington State.[7] The district court then sought to enforce the writ and requested Washington's help in securing the child's safe return to the jurisdiction[8] so the

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1. *See* Petition for Dissolution of Marriage, Susan C. v. Sam E. (Southern Ute Tribal Ct. Oct. 23, 1991) (No. 91-DV-07).

2. Interview with Hon. Elizabeth Callard & Hon. Michael Stancampiano, District Court Judges, Southern Ute Tribal Court, Ignacio, Colo. (Jan. 13, 1999) [hereinafter Callard/Stancampiano Interview].

3. *Id.*

4. *See* Decree of Dissolution of Marriage, Susan C. v. Sam E. (Southern Ute Tribal Ct. Oct. 20, 1992) (No. 91-DV-07). The decree placed the child in the mother's custody, with alternative holiday and extended summer visitation to the father, but also required continuing individual therapy for the father and mother, with Tribal Social Services required to provide updates to the tribal court for an unspecified time period. *See id.* at 2. The decree further ordered "that the Tribal Court shall retain jurisdiction over this matter as provided in the Southern Ute Indian Tribal Code and such other recognized law as may apply." *Id.* at 3.

In June, 1994, the father moved to modify the custody arrangement, seeking exclusive custody. The mother countered by seeking to prohibit any visitation by the father.

> Some time between October 20, 1994, and December 1, 1994, while the issue of custody was still pending, Ms. C.[ ] fled the jurisdiction of the Court taking the child with her and refusing both to produce the child for evaluation and play therapy as required and to appear at hearings scheduled in regard to the pending custody matter.

See Order of Judge Elizabeth C. Callard, Susan C. v. Sam E., ¶ 3 (Southern Ute Tribal Ct. July 7, 1997) (No. 91-DV-07).

Although Washington courts would later interpret the tribal court's findings on the issue of abuse allegations as inconclusive and bare, the tribal court record contained reports from both parents that the child had been subjected to sexual abuse and a professional psychologist reported to the tribal court that in her opinion, the child had been the victim of molestation, but that the alleged abuser had not yet been identified. Thereafter, the presiding Judge ordered the mandatory play therapy and scheduled additional investigative hearings on the matter. *See* Order of Judge Elizabeth C. Callard, Susan C. v. Sam E. (Southern Ute Tribal Ct. Aug. 25, 1995) (No. 91-DV-07).

5. Callard/Stancampiano Interview, *supra* note 2; *see also* Order and Writ of Habeas Corpus, Susan C. v. Sam E. (Southern Ute Tribal Ct. Aug. 12, 1995) (No. 91-DV-07).

6. *See* Order and Writ of Habeas Corpus, Susan C. v. Sam E. (Southern Ute Tribal Ct. Aug. 25, 1995) (No. 91-DV-07).

7. Callard/Stancampiano Interview, *supra* note 2.

8. *See* Order Directing Washington Law Enforcement Agencies to Take Custody of Benjamin E., a Minor, and Deliver Said Minor to Representative of the Department of Social Services of the

investigation could be completed and a final custody order entered. The Washington State courts refused to recognize the prior judicial orders reasoning that, because the child was not within the territorial jurisdiction of the district court at the time the writ was issued, the district court lacked jurisdiction over the child.[9] Five years later, Susan C. remains in Washington with her child.[10] No available remedy exists either for the district court or the father to force the mother or the child to return for court dates or scheduled visitations.

How, one might ask, could Susan C. circumvent the district court's authority and succeed in an act of parental kidnapping otherwise prohibited by federal law?[11] In retelling this case history, I have omitted only one fact: the local district court was a tribal court.

This parental kidnapping provides a disturbing but hardly unique illustration of how deference to and cooperation with tribal courts compares with recognition afforded to other courts within our federal union. Had the local district court been a state court, or even a court of a foreign country,[12] the outcome likely would have differed.

In this article I examine the political and legal relationships between tribal courts and their state and federal counterparts. I appraise the state courts' policies for determining whether tribal court judgments are to be recognized and subsequently enforced, cross-jurisdictionally. I explore the practical experiences of contemporary tribal court systems. Based on evidence gathered from tribal court records, survey responses and

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Southern Ute Indian Tribe, *In re* Benjamin E. (Wash. Super. Ct. Jan. 29, 1996) (No. 96-2-00).

9. *See* Benjamin W.E. v. Susan C., No. 16474-8-III, 1998 WL 289167 (Wash. Ct. App. May 26, 1998). The Court of Appeals for Washington concluded that the tribal court lacked jurisdiction to issue the writ against the child because Susan C. was the "legal custodial parent." *Id.* at *4.

10. Callard/Stancampiano Interview, *supra* note 2.

11. *See* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994 & Supp. IV 1998). Had the issuing court in this scenario been a state court, Washington would have a duty under federal law to enforce the custody and visitation determinations. *See id.* § 1738A(a). *See generally* Thompson v. Thompson, 484 U.S. 174, 175-78 (1988).

12. The strikingly similar case of *Ieronimakis v. Ieronimakis*, 831 P.2d 172 (Wash. Ct. App. 1992), is illustrative. In *Ieronimakis*, a U.S. citizen, moved her two children from Greece back to her home state of Washington where she sought to divorce her Greek husband, alleging physical abuse to herself and their children. *See id.* at 173, 184. Thereafter, the father commenced child custody proceedings in Greece. *See id.* at 174. Based on the policy considerations of Uniform Child Custody Jurisdiction Act (section 26.27 of the Revised Code of Washington), and forum non conveniens, Washington declined jurisdiction in favor of Greece stating:

> To allow Washington courts to assert jurisdiction because [she] generated significant contacts with the state is in effect telling any abducting parent that if you can stay away from home long enough . . . that is a sufficient reason for the new state to assert a right to adjudicate the issue.
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> . . . .
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> . . . It would be an unacceptable precedent to reward the abducting parent without any substantial showing that such action is necessary to avoid threatened mistreatment and abuse of the children.

Id. at 177-78. The Court expressed concern that failure to defer to Greek jurisdiction would effectively deny the children "any reasonable relationship with their father and would be cut off from their Greek heritage." *Id.* at 178.

interviews with tribal court officials throughout the country, I document the law of tribal judgment recognition as it operates on the ground, demonstrating that it often deviates markedly from law on the books. Along the way I consider whether current federal full faith and credit mandates and uniform laws provide an appropriate and effective model. I conclude that non-recognition of tribal court judgments is a problematic reality growing out of an increasingly restrictive view of tribal adjudicatory jurisdiction, a lack of uniformity of approaches, and a failure to implement procedures to effectuate those laws that do exist.

In conclusion, I explore possible remedies to ensure more consistent cross-jurisdictional recognition and enforcement. Based on my analysis of the workings of state-tribal relationships as expressed through recognition and non-recognition of tribal court judgments, I specifically recommend strengthening the existing federal full faith and credit mandates by providing federal enforcement assistance.

II. "RECOGNITION" DEFINED

To investigate the tribal court experience, the term "recognition" of judgments must be broadly defined. At the forefront is the standard inquiry of what force and effect a reviewing court will afford judgments rendered by a tribal court.[13] But, "recognition" in terms of the approach taken by non-judicial state agencies when tribal court orders are at issue is also a necessary part of the inquiry. These non-judicial agencies include law enforcement officials and administrative agencies, such as vital statistics departments, health and human services agencies, and child support enforcement agencies.

Much of the caselaw and the majority of commentaries on recognition and enforcement of judgments focuses on money judgments within the judicial system.[14] The prevailing party seeks ratification of an earlier

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13. The area of law governing the recognition and enforcement of judgments, that do not otherwise fall within the federal full faith and credit scheme is generally governed by the United States Supreme Court decision in *Hilton v. Guyot*, 159 U.S. 113 (1895):

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance by the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice . . . and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of his nation should not allow it full effect, the merits of the case should not . . . be tried afresh . . . .

Id. at 202-03.

Addressing whether a lack of reciprocity should preclude recognition, *Hilton* concluded that reciprocity is a prerequisite. *See id.* at 228. Although the reciprocity requirement is no longer recognized in many jurisdictions, *Hilton's* other pronouncements continue to prevail. *See, e.g.*, UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1986).

14. *See generally* Robert Laurence, *The Off-Reservation Garnishment of On-Reservation Debt*

final judgment on the merits by a court within another jurisdiction. The goal is to obtain the second jurisdiction's assistance in enforcing the decision of the first court.[15] Limiting the discussion to these types of court-to-court scenarios, however, ignores a range of other practical problems encountered by individuals seeking recognition of tribal court orders. For instance, if a tribal court enters a domestic violence protection order, do state law enforcement officials provide precautionary protection on the basis of that order alone? Will a state department of vital statistics record information from a tribal court paternity decree without a subsequent order of recognition issued by a state court? Will a state child support enforcement agency assist in collecting payments ordered by a tribal court without being ordered to do so by a state court? Will a state-operated mental institution accept a tribal commitment order?

Even if we narrow the focus to court-to-court relations only, there are broader "recognition" issues than whether the tribal court judgment will receive full faith and credit or comity by the state court. Is relitigation of issues precluded by virtue of prior tribal court rulings in related cases? Do states enter competing orders with the knowledge that a tribal court is simultaneously exercising jurisdiction, even if a final judgment has not been reached?

Each of these scenarios is encompassed within the meaning of "recognition" for purposes of this study, with the ultimate comparison being whether a state's action or inaction would differ had the issuing court been something other than a tribal forum.

III. TRIBAL COURTS

Tribal courts today entertain an extensive range of cases from misdemeanor criminal matters to complex corporate tort claims.[16] The

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and Related Issues in the Cross-Boundary Enforcement of Money Judgments, 22 AM. INDIAN L. REV. 355, 356 (1998); Christopher P. Hall & David B. Gordon, *Enforcement of Foreign Judgments in the United States*, 10-AUT INT'L L. PRACTICUM 57, 58-59 (1997); Jeremy Maltby, Note, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 1983-84 (1994); Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 262-65 (1991).

15. *See generally* Jerome A. Hoffman, *Recognition by Courts in the Eleventh Circuit of Judgments Rendered by Courts of Other Countries*, 29 CUMB. L. REV. 65, 66-75 (1998) (discussing recognition and enforcement).

16. Although tribal courts exercise jurisdiction over both Indians and non-Indians, the majority of tribal court cases involve tribal members or residents of the reservation. *See* HO-CHUNK NATION TRIAL COURT REPORT ON TRIBAL SOVEREIGNTY (1996-1997) (on file with author). A breakdown of cases involving non-Indians during 1996 and 1997 in the Ho-Chunk Nation provides an example of the type of cases involving non-Indian litigants brought in tribal court. *See id.* During this time period, 266 civil cases were filed in the Ho-Chunk Nation. *See id.* Only 32 involved non-Indian parties. *See id.* The majority of those cases, 26 involved employment disputes concerning non-Indian parties who are employed by the tribe. *See id.* In two actions, the non-Indian won outright. *See id.* Ten favorably settled and the non-Indian litigant voluntarily dismissed one case. *See id.* The trial court dismissed six overall: three for want of prosecution and three for lack of substantive evidence. *See id.* Seven

various tribal court systems[17] enforce diverse substantive laws and procedural requirements, but tribal courts, like their state counterparts, are uniformly subject to the federally mandated minimum due process requirements. The states are mandated by the U.S. Constitution and the tribes are mandated by the Indian Civil Rights Act (ICRA).[18] The Honorable Robert Yazzie, Chief Justice of the Navajo Nation, provides a tribal court interpretation of the ICRA:

> What about the Indian Civil Rights Act? Doesn't it override everything? Look at it another way: The Indian Civil Rights Act has certain "minimums" you must follow. However, when it comes to ideas of due process, which is basic fairness, or equal treatment of persons, Indian values most often give far more protections and consideration than Anglo values. Too often, it seems that "due process" in non-Indian court systems means power and money. To Indians, it means respect, talking things out, listening to everyone's point of view, and using your values.[19]

As an additional check to tribal adjudicatory authority, all challenges to tribal court jurisdiction are granted federal review.[20] These "safeguards,"[21] to tribal court authority are relatively new additions to

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cases remained for litigation at the end of 1997. *See id.*

Of the new cases filed in the Ho-Chunk trial court during 1996, 42% involved child support enforcement, 21% dealt with internal tribal governmental matters, 29% involved employment law, 7% were contract disputes, and only 1% were tort cases. *See id.* Although the ratio of Indian to non-Indian litigants varies from court to court, tribal courts do not generally have significant impact on non-Indians unless they are domiciled within Indian country or if they have entered into a consensual business or domestic relationship with the Indian tribe or its members. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, AM. INDIAN L. REV. 285, 299 (1998) (providing an overview of the types of cases published in the *Indian Law Reporter* in 1996).

17. The number of tribal courts has increased dramatically in the last two decades. There were only 117 tribal courts identified in 1976. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 n.21 (1978). Presently, the number of tribal court systems exceeds 170. *See* Hon. Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, 9 TRIBAL CT. REC. 12 (1996).

18. 25 U.S.C. §§ 1301-1303 (1994). Section 1302 of the ICRA ensures many rights guaranteed in the United States Constitution, but reveals certain differences. In comparison to the First Amendment, which prohibits any "laws respecting establishment of religion, or prohibiting the free exercise thereof," the ICRA's only limitation is against laws "prohibiting free exercise of religion." *Id.* § 1302(1). In comparison to the Sixth Amendment, the ICRA's provisions differ only in respect that the accused is entitled to an attorney at his own expense. *See id.* § 1302(6). The ICRA limits tribal courts from imposing a sentence for more than one year and a $5,000 fine. *See id.* § 1302(7). With these few exceptions, there are many similarities between the Bill of Rights and the ICRA. Section 1302 incorporates the language of the Fourth and Fifth Amendments, for example, as well as the Fourteenth Amendment's equal protection language.

19. *See* Robert Yazzie, Speech, *Developing Tribal Common Law* (Annual Conference of the National American Indian Courts Judges Association Mar. 22, 1999) (transcript on file with author).

20. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985) (stating that tribal jurisdiction is a federal question to be determined by federal district courts); *see also* Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 714-23 (1997).

21. One's take on the passage of the ICRA and the federal court's willingness to treat any challenge to tribal court jurisdiction as a federal question is a matter of perspective. To those seeking

federal Indian law, and represent the ongoing attempt to define the relationship of tribal governments within, or to, our federal union.[22]

A. HISTORY OF CHANGING RELATIONSHIPS

Tribal court judgments were first discussed within the context of the American legal system in 1855 when the United States Supreme Court decided *United States ex rel. Mackey v. Coxe*.[23] In *Mackey*, the Court recognized a Cherokee Nation order on the basis that tribes were "territories" under a federal probate statute.[24] Although the opinion does not state whether an Indian tribe is a territory under the implementing statute of the Full Faith and Credit Clause,[25] *Mackey* remains the only case in which the Supreme Court has addressed what force and effect is due a final tribal court judgment.[26] To give *Mackey* its proper context, some discussion of the origins of federal Indian law is warranted.

When the United States Supreme Court decided the first Indian law cases, the central question was where tribal governments would fit into the federal union, if at all. This question required the Court to define tribal governments either as foreign nations or as entities occupying a contextual position within our federal union.

The Supreme Court's initial attempt to define the relationship suggested a tribal existence within the federal union, yet simultaneously recognized elements of enduring tribal sovereignty.[27] Chief Justice John

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to limit tribal authority, these measures are "safeguards." On the other hand, these measures significantly infringe on tribal self-government by injecting the procedures and values of non-Indian legal thought into political systems that never consented to such. "In Lockean social compact terms, Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty." Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990).

22. *See id.* at 843-66; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 690-701 (1989). *See generally* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

23. 59 U.S. (18 How.) 100, 102 (1855).

24. *See* United States *ex rel.* Mackey v. Coxe, 59 U.S. (18 How.) 100, 104 (1855).

> [I]t shall be unlawful for any person or persons to whom letters testamentary or of administration hath been or may be hereafter granted, by the proper authority in any of the United States or territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the district of Columbia, in the same manner as if the letters of testamentary or administration had been granted . . . in the said District.

12 Cong. ch. 106, 2 Stat. 755 (1848).

25. 28 U.S.C. § 1738 (1994).

26. Over a century later, the United States Supreme Court buries its only other relevant pronouncement in a footnote to *Santa Clara Pueblo v. Martinez:* "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." 436 U.S. 49, 65-66 n.21 (1978) (citing *Mackey*, 59 U.S. (18 How.) 100).

27. This speaks only to the federal government's view of tribes within the federal union, and does not suggest that tribes should, or do, adopt the same interpretation. To the contrary, many tribal courts reject this interpretation. *See* Order of Judge M.J. Stancampiano, Durango Credit and Collection v. Weaver (Southern Ute Tribal Ct. Oct. 17, 1997) (No. 97-CV-13) (stating that the Southern Ute

Marshall, in *Cherokee Nation v. Georgia,*[28] attempted to clarify the relationship by defining Indian tribes as "domestic dependent nations."[29] The phrase placed tribes outside the scope of Article III,[30] thus denying tribes access to federal courts, yet contextually included tribes within the federal union by dispelling the notion that they were foreign nations.[31] Justice Marshall's definition adapted well to the federal Indian policy emerging in the 1830s, and which would prevail toward the end of the nineteenth century, because it justified contemporaneous efforts to subject tribal governments to federal control.[32]

After forced relocation to Indian Territory, the government of the Cherokee Nation was reestablished in 1839,[33] including the constitutionally created tribal court from which *Mackey* originated. Following *Mackey,* the Eighth Circuit decided several similar cases, each involving

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Tribe of Indians has elected to extend general principles of comity to judgments of other jurisdictions because "the 'full faith and credit clause' of the federal Constitution is not applicable to Indian tribes"). The Navajo Nation also uses comity to recognize state and federal decisions. *See generally* James W. Zion, *Many Passports, Many Frontiers: The Movement of Indian Judgments and Laws In and Out of Indian Country, in* FULL FAITH AND CREDIT: A PASSPORT TO SAFETY 167-79 (Byron R. Johnson & Neil S. Websdale eds., 1997).

Scholarly debate over the tribes' obligation to extend full faith and credit to state and federal court judgments has evolved into two schools of thought. One side, most notably Professors Ragsdale and Clinton, adopts a symmetrical approach, positing that if tribes are to be "territories" under 28 U.S.C. § 1738, then the tribes would also be constitutionally compelled to recognize state and federal judgments by extending them full faith and credit. *See* Clinton, *supra* note 21, at 909; Fred L. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. Rev. 133 (1977). Conversely, Professor Laurence, with whom I agree on this matter, contends that an asymmetrical model is more appropriate in the Indian law context. *See* Laurence, *supra* note 14, at 360.

28. 30 U.S. (5 Pet.) 1 (1831).

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

30. At issue in *Cherokee Nation* was whether the tribe was entitled to access federal courts to resolve an issue between the State of Georgia and the Cherokee Nation. *See id.* at 29. Article III limits judicial power to controversies between the states of the union, between states and private citizens, and between foreign nations and private citizens. *See* U.S. CONST. art. III, § 2.

31. It is interesting to note, for purposes of the tribal court recognition approaches discussed *infra* Part IV, that *Cherokee Nation's* dissenting Justices Thompson and Story chose to address the Indian question as a matter of foreign relations, concluding that Indian tribes were foreign governments. *See* 30 U.S. (5 Pet.) at 51 (Thompson, J., dissenting). This view is consistent with the current trend by federal courts to apply principles of international comity to tribal court review.

32. This federal policy had been categorized as "removal and relocation" and prevailed in the period between 1828 and 1887. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 6-8 (1983); *see also* Act of 1830, Removal of the Indians West of the Mississippi, 4 STAT. 411-13 (1850); President Jackson on Indian Removal (Dec. 8, 1829), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 47-48 (Francis Paul Prucha, ed., University of Neb. Press 2d ed. 1990) (suggesting that lands be set aside west of the Mississippi for exclusive control by each particular tribe); Message of President Monroe on Indian Removal (Jan. 27, 1825), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* at 39-40 (proposing a voluntary removal policy as the best solution against encroaching white settlers and increased pressures from state governments).

Professor Strickland notes, however, that the federal removal and relocation policy was opposed by many non-Indians: "more than one million people, in a nation with a population of about twelve million, wrote Congress and signed petitions protesting the removal bill." RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 107 (1997).

33. *See* CHEROKEE NATION CONST. OF 1839 art. V (full text available at <http:\\www.geocities.com/Heartland/Prairie/5918/Issues/1839constitution.html>). *See generally* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

collateral attacks to tribal court judgments.[34] These included *Mehlin v. Ice*,[35] *Exendine v. Pore*,[36] *Standley v. Roberts*,[37] and *Cornells v. Shannon*.[38] In *Mehlin* and *Exendine*, which were argued in the same term and decided in 1893, the Eighth Circuit concluded that judgments of the Cherokee Nation "are on the same footing with the proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith and credit."[39] In *Cornells*, a Muscogee (Creek) Nation judgment was also construed equivalent to judgments of the territorial courts, to be afforded the same respect and the same faith and credit.[40] Likewise, the *Standley* decision recognized the validity of a Choctaw quiet title action. Curiously, none of these early cases pursues the analogy of tribes to territories so as to reach the precise question of whether full faith and credit was due tribal court judgments under the general full faith and credit statute, 28 U.S.C. § 1738. These opinions nonetheless indicate that by the turn of the last century, federal courts treated tribal court judgments with the same respect as those of any other court within the federal union. As a logical extension of these decisions, the federal courts also demonstrated restraint by limiting post-exhaustion review exclusively to issues of jurisdiction:[41]

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34. The tone of these cases suggests that other tribal courts might have been treated differently on review, because the tribes in Indian Territory during this era were considered more "civilized" in their political organization. *See, e.g.*, Mehlin v. Ice, 56 F. 12, 16 (8th Cir. 1893). Of the Cherokee Nation, it was written:

> By intermarriage with the whites, they have to a considerable extent come to be of mixed blood. [sic] Generations ago they abandoned the chase and the war path, and adopted the pursuits of civilized man. As far back as 1827 they adopted a written constitution, modeled after the constitutions of the state then surrounding their country.

Id. at 17. More expressly, in terms of the Cherokee Nation's recognized jurisdiction over non-Indians, the same court stated:

> It is quite obvious that the jurisdiction conferred on the Cherokees could only have been granted on the assumption that they were then a civilized people, having an established government of their own, and that their laws and modes of trial were of a character which made it proper to subject to their jurisdiction citizens of the Unites States settling upon their lands. It is very clear no such jurisdiction would have been granted to a savage or uncivilized tribe of Indians.

Id.

35. 56 F. 12 (8th Cir. 1893).

36. 56 F. 777 (8th Cir. 1893).

37. 59 F. 836 (8th Cir. 1894).

38. 63 F. 305 (8th Cir. 1894).

39. *Mehlin*, 56 F. at 19; *accord* Exendine v. Pore 56 F. 777, 778 (8th Cir. 1893).

40. *See* Cornells v. Shannon, 63 F. 305, 306-07 (8th Cir. 1894).

41. Federal district courts today do not exercise the same restraint. *See* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 245-46 (1998) (arguing that federal courts' de novo review of all tribal court determinations of federal law relegate tribal courts to the role of preliminary fact finder); *see also* Phillip W.M. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277 (1995).

> This court is not invested with appellate jurisdiction over the proceedings of [those tribal] courts. However irregular and erroneous their proceedings may be, their judgments, like those of any other court, are not void, and are not subject to collateral attack when it appears they had jurisdiction of the subject-matter and the person.[42]

This language is just as strong as contemporaneous federal court decisions concerning state-to-state recognition:

> A judgment is conclusive . . . and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based on a mistake of law. Of course, a want of jurisdiction over either the person or the subject-matter might be shown . . . But as the jurisdiction of the [state] court is not open to dispute the judgment cannot be impeached . . . even if it went upon a misapprehension of the [state] law.[43]

Cornells, *Mehlin*, *Exendine* and *Mackey* each involved non-Indian parties over whom the tribal court had exercised jurisdiction. The reviewing federal courts unequivocally validated this jurisdictional claim. Specifically, in *Mehlin*, the defendant attempted to nullify the tribal court proceedings on the basis that he was a "white man, and a citizen of the United States."[44] The federal courts rejected this challenge on the basis that the defendant had waived personal jurisdiction.[45] The Court reasoned that personal jurisdiction was a privilege that the defendant might, and did, waive.[46]

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42. *Cornells*, 63 F. at 307 (determining jurisdiction in a dispute where the Muscogee (Creek) Nation Court imposed a $30,000 fine on non-Indian for a cattle smuggling infraction). It is important to note that there was no record from the tribal court on the question of jurisdiction, yet the federal court exercised restraint and avoided relitigation of issues disposed of at the tribal level. *See id.* at 307.

43. Fauntleroy v. Lum, 210 U.S. 230, 237 (1908).

44. 56 F. at 19.

45. Likewise in *Exendine*, the defendant in a Cherokee Nation forcible entry and detainer action was a citizen of the United States who, after losing at the tribal court level, sought to have the federal district court relitigate the merits of the case. *See* 56 F. at 777-78. The Eighth Circuit, relying on *Mehlin*, dismissed the federal action. *See id.* at 778 (citing *Mehlin*, 56 F. 12).

46. *See* Mehlin v. Ice, 56 F. 12, 19 (8th Cir. 1893). The Court allowed a waiver of personal jurisdiction indicating that if the 11th Amendment to the Constitution can be waived by a state, an individual can waive personal jurisdiction:

> A party may waive any provision either of a constitution, treaty, or statute intended for his benefit. It is therefore competent for a white man to waive the treaty or statutory stipulations exempting him from the jurisdiction of the Cherokee courts; and when he enters a general appearance to an action pending in those courts, and pleads to the merits, and there is a trial upon such plea, he thereby waives the exemption, and submits himself to the jurisdiction of the court, and will not afterwards be heard to contest the validity of the proceedings and judgment of the Cherokee court on the ground that it had no jurisdiction of his person.

From *Mackey* in 1855 to *Cornells* in 1894, the federal courts clearly placed tribal courts on the same plane as the territorial courts of the United States, and thus accorded them the same full faith and credit as the states. This reasoning applied to tribal court civil adjudication regardless of whether the litigants were Indian or non-Indian. This clear mandate of recognition soon faded away, however, due to a shift in federal Indian policy.[47] In fact, only four years after *Cornells*, Congress abolished the Cherokee court system.[48]

When these Indian Territory cases were decided, the movement that led to the late-nineteenth century demise of tribal courts was already underway.[49] A decade before *Mehlin*, a decision of the Brule Sioux played the leading role as catalyst for a reactionary shift in federal Indian policy following a murder trial memorialized as *Ex Parte Crow Dog*.[50]

Crow Dog involved an intra-tribal murder on the Brule Sioux reservation that had been resolved by a tribal mechanism that progressive thinkers today might call "restorative justice."[51] The murder was settled, as a matter of tribal law, by a forum consisting of the family members of both assailant and victim.[52] Crow Dog's sentence called for restitution to the victim's family[53] but the tribunal did not impose the death penalty. One year later, Crow Dog was tried and sentenced to death by the federal district court for the Dakota territory.[54] On appeal

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Id. at 19-20. Compare this outcome to the Washington decision in *Susan C.* where the court ruled that the tribe lacked personal jurisdiction even though Susan C. initiated the tribal proceedings. *See* Benjamin W.E. v. Susan C., No. 16474-8-III, 1998 WL 289167 (Wash. Ct. App. May 26, 1998). In *Mehlin*, a challenge to personal jurisdiction was discarded by the federal court by defendant's general entry of appearance at the tribal level. 56 F. at 19. Within the state-state recognition context, personal jurisdiction may be waived. Even a judgment rendered without personal jurisdiction may be entitled to full faith and credit. *See* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931).

47. *See* DELORIA & LYTLE, *supra* note 32, at 8-12 (defining the "allotment and assimilation" period of federal Indian policy from 1887 to 1928).

48. *See* Act of June 28, 1898, 30 Stat. 495 (1899); STRICKLAND, *supra* note 32, at 175-82.

49. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 110-18 (1994). Sidney Harring documents that Crow Dog's arrest, on the authority of an Indian agent that was "fully aware that the Brule had already settled the case according to tribal law," was a calculated attempt on behalf of the Bureau of Indian Affairs and the Department of Justice to use the circumstance as a test case to extend federal jurisdiction into Indian country. *Id.* at 110-113.

50. *See Ex parte* Crow Dog, 109 U.S. 556 (1883); B.J. Jones, *Welcoming Tribal Courts Into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Courts Relations*, 24 WM. MITCHELL L. REV. 457, 468-70 (1998).

51. "Restorative" justice is an innovative approach to criminal justice that advocates victim-oriented programs such as restitution and community service programs. *See generally*, Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1 (1998).

52. A tribal council meeting was held the day following the murder, in which an order ending the trouble was issued. The council sent peacemakers to both families, and an agreement was reached to restore harmony. *See* HARRING, *supra* note 49, at 110.

53. *See* HARRING, *supra* note 49, at 110. He was fined $600 in cash, eight horses, and one blanket. *See* HARRING, *supra* note 49, at 110.

54. *See Crow Dog*, 109 U.S. at 557. Crow Dog was initially arrested by Indian police on the orders of the reservation clerk and served one year in jail, pending the trial in Dakota territorial court.

to the United States Supreme Court, Crow Dog was granted habeas relief on the grounds that the United States lacked jurisdiction over an intra-tribal murder occurring on the reservation.[55]

This federal deference to tribal adjudicatory authority triggered widespread public outcry. Conventional wisdom outside the Brule Sioux Nation deemed Crow Dog's "punishment" inadequate and Congress swiftly enacted the Indian Major Crimes Act[56] to provide for federal jurisdiction over major crimes committed within Indian country, regardless of whether the parties involved were Indians or non-Indians.[57] The law divested tribal courts of exclusive jurisdiction over certain crimes committed within their own territories.[58]

The same year *Crow Dog* was decided, the first Courts of Indian Offenses were authorized.[59] The federal government established these courts, commonly referred to as "CFR courts,"[60] for the purpose of civilizing the Indians by eliminating certain "undesirable" practices among reservation Indians.[61] The Department of the Interior dictated CFR court rules and procedures from the outset, and still does.[62]

The purpose of the CFR courts was to assimilate the Indians rather than to provide a federally sanctioned court of tribal law. According to an 1891 *New York Times* editorial, these courts originated "in the desire to restrict and, as far as possible, abolish certain barbarous customs of the

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See HARRING, *supra* note 49, at 110-11. At the time of Crow Dog's arrest, the BIA officials were aware that the case had been resolved according to tribal law. *See* HARRING, *supra* note 49, at 110.

55. *See Crow Dog*, 109 U.S. at 571-72.

56. 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)).

57. *See* 18 U.S.C. § 1153(a). Initially consisting of seven enumerated crimes, the list of major crimes has since been expanded to 14: murder, manslaughter, kidnapping, rape, statutory rape, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. *See id. See generally* United States v. John, 437 U.S. 634 (1978) (discussing jurisdiction in a case involving an offense listed in the Indian Major Crimes Act); United States v. Kagama, 118 U.S. 375 (1886).

58. This is not to suggest divestiture of concurrent jurisdiction as the statute does not expressly diminish tribal jurisdiction. *But see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978) (suggesting exclusive federal jurisdiction).

59. *See* Yazzie, *supra* note 19. Courts of Indian Offenses were first authorized in 1883 as a means to assimilate and control the Indians. *See* Yazzie, *supra* note 19.

> It was a crime to see a medicine man. It was a crime to *be* a medicine man. Men (and it was "men") who were selected to be judges had to cut their hair, wear a "citizen's dress" (no blankets or feathers allowed) and have only one wife. The Indian judges of the Court of Indian Offenses were appointed by the Commissioner of Indian Affairs and served at his pleasure. Those judges were under the supervision of an agency superintendent, who could reverse a ruling at any time.

Yazzie, *supra* note 19.

60. The procedures are published in 25 C.F.R. pt. 11 (1999).

61. In his 1883 Annual Report, Secretary of the Interior Henry M. Teller mentioned his desire to eliminate "heathenish practices" among the Indians through the establishment of these Courts. *See* Annual Report of the Secretary of the Interior (Nov. 1, 1883), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 32, at 160-62.

62. Today, there are approximately 50 CFR courts. *See* Listing of Courts of Indian Offenses, 25 C.F.R. § 11.100 (1999). This number decreases each year, as tribes voluntarily develop their own court systems and end the supervisory role of the CFR courts. *See id.* § 11.100(e).

red men," and, it was hoped, "to have a good effect in accustoming the red men to the settlement of their disputes and grievances by law instead of by violence."[63] Soon CFR courts became the only recognized tribunals in Indian country and the tribal courts became extinct.[64]

Within several decades, Congress and the executive branch acknowledged that federal Indian policy of aggressive assimilation had failed,[65] calling once again for a reversal of policy directives that led to the passage of the Indian Reorganization Act of 1934 (IRA).[66] The IRA encouraged reorganization of tribal governments. As a result, many tribes adopted new constitutions and eventually revitalized their tribal courts. Navajo Chief Justice Robert Yazzie clarifies a frequent misconception about the IRA:

> Our court systems were not created by the Indian Reorganization Act. They are *recognized* by the Indian Reorganization Act. The law is quite clear that Indian courts are the creation of their own Indian nation.[67]

As tribal courts gradually asserted a renewed authority, the federal courts faced the same questions Justice John Marshall had addressed in the previous century, only somewhat more focused: where do tribal courts fit into our federal system, if at all?

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63. *Indian Reservation Courts*, N.Y. TIMES, Mar. 6, 1981, *reprinted in* ROBERT G. HAYS, A RACE AT BAY: NEW YORK TIMES EDITORIALS ON "THE INDIAN PROBLEM," 1860-1900, at 341-42 (Southern Ill. Univ. Press 1997).

64. This is not to suggest that traditional forums ceased to exist, but refers to the abolition of courts that were openly visible to the outside world, such as in *Mackey*. *See* United States *ex rel.* Mackey v. Coxe, 59 U.S. (18 How.) 100, 102-03 (1855) (comparing Cherokee Courts with state courts and finding them equally responsible). The federal courts make little reference to tribal courts for a period of nearly 50 years, from *Talton v. Mayes*, 163 U.S. 376 (1896) to *Head v. Hunter*, 141 F.2d 449 (10th Cir. 1944) (addressing double jeopardy claim when federal prosecution follows dismissal from Oglala tribal court). Search of Westlaw, Allfeds-Old Database (July 25, 2000) (search for documents containing "Tribal Court" between the dates of May 18, 1896 and March 3, 1944) (yielding 21 cases which refered to "Tribal Courts," 19 of which referred to the abolition of tribal courts and two of which referred to "Tribal Courts" resolving inter-tribal disputes such as tribal membership). Tribal courts were rarely mentioned in state court opinion during the same time period. Search of Westlaw, Allstates Database (July 25, 2000) (search for documents containing "Tribal Court" between the dates of May 18, 1896 and March 3, 1944) (yielding no documents which matched search terms). *But see* Jimeson v. Pierce, 79 N.Y.S. 3 (N.Y. 1902) (referring to "peacemaking courts" as having jurisdiction over inter-tribal matters). The modern Navajo Nation courts were established in 1959. *See* Navajo Nation Council Res. CO-69-58, CJA-5-59 (codified as amended at NAVAJO TRIBAL CODE tit 7, § 101 (1969)); Robert Yazzie, *"Life Comes From It:" Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177 n.17 (1994).

65. A reform movement, led by John Collier, culminated in a report to Congress indicating that the failure of the allotment system, which led to a loss of roughly two-thirds of all Indian land, had virtually robbed the Indians of the ability to be self-supportive. *See* 1934 Annual Report of the Commissioner of Indian Affairs (1934), at 78-83, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 32, at 225-28.

66. Wheeler-Howard Act (Indian Reorganization Act) of 1934, Pub. L. No. 383, 48 Stat. 984.

67. Yazzie, *supra* note 19.

In the modern era, only the Ninth Circuit has directly answered the question. In *Wilson v. Marchington,*[68] the appeals court analogized tribal courts to courts of foreign countries.[69] According to *Wilson,* principles of international comity as dictated in *Hilton,*[70] and not full faith and credit, govern whether a federal district court should recognize and enforce a tribal court judgment.[71] *Wilson* observed that *Hilton's* rule of comity might not be completely right for the Indian situation.[72] But rather than softening the elements, the Ninth Circuit suggested using the following parameters:

> [F]ederal courts must neither recognize nor enforce tribal [court decisions] if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law. In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (1) the judgment was obtained by fraud; (2) the

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68. 127 F.3d 805 (9th Cir. 1997).

69. *See* Wilson v. Marchington, 127 F.3d 805, 811-12 (9th Cir. 1997).

70. *Hilton* is the leading case on recognition of foreign country judgments. *See supra* Part II.

71. *See Wilson,* 127 F.3d at 807. *Wilson,* takes *Hilton's* application to tribes a step further, and comments that the *Restatement (Third) of the Foreign Relations Law* could also apply to tribes. The Restatement suggests two mandatory and six discretionary grounds for non-recognition of foreign judgments:

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
> (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.
> (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
> (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
> (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
> (c) the judgment was obtained by fraud;
> (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
> (e) the judgment conflicts with another final judgment that is entitled to recognition; or
> (f) the proceeding in the foreign country was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987); *see also* Roger Alford & Christopher Gibson, *Enforcement of Foreign Judgments*, 32 INT'L LAW. 249, 250-51 (1998).

72. Although the status of Indian tribes as "dependent domestic nations" presents some unique circumstances, comity still affords the best general analytical framework for recognizing tribal judgments. *See Wilson,* 127 F.3d. at 810.

> judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.[73]

Wilson imposes no reciprocal recognition duty on tribes,[74] noting that the requirement has "fallen into disfavor."[75]

> [T]he Supreme Court "certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here. That doctrine I am happy to say is not a part of American jurisprudence."[76]
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> . . .
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> The general rationale underlying rejection of the reciprocity requirement is that it is a matter of diplomacy, best negotiated by the executive and legislative branches. There are, of course, substantive differences between foreign relations with other nations and domestic relations with Native American tribes
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> . . .
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> . . . The question of whether a reciprocity requirement ought to be imposed on an Indian tribe before its judgments may be recognized is essentially a public policy question best left to the executive and legislative branches.[77]

And what has become of *Mackey* and its Eighth Circuit progeny? The *Wilson* court interprets *Mackey*'s pronouncements on collateral

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73. *Id.*

74. Except when otherwise required by local statute, the great majority of State and federal courts have extended recognition to judgments of foreign nations without regard to any question of reciprocity." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 98 cmt. f (1988). In fact, only six states currently require reciprocity in their adaptation of the Uniform Foreign Money-Judgments Act, 13 U.L.A. 85 (Supp. 1999). *See* Russell J. Wientraub, *Recognition and Enforcement of Judgments and Child Support Obligations in United States and Canadian Courts*, 34 TEX. INT'L L.J. 361, 363 n.25 (1999).

75. *See Wilson*, 127 F.3d at 811.

76. *Id.* at 812 (quoting Direction der Disconto-Gesellshaft v. United States Steel Corp., 300 F. 741, 747 (S.D.N.Y. 1924), *aff'd* 267 U.S. 22 (1925)).

77. *Id.*

matters as "inconclusive"[78] in light of the fact that the Supreme Court has never ruled on whether the general full faith and credit statute[79] includes Indian nations. Instead, the Ninth Circuit adopts the ruling in *Ex parte Morgan*,[80] an 1883 case out of the Western District of Arkansas, in which the Cherokee Nation was not treated as "territory" under a federal extradition statute.[81]

The Ninth Circuit's reliance on *Morgan* blurs various types of tribal jurisdiction. *Morgan*, unlike *Wilson* and the *Mackey* line of cases, has nothing to do with civil adjudicatory jurisdiction, but instead addresses criminal jurisdiction. In *Morgan,* the Cherokee Nation was not considered a "territory" under a federal extradition statute. But no other conclusion *could* have been reached given the fact that prior federal law had divested Indian tribes of criminal jurisdiction over the fugitive that the Cherokees were seeking:

> It must appear to the governor honoring the requisition that the tribunals of the demanding state or territory had jurisdiction to try, or else how can a charge of crime be legally made . . . . Now, ordinarily, properly charging a man with the crime of murder, in a state or territory, would be sufficient to show jurisdiction to try, because the courts all the states and territories have jurisdiction to try for the crime of murder, if committed within their boundaries, regardless of who commits the crime and against whom it is committed. But this is not so in the Cherokee Nation. The courts of that nation have jurisdiction, and can only try for the crime of murder when the person murdered is an Indian, and the one charged with the crime is also an Indian.[82]

Given that the issue was how much deference a federal court should extend to a tribal court order in a civil and not a criminal matter, the attempt in *Wilson* to avoid the precedential force of *Mackey* is confused.[83] *Wilson* did not, of course, overrule *Mackey*. Instead, the case

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78. *See id.* at 808.

79. *See* 28 U.S.C. § 1738 (1994).

80. 20 F. 298 (W.D. Ark. 1883). The court in *Wilson* notes that the U.S. Supreme Court cited *Ex parte Morgan* with approval in *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909). *See Wilson*, 127 F.3d at 808.

81. *See Ex parte* Morgan, 20 F. 298, 307 (W.D. Ark. 1883). No credence was given to the fact the United States Supreme Court has approvingly cited *Mackey* and *Standley* in subsequent cases. "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.21 (1978).

82. *Morgan*, 20 F. at 308.

83. In federal Indian law, it is crucial to properly distinguish what type of tribal jurisdictional authority is at issue, because the results will differ greatly. For example, tribes have been divested of

creates a split of authority in the federal system on the issue of whether tribal courts are to be afforded the same faith and credit as state, federal and territorial courts, or whether tribal courts should be granted only the comity due to the courts of another nation. The decision also triggers apprehension in some tribal judiciaries: "The recent federal rule under the Ninth Circuit's decision in Wilson v. Marchington . . . will permit widespread attacks against our court system's legitimacy,"[84] commented an official of the Navajo Court system.

If we are left to reconcile the two cases, the path from *Mackey* to *Wilson* traces an ironic, indeed perverse, evolution of tribal court status. At a point in history when Indian tribes negotiated treaties with the United States[85] and tribes were denied access to the federal courts to adjudicate their claims, the federal courts granted full force and effect to tribal court judgments as if they were states or territories.[86] Now that Indian treaty making is dead,[87] and Congress exercises "plenary" authority[88] over tribes, the federal courts equate Indian tribes with foreign nations.

Wilson does not note nor lend any significance to the procedural safeguards already in place within our federal system.[89] It improperly equates tribes with foreign nations for judgment recognition purposes, ignoring the fact that United States already exhibits controls on the tribal courts process, with the ICRA and guaranteed federal question review under 28 U.S.C. § 1331. Likewise, *Wilson* fails to grasp that the

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criminal jurisdiction over non-Indians, yet tribal civil adjudicatory and regulatory jurisdiction over non-Indians is often permissible. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (finding that Indian tribes lack criminal jurisdiction over non-Indians because it is "inconsistent with their status" as domestic dependant nations); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (upholding tribal authority to tax non-Indian lessors); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1312 (9th Cir. 1990) (upholding tribal authority over non-Indian business on fee lands within the reservation); Resnik, *supra* note 22, at 729-34.

84. Letter from James W. Zion, Solicitor, The Navajo Nation, Judicial Branch to Stacy L. Leeds, William H. Hastie Fellow, University of Wisconsin Law School (Oct. 6, 1998) (on file with author).

85. *See, e.g.*, Treaty with the Creek Indians, June 14, 1866, U.S.-Creek Nation of Indians, 14 Stat. 785-92; Treaty with the Sioux Indians, Apr. 29, 1868, U.S.-Tribes of Sioux Indians, 15 Stat. 635-47. For a complete appendix of ratified Indian treaties see FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 446-500 (1994).

86. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 49 (1831).

87. In 1871, Congress ended treaty-making with the Indian tribes: "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570 (1871) (codified as amended at 25 U.S.C. § 71 (1994)).

88. The plenary power doctrine has been appropriately referred to as "the most obvious example of the legal legacy of colonialism," because it lacks constitutional sources. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 110 (1993); *see also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 25-27 (1997); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 260 (1986).

89. *See supra* Part III.

concerns addressed in *Hilton* and the Restatements are already embodied in the federal system.

B. FEDERAL QUESTION JURISDICTION AND THE TRIBAL ABSTENTION DOCTRINE

For a question of such political and practical significance, there are surprisingly few tribal court recognition cases in the federal system. This is partially explained by the fact that federal courts set aside many tribal court cases on jurisdictional grounds before a tribal court hears the merits of the case.[90] For this reason, a discussion of tribal court recognition necessarily includes consideration of tribal adjudicatory jurisdiction as well as the tribal abstention doctrine.

In 1985, the United State Supreme Court ruled, in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians,*[91] that a federal question[92] exists when a tribal court's exercise of jurisdiction is challenged.[93] At issue in *National Farmers* was whether the Crow Tribal Court could exercise jurisdiction over a tort claim involving a non-Indian that arose on state-owned lands within the reservation boundaries. The Court ruled that the tribal court lacked jurisdiction and the case never proceeded to the merits.[94] The Court reasoned that tribal authority had been somewhat divested over time, and it was federal law that must dictate the extent of such divestiture.[95] Specifically, the Court stated:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under [28 U.S.C.] § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of

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90. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985), is demonstrative. *National Farmers* was initiated in tribal court. *See id.* at 847. After the tribal court determined it had jurisdiction, the losing party challenged jurisdiction in federal district court. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp 213 (D. Mont. 1983), *rev'd,* 763 F.2d 1320 (9th Cir. 1984), *rev'd,* 471 U.S. 845 (1985). After "four years and six judicial opinions from four different courts," the parties reached a pretrial settlement. *See* Koehn, *supra* note 20, at 714.

91. 471 U.S. 845 (1985).

92. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994). *See generally* WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3579 (1984).

93. *See National Farmers,* 471 U.S. at 858.

94. *See id.*; Koehn, *supra* note 20, at 714.

95. *See National Farmers,* 471 U.S. at 852-53.

> freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of [28 U.S.C.] § 1331.[96]

Because petitioners asserted a "right of freedom from Tribal Court interference," the Supreme Court ruled that they had filed an action arising under federal law.[97]

The ruling in *National Farmers* fundamentally altered the tribal courts' stature within the federal system. It subjects all tribal court causes of action to federal review any time there is a challenge to tribal adjudicatory authority. On a hierarchical level, this relegates tribal courts to the role of magistrate to the federal district courts on issues of jurisdiction. By contrast, objections to a state court's claim of civil adjudicatory jurisdiction may be reviewed only upon the Supreme Court's grant of certiorari. The federal district courts are not ordinarily available for such challenges to state court power. Despite this conceptual diminution of tribal court stature, *National Farmers* also implemented a policy of deference toward tribal court preliminary determinations of jurisdictional issues, known as the tribal abstention doctrine.[98] This doctrine requires federal courts to refrain from exercising jurisdiction until the tribal court is afforded an opportunity to rule on its own jurisdiction. Although the tribal court's decision on jurisdiction is reviewed *de novo* by the federal court, the exhaustion doctrine, based on domestic comity,[99] suggests a mutual respect between the tribal and federal courts.[100] State courts differ, however, on whether the exhaustion rule is to be considered substantive federal law, and therefore binding in state courts.[101]

Decided two years after *National Farmers*, *Iowa Mutual Insurance Co. v. LaPlante*[102] invoked diversity jurisdiction in a tort claim initiated in the Blackfeet Tribal Court. Extending the deference required by *National Farmers'* exhaustion doctrine, the Court dismissed the case,

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96. *Id.*

97. *Id.*

98. *See* Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 194-98 (1994) (citing *National Farmers*, 471 U.S. at 855-58).

99. *See infra* Part IV.B.

100. In *National Farmers*, the United States Supreme Court stated: "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." 471 U.S. at 857.

101. *See* Drumm v. Brown, 716 A.2d 50, 61 (Conn. 1998) (holding tribal exhaustion doctrine is binding on state courts). *But see* Gavle v. Little Six, Inc., 555 N.W.2d 284, 290-92 (Minn. 1996).

102. 480 U.S. 9 (1987).

effectively disallowing forum shopping between federal and tribal courts, reasoning:

> In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. . . . Adjudication of such matters by any non-tribal court also infringes upon tribal law making authority, because tribal courts are best qualified to interpret and apply tribal law.[103]

The tribal exhaustion doctrine sends a mixed federal directive to the states, each of which must develop its own approach to tribal court recognition. On one hand, the rule requiring federal courts to defer to preliminary jurisdiction rulings of tribal courts nurtures an environment of respect for tribal courts. Simultaneously, however, federal courts solidify a policy of extreme scrutiny before they will recognize tribal authority to adjudicate. This skepticism encourages even greater disrespect from states that have been the historical nemesis of tribal authority.[104]

The level of deference coming out of *National Farmers* and *Iowa Mutual* is, in some respect, no deference at all. It merely extends to tribal courts the courtesy of the first glance to determine jurisdiction, allows the development of a tribal court record, yet reviews *de novo* the jurisdictional ruling.

IV. RECOGNITION AND ENFORCEMENT LAWS

In the absence of controlling federal law, substantive judgment recognition is a matter of state law.[105] Therefore, each state adopts its own approach to tribal court judgment recognition. This section addresses the controlling federal law with regard to tribal judgments, followed by an assessment of the different state recognition approaches.

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103. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

104. Having been referred to as the Indian tribes' "deadliest enemies," States have a long-standing history of challenging tribal exercises of authority. United States v. Kagama 118 U.S. 375, 384 (1886). An unparalleled magnitude of federal Indian cases are the result of tribal-state conflict. *See, e.g.*, Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973); Worcester v. Georgia, 31 U.S. (31 Pet.) 515, 561 (1832) (pledging federal protection).

105. *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

A. FEDERALLY MANDATED FULL FAITH AND CREDIT

Tribal governments have a pre-constitutional and extra-constitutional connection to the federal union,[106] but the U.S. Constitution itself is mostly silent as to tribes. As such, the notion that Indian tribes were meant to be included within the federal full faith and credit scheme of 28 U.S.C. § 1738 is not widely accepted.[107] The federal statute at issue mandates full faith and credit for every "State, Territory, or Possession."[108] Idaho and New Mexico are the only states that affirmatively interpret tribes as "territories" that are unequivocally included within the statute.[109] For their part, many tribal courts conclude they are not bound to extend full faith and credit to state or federal judgments because 28 U.S.C. § 1738 imposes no obligation on tribal courts.[110] The passage of specific federal laws extending full faith and credit to certain tribal court decisions provides further legislative evidence that Congress does not see tribal courts as within the general scope of 28 U.S.C. § 1738.[111]

Among the federal laws expressly requiring the states to give full faith and credit to tribal court decisions are the Indian Child Welfare Act,[112] the Violence Against Women Act,[113] and the Full Faith and Credit for Child Support Orders Act (Child Support Orders Act).[114] The

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106. *See* WILKINS, *supra* note 88, at 21-22.

107. *See* Clinton, *supra* note 21, at 936. Representing the minority view, Professor Clinton argues that tribal court judgments are entitled to full faith and credit under 28 U.S.C. § 1738, and that tribes are consequently obligated under the same legislation to extend full faith and credit to the states. *See* Clinton, *supra* note 21, at 936. *But see* P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 367-80 (1994); discussion *supra* note 27.

108. 28 U.S.C. § 1738 (1994).

109. *See* Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982) ("[W]e agree with those courts which have found the phrase "Territories and Possessions" broad enough to include Indian tribes, at least as they are presently constituted under the laws of the United States."); Jim v. CIT Fin. Servs. Corp., 527 P.2d 1222, 1228 (N.M. Ct. App. 1974) ("[T]he use of the term "territory" in Section 1738 . . . is broad enough to include the Navajo Indian Tribe.").

110. *See* discussion *supra* note 27.

111. *See* Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997). One would not expect Congress to specifically check each act to include tribal court decisions if such decisions were part of the general policy stated in 28 U.S.C. § 1738.

112. 25 U.S.C. § 1911(d) (1994). The Indian Child Welfare Act was enacted to prevent the wholesale separation of Indian children from their families and communities. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 1978 U.S.C.C.A.N. 7530. In the late 1960s, it is estimated that between 25% and 35% of Indian children were removed from their homes. *See id.* at 7531. This high rate of removal was considered a threat to tribal survival: "no resource . . . is more vital to continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3) (1994).

113. Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as 18 U.S.C. § 2265(a) (1994)).

114. Pub. L. No. 103-383, 108 Stat. 4063 (codified as 28 U.S.C. § 1738B (1994 & Supp. IV 1998)).

Parental Kidnapping Prevention Act[115] has been held to require full faith and credit to tribal court orders, although the congressional mandate is merely implicit.[116]

The Indian Child Welfare Act's full faith and credit provision requires state and federal courts to extend full faith and credit to tribal court child placement orders.[117] The Violence Against Women Act[118] and the Child Support Orders Act[119] provisions require all courts, including tribal courts, to extend full faith and credit to orders under each respective enactment.[120]

B. COMITY IN THE FEDERAL COURTS

When tribal court judgments fall outside the scope of these specific federal mandates, however, a growing number of state and federal courts apply principles of comity to tribal court decisions.[121] But there are two distinct applications for the term "comity" that must be distinguished for this discussion. Domestic comity applies only within our federal union and ensures that jurisdictions will honor the laws of other jurisdictions as a matter of deference and mutual respect under an umbrella of federal law. International comity, on the other hand, is the recognition that one nation allows within its territory to the judicial acts of another nation out of regard for principles of international law, political understandings of reciprocity, and concern for the rights of its own citizens.[122] This distinction between domestic and international comity is important to tribal court review because applying both is inconsistent. Domestic comity welcomes tribes into the federal judicial fraternity, albeit as a little brother or sister. Applying international comity to recognize tribal judgments, by contrast, suggests an insider-outsider relationship.

Comity within the domestic sphere refers to a spirit of cooperation within our federal union; it requires cooperation of all sovereigns whether federal, state, or tribal. Domestic comity explains various abstention doctrines by which judicial policy precludes one court's interference with the judicial proceedings of another jurisdiction. *Younger v.*

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115. 28 U.S.C. § 1738A (1994 & Supp. IV 1998).

116. *See* discussion *infra* Part V.B.

117. *See* 25 U.S.C. § 1911(d) (1994).

118. 18 U.S.C. § 2265(a) (1994).

119. 28 U.S.C. § 1738B (1994 & Supp. IV 1998).

120. *See* discussion *infra* Part V.B.

121. *See* Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997) (holding that a district court should use the principles of comity to determine recognition and enforcement of a tort judgment from a tribal court).

122. *See* Hilton v. Guyot, 159 U.S. 113, 227-28 (1895).

Harris[123] sets forth the federal-state abstention doctrine, and *National Farmers* establishes the federal-tribal abstention requirement.[124]

Abstention in both instances is justified by comity and premised on the notion that federal courts should have the power to enjoin the actions of state or tribal governments only in extraordinary circumstances.[125] In ordinary circumstances, the federal court should stay its hand and refrain from interference, affording the state or tribal government deference as a sovereign deserving respect, even at the expense of federal power. Current expressions of domestic comity lack a historic source. Although the principle conserves and allocates judicial resources within the system, scholars point out that the principle of comity within our federal system has no constitutional or legislative basis.[126] Domestic comity considerations also lie at the heart of habeas review. Habeas review of state authority is authorized by 28 U.S.C. § 2254 and, as to tribal authority, at 25 U.S.C. § 1303, each requiring exhaustion of remedies, a requirement imposed as a matter of comity.[127] Domestic comity plays a role not only in federal-state or federal-tribal review, but also within the federal government in terms of administrative review.[128]

International comity, as defined in *Hilton*, refers to the recognition of foreign proceedings, which contemplates courts that are clearly outside the scope of "our federalism."[129] International comity is afforded to foreign courts upon a showing that the foreign court had competent jurisdiction, and that the laws and public policy of the reviewing jurisdiction and the rights of its citizens will not be violated. International comity pertains to courts over which our laws exercise no control. This lack of control justifies any refusal to recognize decisions from courts that do not share minimum norms of fair process or that pursue policies substantially different from our domestic choices. Within the federal system, application of *Hilton's* comity is unnecessary because all

123. 401 U.S. 37 (1971).

124. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

125. In *Younger*, federal courts retain the power to enjoin state officers from instituting criminal action in special circumstances, such as the protection of constitutional rights. *See* Younger v. Harris, 401 U.S. 37, 45 (1971); *see also Ex parte* Young, 209 U.S. 123, 168 (1908) (holding that Minnesota Attorney General Young was properly enjoined from enforcing an unconstitutional state law). Likewise, in the Indian law context, federal courts could enjoin tribal officers if officers were acting in bad faith or in violation of express prohibitions of federal law. *See National Farmers*, 471 U.S. at 856 n.21.

126. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-28 (3d ed. 2000); Joanne C. Brant, *Taking the Constitution Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 25 (1995).

127. *See Ex parte* Royall, 117 U.S. 241 (1886).

128. *See generally* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984). Professor Alex Tallchief Skibine suggests that federal courts apply the same standard of review in tribal court review as in administrative review. *See* Skibine, *supra* note 98, at 221.

129. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

courts within the federal union, including tribal courts, are subject to minimum due process requirements and are subject to federal review to enforce fundamental policy principles.

Further, there is no need to retain a public policy exception to tribal court review when, according to the prevailing federal interpretation, Congress has the "plenary" authority to enforce policy directives upon tribal governments.[130] *Wilson* nonetheless suggests a federal court as a means for non-recognition could use the public policy:

> Whether a district court may, in the exercise of its discretion, reject a judgment for lack of reciprocity is a question we leave for another day. Although best left to our sister branches of government, there may be an appropriate case in which the record demonstrates significant public policy factors which might be sufficient for the district court to consider reciprocity under the "public policy" discretionary exception.[131]

Domestic comity is the only sensible framework within the context of the federal-tribal relationship that presently exists. The doctrine of international comity, when applied to tribal decisions, imposes an overly rigid set of guidelines, which have no legitimate function with a federal union. The safeguards that international comity embodies are addressed well before a final tribal judgment is entered through minimum due process requirements and the availability of federal review.

C. STATE APPROACHES

Over the past two decades, many states, particularly in the western United States, have developed laws, policies and procedures for recognition and enforcement of tribal court judgments. Although in some regards these explicit statements of standards represent a positive step forward,[132] substantial state involvement in Indian law may diminish the central role of a federal Indian law that has historically excluded states as policymakers.

Many unresolved issues remain. Should states entertain issues such as tribal court recognition, when such are so fundamentally bound to perceptions of tribal governmental legitimacy? Is it appropriate for states to make decisions that bear so directly on the political relationship between the federal union and Indian nations?

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130. *But see* discussion of "plenary power," *supra* note 88.

131. Wilson v. Marchington, 127 F.3d 805, 812 n.7 (9th Cir. 1997).

132. Positive dialogues between tribes and the federal judiciary are ongoing in the Eighth, Ninth, and Tenth Circuits.

The lack of a broad federal mandate on recognition of tribal judgments creates a chaotic environment within which each state implements its own approach, if at all. Of the states that have addressed the question legislatively or by court rule, several restrict the applicability of the policy to tribes geographically located within their borders.[133] The practical implications of such a policy are self-evident. For instance, a party bound by a tribal court judgment within the geographic boundaries of State A travels to State B. If enforcement is sought in State B, and State B has not articulated a policy for recognizing judgments of tribes beyond its boundaries, recognition and enforcement is crippled by uncertainty as procedural and substantive law that could render the tribal judgment meaningless.

Recognition of judgments should not be a product of one state's relationship with local tribes, but should be an outgrowth of the federal-tribal relationship as a whole. Full faith and credit rests on binding co-equal sovereigns who share common political identity and unity in federal structure. The international approach, by contrast, allows states to act as sovereigns in their dealings with political outsiders.

Whatever the governing concept or even the explicit standard, it is the practical reality that the majority of states do not extend full faith and credit to tribes. In some cases, a state's laws on the subject cause additional hostility by employing language that suggests tribal court inferiority or illegitimacy. This section surveys the four categories of approaches currently adopted by the states: (1) absence of a comprehensive policy; (2) judicial extension of international comity standards by analogizing tribes to foreign countries; (3) extension of comity as defined by statute or court rule; and (4) extension of full faith and credit to tribal courts as if they were states or territories.

1. *Absence of a Generally Applicable Policy*

In the mid-1980s, a survey of possible approaches to state court recognition of tribal judgments might have included a group of states that simply ignored tribal court adjudication.[134] Today, as a result of federal legislation requiring states to recognize certain kinds of tribal court judgments, this approach has theoretically disappeared. Congress

133. *See* N.D. CENT. CODE § 27-01-09 (Supp. 1999); WIS. STAT. § 806.245 (1998); WYO. STAT. ANN. § 5-1-111 (Michie 1999).

134. *See* Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1409 (1985). Wright raised, yet discouraged, the possibility that states could adopt a policy of disregarding tribal court decisions altogether. *See id.* Such a policy could have been facilitated at that time given that the Indian Child Welfare Act of 1978 was the only law expressly requiring states to grant full faith and credit to tribal court proceedings. *See* 25 U.S.C. § 1911(d) (1994).

requires states to extend full faith and credit to tribal courts decisions at the least in a limited number of subject matter areas, including child custody proceedings,[135] domestic violence protection orders,[136] and child support awards.[137]

States that have no recognition policy apart from the subject matter areas addressed by federal legislation fall under this classification. Illinois,[138] for example, has no statutes, reported case decisions, or judicial standards addressing tribal court recognition. Other states under this classification have passed laws that simply mirror the federal mandates, including Arkansas,[139] Kansas,[140] Missouri,[141] Nevada,[142] North Carolina,[143] Tennessee,[144] Texas,[145] Utah,[146] Vermont,[147] Virginia,[148] and West Virginia.[149] Colorado is grouped in this category for lack of a policy of general applicability, although the state's traffic code provides that a tribal court conviction constitutes a past conviction for consideration in subsequent state sentencing proceedings.[150]

Many states under this classification have adopted the Uniform Interstate Family Support Act (Family Support Act),[151] which extends

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135. *See id.*

136. *See* Violence Against Women Act of 1994, 18 U.S.C § 2265 (1994); *see also* The Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1994); The Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (1994).

137. *See* 28 U.S.C. § 1738B (1994 & Supp. IV 1998).

138. Although Illinois does not have a policy of general applicability for the recognition or enforcement of tribal court judgments, the state courts on a case-by-case basis have exhibited a friendly relationship toward tribal court jurisdiction in Indian Child Welfare Act cases. Illinois courts, unlike other jurisdictions, have been receptive to transfer of proceedings to tribal courts when appropriate. *See In re* Armell, 550 N.E.2d 1060, 1069 (Ill. App. Ct. 1990).

139. *See* ARK. CODE. ANN. § 9-15-302 (Michie 1998) (protection orders).

140. *See* KAN. STAT. ANN. § 21-3843 (Supp. 1999) (protection orders).

141. *See* MO. ANN. STAT. § 455.067 (West Supp. 2000) (protection orders).

142. Nevada mirrors federal legislation by extending full faith and credit to tribal court domestic violence protection orders. *See* NEV. REV. STAT. ANN. § 33.090 (Michie Supp. 1999). Similar treatment is extended to tribal court custody proceedings involving Indian children. *See* NEV. REV. STAT. ANN. § 62.170 (Michie Supp. 1999).

143. North Carolina extends full faith and credit to tribal court protective orders. *See* N.C. GEN. STAT. § 50B–4 (1999).

144. Tennessee recognizes tribal court protective orders. *See* TENN. CODE. ANN. § 36-3-622 (Supp. 1999).

145. *See* TEX. FAM. CODE ANN. § 71.008 (West Supp. 2000) (protective orders).

146. *See* UTAH CODE ANN. § 77-36-1 and 30-6-4 (1998) (protective orders).

147. *See* VT. STAT. ANN. tit. 15 §§ 1030, 1101 (1989) (protective orders).

148. *See* VA. CODE ANN. § 19.2-152.10 (Michie Supp. 1999) (protective orders).

149. *See* W. VA. CODE § 48-2A-3 (1999) (protective orders).

150. *See* COL. REV. STAT. § 42-2-127 (1999).

151. *See* ALA. CODE § 30-3-1 (1989); ARK. CODE. ANN. § 9-17-101 (Michie 1998); DEL. CODE. ANN. tit. 13 § 601 (1998); FLA. STAT. ANN. § 88.1011 (West Supp. 2000); GA. CODE. ANN. §§ 19-11-101, 19- 6-26 (1998); IND. CODE ANN. § 31-18 (Michie 1997); KAN. STAT. ANN. § 23-9 (1995); KY. REV. STAT. ANN. § 407.5101 (Michie 1999); LA. CIV. CODE ANN. art. 141, ch.c. (West 1999); MD. CODE ANN., FAM. LAW. § 4–508.1 (1999); MASS. GEN. LAWS ch. 209D § 1-101 (1998); MISS. CODE ANN. § 93-25-3 (1999); MO. REV. STAT. § 454.850 (Supp. 2000); N.H. REV. STAT. ANN. § 546-B:1 (Supp. 1999); OHIO REV. CODE ANN. § 3115.01 (Anderson Supp. 1999); PA. STAT. ANN. tit. 23, § 7101 (West

full faith and credit to tribal court alimony and support orders.[152] With regard to child support orders, the Family Support Act mirrors the federal mandate of the Full Faith and Credit for Child Support Orders Act (Child Support Orders Act).[153] The Child Support Orders Act includes Indian country in the definition of "states" entitled to full faith and credit.[154] The Family Support Act somewhat expands the Child Support Orders Act by including alimony support orders as well as the federally mandated child support orders.[155]

It is vitally important for the uniform acts to expressly include tribes if their general purposes of national uniformity of laws are to be realized. Perhaps the act that most needs to incorporate tribes if it is to carry out its policies is the Uniform Child Custody Jurisdiction Act (Child Custody Act).[156] The purpose of the Child Custody Act is to discourage state-to-state forum shopping by dissatisfied litigants in custody battles and, by extension, to discourage parental kidnapping.[157] Including tribal courts within the meaning of the Child Custody Act is vital because it reaches beyond the scope of the Indian Child Welfare Act. Specifically, the Indian Child Welfare Act does not apply to custody proceedings between parents. In its current manifestation the Child Custody Act does not expressly apply to tribes, leaving the issue for differing interpretations.

At least two of the states under this classification have taken steps to create a strong relationship between state and tribal courts by authorizing state court judges to certify questions to tribal courts in order to determine the applicable tribal law.[158] This mechanism promotes tribal self-governance because it lessens the possibility of an incorrect interpretation of tribal law, and communicates inter-sovereign respect.

2. *Common Law International Comity*

Many states apply international standards by analogizing tribes to foreign countries. Judicially crafted comity rules are distinguished from comity embodied in statutes or court administrative rules. Common law

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Supp. 2000); R.I. GEN. LAWS § 15-23.1-101 (Supp. 1999); UTAH CODE ANN. § 78-45f-101 (Supp. 1999); VT. STAT. ANN. tit. 15B, § 101 (Supp. 1999); VA. CODE ANN. §§ 16.1-279.1, 20-88.32 (Michie Supp. 1999); W.VA. CODE § 48b-1-101 (1999).

152. Alimony and child support orders from tribal courts are recognized under Tennessee's uniform support act. *See* TENN. CODE. ANN. § 36-5-2101 (Supp. 1999).

153. 28 U.S.C. § 1738B (1994 & Supp. IV 1998). The Child Support Orders Act provides for full faith and credit for child support orders, including orders from Indian country, as defined at 18 U.S.C. § 1151.

154. *See* 28 U.S.C. § 1738B.

155. *See* Uniform Interstate Family Support Act, § 101, 9 U.L.A. 256-58 (1996).

156. *See* 9 U.L.A. 123 (1988).

157. *See id.* § 1, 9 U.L.A. 123-24.

158. *See* MD. CODE ANN., CTS. & JUD. PROC. § 12-601 (1998); W. VA. CODE § 51-1A-2, 51-1A-3 (1998).

comity tends to be more flexible and consequently less predictable in its application.

Montana and Oregon courts analogize tribal courts to the courts of foreign nations in the spirit of *Hilton*.[159] Montana, however, does not specify the prerequisites that will be considered before recognition is extended. It is unclear, for instance, whether Montana courts will require tribal court reciprocity. On one hand, the reciprocity requirement has all but vanished from our foreign country recognition jurisprudence,[160] yet if *Hilton* is the only authority cited, it is unclear whether recognition could be denied for lack of reciprocity even though all other conditions are met.

Montana's decisions generally involve enforcement of tribal money judgments as exemplified by *Wippert v. Blackfeet Tribe*.[161] The *Wippert* standard was most recently revisited in *Anderson v. Engleke,*[162] a case in which enforcement was denied, not on the basis that the tribal court judgment was invalid, but because the state lacked authority to enforce as to on-reservation assets.[163]

Montana's courts have recognized tribal orders as a matter of full faith and credit under the Child Support Orders Act by affirming the authority of the state's Child Support Enforcement Division to enforce tribal court judgments without initiating special enforcement proceedings under *Wippert*.[164] The Montana courts are careful to note, however, that tribal court orders, judgments, and decrees that do not involve child support are not entitled to full faith and credit, but are subject to the *Wippert* standard of scrutiny under an international comity analysis.[165]

Minnesota has adopted an international comity approach, but with less clarity. Recognition was denied in *Desjarlait v. Desjarlait,*[166] a marriage dissolution proceeding, due to lack of jurisdiction.[167] However, the court of appeal's only policy pronouncement was to decline to

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159. *See* Wippert v. Blackfeet Tribe, 654 P.2d 512, 514 (Mont. 1982); Red Fox v. Red Fox, 542 P.2d 918, 920 (Or. Ct. App. 1975); discussion on *Hilton* standards, *supra* note 13.

160. *See* discussion on reciprocity requirement, *supra* Part IV.B.

161. 654 P.2d 512, 514 (Mont. 1982).

162. 954 P.2d 1106 (Mont. 1998).

163. *See* Anderson v. Engleke, 954 P.2d 1106, 1112 (Mont. 1998). Litigants potentially encounter serious problems when their judgments involve non-Indian fee land or non-Indian assets located on the reservation. On one hand, the tribe might not retain regulatory authority to seize these assets, but if the state refuses to exercise such authority, the tribal court judgment is unenforceable.

164. *See* Day v. State, 900 P.2d 296, 300 (Mont. 1995) (enforcing tribal court child support award under 28 U.S.C. § 1738B(b) (1994). Montana's legislature has codified the federal mandate. *See* MONT. CODE. ANN. § 25-9-602(1), (2) (1999).

165. *See Day,* 900 P.2d at 301.

166. 379 N.W.2d 139 (Minn. Ct. App. 1985).

167. *See* Desjarlait v. Desjarlait, 379 N.W.2d 139, 145 (Minn. Ct. App. 1985).

include tribes within the federal full faith and credit scheme.[168] The court held "[t]he full faith and credit clause of the federal constitution is inapplicable because it expressly applies to matters between states, not to matters between tribal courts and states."[169] They did not go on to outline a tribal judgment recognition policy.

With respect to uniform acts, Minnesota policy is even less clear. On the one hand, the Child Custody Act has been interpreted to exclude tribal courts,[170] but state courts have declined jurisdiction in the favor of tribal courts[171] to safeguard the general purposes of both the Parental Kidnapping Prevention Act and the Child Custody Act. A dialogue between tribal leaders and the Minnesota judiciary is presently underway and will perhaps clarify practice in the state.[172]

The Arizona courts also decline tribal court judgments the same full faith and credit as sister states,[173] and opt instead for an international comity approach.[174] This approach is likely be codified when a proposed court rule is presented for final approval.[175] Arizona's proposed rule is the result of a ten-year process of study and negotiation, the final product of which mirrors the mandatory and discretionary grounds for recognition pronounced in *Wilson*.[176] If adopted, the Arizona rule will apply to all federally recognized tribes and place the burden of proof on the objecting party.[177]

The most recent states to adopt this approach are New Jersey and Connecticut, each applying comity to recognizing money judgments entered by the Mashantucket Pequot Tribal Court.[178] It is important to

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168. *See id.* at 144.

169. *Id.* at 144.

170. *See id.* at 143. The Court referred to language of the Minnesota Child Custody Act which did not expressly include tribes. *See id.* (citing MINN. STAT. § 518A (1984)).

171. *See In re* Custody of K.K.S., 508 N.W.2d 813, 814 (Minn. Ct. App. 1993).

172. This dialogue has not always proceeded smoothly. Personnel changes in the state judiciary have produced differing political views with regard to tribal court recognition. *See* Pat Doyle, *Judges Ponder Writing State Rule to Enforce Tribal Orders*, STAR-TRIBUNE (Minneapolis-St. Paul), May 4, 1998 at 1A.

173. *See* Begay v. Miller, 222 P.2d 624, 628 (Ariz. 1950).

174. *See* Tracy v. Superior Court, 810 P.2d 1030, 1041 (Ariz. 1991); Lynch v. Olsen, 377 P.2d 199, 201 (Ariz. 1962); Leon v. Numkena, 689 P.2d 566, 570 (Ariz. Ct. App. 1984); Brown v. Babbitt Ford, Inc., 571 P.2d 689, 694-95 (Ariz. Ct. App. 1977).

175. *See* Petition for Adoption of Rules of Procedure for the Recognition of Tribal Court Judgments (submitted to Ariz. Sup. Ct. Nov. 19, 1998 by Michael C. Nelson, Chairman, Arizona Court Forum) (on file with author). The forum was initiated in 1989 as a project of the Conference of Chief Justices of the State Supreme Courts, but has expanded to include tribal and federal representatives. *See id.*

176. *See* Wilson v. Marchington, 127 F.3d 805, 815 (9th Cir. 1997).

177. *See* Proposed Rules of Procedure for the Recognition of Tribal Court Judgments, at Rule 4 (submitted to Ariz. Sup. Ct. Nov. 19, 1998 by Michael C. Nelson, Chairman, Arizona Court Forum) [hereinafter Proposed Rules] (on file with author).

178. *See* Mashantucket Pequot Gaming Enter. v. Malhorta, 740 A.2d 703 (N.J. 1999); Mashantucket Pequot Gaming Enter. v. Dimasi, 25 Conn. L. Rptr. 474 (Conn. Super. Ct. 1999).

note, however, that in both cases, the petitioner sought recognition under comity principles rather than seeking full faith and credit.[179]

3. *Codified Versions of Comity*

States that have codified their policy and procedures in the form of a statute or court rule constitute a separate category. Although many states dignify their policy with a "full faith and credit" title, most are more akin to international comity standards.

South Dakota's statute, for example, adopts the general categories of factors set out in *Hilton,* minus the reciprocity requirement.[180] But the statute's standard is far more difficult to meet than the typical international comity analysis.[181] Although the premise for foreign judgment recognition is that a judgment should be enforced absent a showing of a lapse in due process safeguards, the South Dakota statute reverses the premise and presumes invalidity. The tribal court judgment will not be recognized unless the party seeking recognition establishes compliance with the standards, by a clear and convincing proof. Reviewing jurisdictions typically place the burden of proof on the party waging the collateral attack, in contrast to South Dakota's statute.

The case of *Red Fox v. Hettich*[182] is demonstrative. In determining that a tribal court tort judgment would not be recognized under the statute, the South Dakota Supreme Court held only that the plaintiff had failed to meet the requisite burden.[183] The South Dakota Supreme Court did not conclude, nor suggest, that the tribal court lacked personal or subject matter jurisdiction, nor did the court find a defect in process or suspect fraud.[184] The South Dakota Supreme Court simply suggested that there was a failure to meet the clear and convincing standard based on a question of whether the tribe's legislature could have extended regulatory jurisdiction over the non-Indian defendant's conduct of allowing his horses to roam free on a highway within the reservation

179. *See Malhorta,* 740 A.2d at 705; *Dimasi,* 25 Conn. L. Rptr. at n.1.

180. *See* S.D. CODIFIED LAWS § 1-1-25 (Michie 1992).

181. *See id.* Recognition, under this statute, is only proper when the state court is convinced that: (1) the tribal court had subject matter and personal jurisdiction; (2) the judgment was procured without fraud; (3) the tribal court's processes were impartial with due notice and hearing; (4) the judgment complied with tribal law; and (5) the judgment does not contravene South Dakota's public policy. *See id.* § 1-1-25(1)(a)-(e).

182. 494 N.W.2d 638 (S.D. 1993).

183. *See* Red Fox v. Hettich, 494 N.W.2d 638, 647 (S.D. 1993).

184. *See generally id.*

boundaries.[185] Under an international comity analysis, the judgment undoubtedly would have been recognized.

At one time, Washington courts affirmatively held that tribal court decrees were entitled to full faith and credit to the same extent afforded to sister states.[186] Washington, like South Dakota, has retreated over time to become more restrictive. The state has since adopted a court rule that addresses both jurisdictional disputes between the state and tribes, and procedures for recognition.[187] Recognition and enforcement applies to any federally recognized tribe unless the tribal court (1) lacked jurisdiction, (2) failed to comply with the due process requirements of the Indian Civil Rights Act of 1968, or (3) failed to provide reciprocal recognition and enforcement of Washington judgments.[188] If the court determines the tribe has exclusive jurisdiction, it is bound to dismiss the state court action unless federal law mandates a transfer of proceedings.[189] If the state court finds concurrent jurisdiction with the tribal court, it may (but need not), transfer proceedings to the tribe. Considerations such as the nature of the action, the interests of the parties, convenience of forum and the availability of tribal court remedies are prescribed.[190]

North Dakota's approach was adopted in 1995 as a result of a forum between tribal and state judges. The standard was established by a court rule rather than by legislative or common law[191] The rule derives from a state constitutional provision that directs the North Dakota judicial system to consider Indian tribes as the equivalent of foreign nations for purposes of recognition.[192] North Dakota's rule embodies the usual conditions of international comity, such as finality, proper procedure and jurisdiction, and an absence of fraud, yet preserves a public policy exception.[193] The burden of proof, unlike South Dakota's approach, rests upon the objecting party.[194] The rule seeks to promote reciprocity from the tribes, but is progressive in contrast to other states

185. *See generally id.* The South Dakota Supreme Court referred to the *Montana* test for regulatory and legislative jurisdiction to question whether the defendant's contact had a detrimental effect on the health, welfare, or economic security of the tribe as a whole. *See id.* at 647 (citing Montana v. United States, 450 U.S. 544, 566 (1981)).

186. *See In re* Adoption of Buehl, 555 P.2d 1334 (1976). The court in *Buehl* adopted New Mexico's policy as defined in *Jim v. CIT Financial Services Corp.*, 533 P.2d 751, 752 (N.M. 1975). *See Buehl*, 555 P.2d at 1342.

187. *See* WASH. SUP. CT. R. 82.5 (1997). The rule was enacted in 1995. *See id.*

188. *See id.* at 82.5(c).

189. *See id.* at 82.5(a).

190. *See id.* at 82.5(b).

191. *See* N.D. R. CT. 7.2 (2000).

192. *See id.* (citing N.D. CONST. art. VI, § 3).

193. *See id.*

194. *See id.*

because reciprocity is not a prerequisite to recognition and finality is presumed.[195]

In 1991, prior to the adoption of the court rule, the North Dakota legislature enacted a statute for the reciprocal recognition of certain state and tribal court judgments that placed a series of conditions on the tribal courts.[196] The statute did not limit the court's discretion to recognize and enforce tribal court judgments as a matter of comity, but limited the state court's discretion to deny enforcement.[197]

Michigan's court rule[198] corresponds to that of North Dakota and also results from a forum between tribal and state court officials. Michigan's court rule applies to all federally recognized tribes rather than limiting the applicability to the tribes within the state.[199] The Michigan rule is, however, contingent on the tribe proving to the state that it will offer reciprocal recognition.[200] Michigan presumes the tribal court judgment to be valid and the objecting party has the burden of raising the standard defenses.[201]

Wyoming's policy is defined legislatively under what is entitled "full faith and credit for tribal acts and records," and applies only to the Eastern Shoshone and Northern Arapaho Tribes.[202] Despite the title, this statute is more appropriately classified as a comity statute because it includes a list of conditions and prerequisites to recognition and enforcement, including authentication requirements for tribal documents.[203] The statute requires a showing that the tribal court is a court of record[204] and allows the state court to examine the record keeping procedures of

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195. *See id.*

196. *See* N.D. CENT. CODE § 27-01-09 (Supp. 1999).

197. *See* Fredericks v. Eide-Kirschman Ford, 462 N.W.2d 164, 169 (N.D. 1990). In a decision prior to the enactment of North Dakota's present court rule, but after the legislative enactment, a tribal court judgment was recognized and enforced under principles of international comity. *See id.* While recognizing a difference between tribal courts and courts of foreign countries, the *Fredericks* court cited *Hilton* and South Dakota's *Mexican Bear* decision to apply the similar principles. *See id.* at 170-71.

The statutory provisions promoted enforcement of tribal court judgments, but only required enforcement of judgments from the Three Affiliated Tribes of the Fort Berthold Reservation, which involved divorce, child custody, adoption, protective orders and juvenile neglect proceedings. *See* N.D. CENT. CODE § 27-01-09. Enforcement under the Act was conditioned on reciprocity and required that the issuing tribal court judge be law trained and admitted to at least one state bar. *See id.*

198. MICH. CT. R. 2.615 (1998).

199. *See id.* at 2.615(A).

200. *See id.* at 2.615(B)(1)-(2). The tribe is required to provide the State Court Administrative Office with a copy of the tribal statute or court rule which obligates the tribe to enforce Michigan's judgments. *See id.*

201. *See id.* at 2.615(C).

202. *See* WYO. STAT. ANN. § 5-1-111 (Michie 1999).

203. *See* Darby L. Hoggatt, Comment, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 LAND & WATER L. REV. 531, 552-54 (1995).

204. *See* § 5-1-111(a)(1)(ii).

the tribal court.[205] The statute places requirements on the very structure of the tribal court system, requiring appellate review and special tribal court contempt proceedings.[206] Wyoming places the burden on the party challenging recognition.[207]

Wisconsin's legislature also inappropriately labeled its tribal court recognition statute[208] "full faith and credit," when the statute more accurately embodies principles of comity. The Wisconsin statute mirrors the language of the Wyoming statute, down to the recordation and authentication requirements.[209] It applies to Wisconsin tribes only, but differs from its counterparts in that the state court may, on its own motion, raise a question as to the validity of a tribal court judgment.[210] All other state statutes and rules require collateral attacks by a party. Prior to the enactment of the statute, Wisconsin courts declined to extend full faith and credit to tribal courts, but recognized and enforced some judgments as a matter of comity.[211]

The Oklahoma legislature statutorily vested the state supreme court with the power to issue standards to extend full faith and credit to federally recognized and CFR courts.[212] The final court rule[213] authorizes recognition on the condition that the tribe provides proof to the state that the tribal court grants reciprocity to Oklahoma.[214] To date, only

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205. *See* § 5-1-111(c). Among the specific requirements of the state is that the tribal court keep permanent records of its proceedings and make available transcripts or electronic recordings of all tribal court proceedings. *See id.*

206. *See id.*

207. *See* WIS. STAT. § 806.245; WYO. STAT. ANN. § 5-1-111.

208. WIS. STAT. § 806.245 (1998). The law took effect in 1994. *See id.* Recently, the statute was applied to recognize a tribal default judgment. *See* Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians, 599 N.W.2d 911 (Wis. Ct. App. 1999).

209. *See* WIS. STAT. § 806.245; WYO. STAT. ANN. § 5-1-111.

210. *See* WIS. STAT. § 806.245.

> In determining whether a tribal court judgment is a valid judgment, the circuit court on its own motion or on the motion of a party, may examine the tribal court record to assure that (a) The tribal court had jurisdiction . . . (b) The judgment is final . . . (c) The judgment is on the merits. (d) The judgment was procured without fraud, duress or coercion. (f) The proceedings of the tribal court complied with the Indian civil rights act [sic] of 1968 . . .

§ 806.245(4).

211. *See, e.g.*, Sengstock v. San Carlos Apache Tribe, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991).

212. *See* OKLA. STAT. ANN. tit. 12, § 728 (West 2000). The statute became effective 1992 and gave the Oklahoma Supreme Court the power to develop standards which would extend recognition, in whole, or part, to tribal courts, so long as the tribal courts grant reciprocity to Oklahoma. *See id.* § 728(B); Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 62 (1994) (providing a discussion of the history behind the present Oklahoma court rule).

213. OKLA. DIST. CTS. R. 30.

214. Of Oklahoma's 34 tribes, only four tribal courts and 10 CFR courts in Oklahoma have registered a reciprocity affirmation with the Oklahoma Supreme Court. Oklahoma's Full Faith and Credit Tribal Court Index (on file with Administrative Office of the Courts, State of Oklahoma). Oklahoma's Full Faith and Credit Tribal Court Index presently lists the following tribes, in order of registra

one reported case, *Barrett v. Barrett*,[215] addresses the recognition issue.[216] The court's decision whether or not to recognize the decree was not a matter of right, but required the court to consider whether the Citizen Band Potawatomi Tribe grants reciprocity to Oklahoma courts.[217] The case was eventually remanded to the lower court to allow the attacking party to present evidence of fraud in procurement of her consent to the tribal court's jurisdiction,[218] despite the fact that the fraud issue had been previously litigated in the tribal appellate and trial courts.

4. *True "Full Faith and Credit"*

Only Idaho and New Mexico afford full faith and credit to tribal courts. Both states adopt the minority view that places tribes within the meaning of "territories" under 28 U.S.C. § 1738. New Mexico's policy, first introduced in *Jim v. CIT Financial Services Corp.*,[219] has been repeatedly upheld even in the recognition of the controversial area of tribal court punitive damage awards.[220]

Idaho's Supreme Court addressed the question as a matter of first impression in the 1982 divorce proceeding of *Sheppard v. Sheppard*,[221] and has never revisited the issue. After a state court entered a divorce decree, the non-Indian husband collaterally attacked a prior tribal court adoption decree as invalid in an attempt to avoid his obligation to pay child support.[222] The state court deemed the tribal court adoption decree was valid and was entitled to recognition under the Full Faith and Credit Clause to the U.S. Constitution and its own implementing statute.[223] The state court reasoned that the phrase "territories and possessions" was broad enough to include tribal courts in their present manifestation.[224] As a historical reference, the Idaho Supreme Court cited *Mackey* as controlling authority.[225] The Idaho Supreme Court extended full faith and credit to the tribe despite the fact that the same

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tion: Creek (Muscogee Nation), June 1, 1994; Seminole Nation, December 22, 1994; Kiowa Tribe, April 6, 1995; Comanche Tribe, April 6, 1995; Wichita Tribe, April 6, 1995; Caddo Tribe, April 6, 1995; Delaware Tribe, April 6, 1995; Fort Sill Apache Tribe, April 6, 1995; Tonkawa Tribe, April 6, 1995; Cherokee Nation, May 26, 1995; Osage Nation, December 4, 1995; and Citizen Band Potawatomi Nation, November 21, 1996. *See id.* No tribes outside of Oklahoma have ever registered. *See id.*

215. 878 P.2d 1051 (Okla. 1994).

216. *See* David S. Clark, *State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization*, 23 OKLA. CITY U. L. REV. 353, 356-60 (1998).

217. *See* Barrett v. Barrett, 878 P.2d 1051, 1053 (Okla. 1994).

218. *See id.* at 1056.

219. 533 P.2d 751 (N.M. 1975).

220. *See* Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088, 1089 (N.M. Ct. App. 1997).

221. 655 P.2d 895 (Idaho 1982).

222. Sheppard v. Sheppard, 655 P.2d 895, 899-901 (Idaho 1982).

223. *See id.* at 901 (citing U.S. CONST. art IV, § 1; 28 U.S.C. § 1738 (1994)).

224. *See id.* at 901-02.

225. *See id.*

tribal court had previously ruled that it was not required to extend full faith and credit to the state of Idaho,[226] refusing the reciprocity required under many comity standards. In keeping with the judiciary's pronouncements, Idaho's legislature adopted the Uniform Interstate Family Support Act[227] extending the definition of "state" to all of Indian country. The state legislature recognizes and includes tribal court criminal convictions for purposes of the state's Sexual Offenders Registration and Community Right-to-Know Act.[228]

Maine, New York, and South Carolina extend full faith and credit to certain tribes, based on codified settlements and accords.[229] None of these states, however, holds that all tribes are entitled to full faith and credit under 28 U.S.C § 1738.

V. THE TRIBAL COURT EXPERIENCE

Although a number of scholarly articles address the ongoing debate of whether states should adopt, or be federally bound by, a full faith and credit or comity approach to tribal court judgments,[230] a relatively small number of published judicial opinions from the state courts address the issue. One reason for the absence of published opinions is that the parties involved rarely force the issue or have the resources to litigate a contested and precedent making case in the state and federal courts. Other times, parties unwillingly choose to litigate in state court fearing possible delays and uncertainty associated with the enforceability of a tribal court judgment. For instance, after five years of litigating an adverse possession boundary dispute that originated in the Muscogee (Creek) Nation District Court, the parties opted out of the tribal court proceedings and sought a more timely resolution in the local state court.[231] After an initial federal ruling, the parties anticipated that any

226. *See id.* at 902 n.2.

227. IDAHO CODE § 7-1001 (1998).

228. *Id.* § 18-8303 (Supp. 1999).

229. *See* S.C. CODE ANN. § 27-16-80 (Law Co-op. Supp. 1999); N.Y. INDIAN LAW § 52 (McKinney 1950). Maine was required to adopt the federal claims settlement statute that included mandatory full faith and credit. *See* 25 U.S.C §§ 1721-1735. New York's statute applies to enforcement of peace maker courts of the Seneca Nation. *See* N.Y. INDIAN LAW § 52. South Carolina's Catawba settlement extends full faith and credit to one tribe only. *See* S.C. CODE ANN. § 27-16-80.

230. *See* Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N.M. L. REV. 19 (1998); B.J. Jones, *supra* note 50; Daina B. Garonzik, Comment, *Full Reciprocity for Tribal Courts From a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723 (1996); Deloria & Laurence, *supra* note 107; Clinton, *supra* note 21; William V. Vetter, *Of Tribal Courts and "Territories" Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987); Ragsdale, *supra* note 27.

231. Telephone Interview with Jessie Huff Durham, Assistant Attorney General, Muscogee (Creek) Nation (Aug. 19, 1999) [hereinafter Durham Telephone Interview]; *see also* Enlow v. Moore, 134 F.3d 993 (10th Cir. 1998); Enlow v. Bevenue, 4 OKLA. TRIB. 175 (Muscogee (Creek) Nation Sup.

remand to the tribal court would elicit further challenges to tribal adjudicatory authority and several additional years of appellate review.[232]

But what do we know about how state standards translate to state practice? Are states complying with federal laws that require them to give full faith and credit to certain kinds of tribal judgments? Are states with articulated policy directives, whether statute, court rule, or case authority, more likely to enforce a tribal court's order than states with no policy? Does the substantive content of a state's standard (say, full faith and credit rather than international comity) affect recognition practice at all?

A. METHODOLOGY

To answer these questions I turned to surveys and in-depth interviews with tribal court judges of federally recognized tribes in the lower forty-eight states, and asked judges from eighty tribal court systems to participate.[233] The data accumulated in this study is the first empirical evidence to be published on the state recognition of tribal court judgments.[234] Additionally, no previous publications examine how tribal court judges view the record of their state counterparts in this area.[235] With data compiled approximately five years after the enactment of the Violence Against Women Act and the Child Support Orders Act, and ten years after the Indian Child Welfare Act, the study comes at an appropriate time to reflect on past successes, in particular the issue of whether

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Ct. 1994), *available at* 1994 WL 1048313.

232. Durham Telephone Interview, *supra* note 231; *see also Moore*, 134 F.3d 993; *Bevenue*, 4 OKLA. TRIB. 175.

233. I distributed surveys to all tribal courts referenced in the National American Indian Court Judges Association's active membership list and the ABA Judicial Division's DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (2d ed. 1997) at sec. V: Tribal Judges of the United States.

The following responses and input of the following individuals provided the breath of life for this article and are extended the most sincere thanks: Elizabeth C. Callard, Michael J. Stancampiano, Robert Yazzie, James W. Zion, Jessie Huff Durham, Patrick E. Moore, Roger Wiley, David D. Raasch, Mark Butterfield, Joan Greendeer-Lee, Phil Lujan, Charles Tripp, Arthur Windy Boy, Sr., Jill Shibles, Ronald E. Johnny, Nathan Young, Rae N. Vaughn, Frank S. LaFountaine, Stan Wolfe, Mary T. Wynne, Eugene White-Fish, Terry Moore, Patrick Lee, Charlene Yellow Kidney, Dwight Birdwell, Scott V. Lundberg, Jay Pedro, William S. Christian, Patricia Riggs, Kathryn F. Van Hoof, and the late F. Browning Pipestem.

234. Previous studies of tribal courts have provided statistical information on the operations of tribal courts. *See* NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE (1978) (surveying 23 tribal courts for purposes of determining the strengths and weaknesses of tribal judiciaries); SAMUEL J. BRAKEL, AMERICAN INDIAN COURTS: THE COSTS OF SEPARATE JUSTICE (1978). Other studies have provided valuable information on published tribal court opinions and the development of tribal common law. *See* Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J. L. & PUB. POL'Y 74, 77 (1999); Newton, supra note 16, at 352; Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 293 (1998).

235. Nor are there studies of the state courts regarding their experiences with tribal court judges. Although such data would be an important contribution to the field, it is beyond the scope of this study.

federal full faith and credit mandates are being carried out at the local level.

Respondents to the initial questionnaire are self-selected and the response rate is relatively low, at thirty-four percent.[236] Informants willing to participate in follow-up interviews also are self-selected and are not necessarily a representative sample. As a result, I have been cautious in generalizing from this data, recognizing the number of factors that affect the experience each tribal court judge reports.[237]

Factors of particular importance in shaping a tribal court's experience are docket size and the length of the court's existence. Chief Judge David Raasch of the Stockbridge-Munsee Band of Mohicans Tribal Court responded to the survey by reporting no instance of non-recognition.[238] But he notes that the court, which was established in 1995, is relatively new and has interacted with only one local state district court.[239] Judge Raasch suggests that the comparatively short tenure of modern tribal courts creates some skepticism among state judges, noting that "[t]ribal courts are a recent development in the judicial process and the state courts are a bit reluctant to recognize tribal court judgments."[240] In contrast, the Navajo Nation courts, with over forty years of experience and an annual docket approaching 75,000 cases, have had many more opportunities for inter-jurisdictional conflict. The average respondent tribal court in my survey was established in its modern organization in 1980, ranging from the Oglala Sioux in 1936 to the newly established court for the Tunica-Biloxi.[241]

The breadth of subject matter entertained by a tribal court is also a factor that determines its experience with state courts. The Ho-Chunk Nation Tribal Court[242] does not hear petitions for domestic violence

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236. Twenty-seven tribal courts responded. Responding tribes are located in the following 17 states: Arizona, Colorado, Connecticut, Idaho, Louisiana, Nevada, New Mexico, North Carolina, Minnesota, Mississippi, Montana, Oklahoma, South Dakota, Texas, Utah, Washington, and Wisconsin.

237. Perhaps judges who have recently had unsatisfactory experiences with other jurisdictions would be more responsive as a means of airing their complaints, while judges who have not experienced difficulties would place participation in my research at a lower priority.

238. *See* Response to Survey by Hon. David D. Raasch, Chief Judge, Stockbridge-Munsee Band of Mohicans (Sept. 27, 1998) (on file with author).

239. *See id.*

240. *See id.*

241. Of the responding tribal courts, six courts have been established in this decade.

242. During 1996 and 1997 there were 266 civil cases filed in the Ho-Chunk Trial Court. *See* Letter from Judges Mark Butterfield & Joan Greendeer-Lee, Ho-Chunk Nation Trial Court, to Judge Eugene White-Fish, Forest County Potawatomi Community (Mar. 22, 1998) (on file with author) (responding to questions concerning jurisdiction over non-Indians and tribal sovereign immunity). Only 32 of these cases involved non-Indian parties, 26 of which were filed by non-Indian employees. *See id.*

In 1996, 59 of the 94 cases before the tribal court involved internal matters of the Ho-Chunk Nation and its members, such as membership, trust funds, constitutional challenges, probate, and child support obligations against a tribal member. *See* HO-CHUNK NATION TRIAL COURT REPORT ON TRIBAL

protection orders,[243] and therefore never interacts with courts concerning the federally mandated full faith and credit implications under the Violence Against Women Act. In the Muscogee (Creek) Nation Tribal Courts, on the other hand, petitions for domestic violence protection orders make up approximately sixteen percent of the annual caseload.[244]

B. OBSERVATIONS

Fifty-six percent of the respondent judges report at least one occasion in which another jurisdiction refused to recognize their tribal court orders, often in direct violation of state policy or federal law.[245] Of those tribes indicating non-recognition, eighty percent report that their difficulties arose in a state forum, and twenty percent report problems with other tribal courts.[246]

But the most striking result of the study is the extent to which states fail to recognize tribal court judgments even when required by federal law to do so. Of the respondents indicating that a state court has failed to recognize an order of their tribal court, over forty percent involved subject matters covered by the federal full faith and credit mandates of Violence Against Women Act and the Child Support Orders Act.[247] Roughly one-third of the total reported instances of non-recognition involved custody disputes between parents.[248] Twenty-seven percent of

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SOVEREIGNTY (1996-1997) (on file with author). The remaining 35 cases involve non-Indians in areas such as employment disputes, contract claims, and tort actions. *See id.*

243. Interview with Hon. Mark Butterfield, Chief Judge, Ho-Chunk Nation Trial Court, Black River Falls, Wis. (Feb. 15, 1999) [hereinafter Butterfield Interview].

244. *See* MUSCOGEE (CREEK) NATION JUDICIAL BRANCH FY 1998 ANNUAL REPORT 13 (1999). Of the 170 new cases filed in 1998, 28 petitions were for protective orders. *See id.*

245. Fifteen of the 27 respondents, or 56%, report instances of non-recognition. See Appendix A for tribe-by-tribe responses.

246. Twelve different tribes reported at least one occasion where a state failed to recognize a tribal court order. Three tribes reported that another tribal court failed to recognize an order of the respondent tribe. As indicated in the survey responses, there are instances when a reviewing tribal court has failed to recognize an order of another tribal court. Even though such non-recognition reportedly happens less frequent than state non-recognition, the fact that it occurs at all, particularly in subject matter in which federal law requires full faith and credit, is problematic for the litigants involved.

247. The Kickapoo Tribe of Oklahoma, the Chippewa-Cree Tribe, the Mashantucket Pequot Tribe, and the Iowa Tribe of Oklahoma indicate non-recognition in Violence Againsts Women Act cases. Response to Survey by Hon. Charles Tripp, Chief Judge, Kickapoo Tribal Ct. (June 20, 1999) (on file with author); Response to Survey by Hon. Arthur Windy Boy, Sr., Chippewa Cree Tribal Ct. (Apr. 5, 1999) (on file with author); Response to Survey by Hon. Jill Shibles, Chief Judge, Mashantucket Pequot Tribal Ct. (Mar. 24, 1999) (on file with author); Response to Survey by Hon. Phil Lujan, Dist. Ct. Judge, Iowa Tribe of Okla. (Oct. 1, 1998) (on file with author). The Duckwater Shoshone CFR Court and the Ho-Chunk Nation indicate problems with child support awards. *See* Letter and Response to Survey by Hon. Ronald E. Johnny, Chief Judge, Duckwater Tribal & Juv. Cts. (Oct. 26, 1998) (on file with author).

248. *See* Response to Survey by Hon. Phil Lujan, Judge, Sac & Fox Nation Trial Ct. (Feb. 10, 1999) (on file with author); Letter and Response to Survey by Hon. Michael Stancampiano, Associate Judge, Southern Ute Tribal Ct. (Oct. 1, 1998) (on file with author); Letter and Response to Survey by Hon. Liz Callard, Associate Judge, Southern Ute Tribal Ct. (Dec. 2, 1998) (on file with author); Response to Survey by Hon. Patrick Lee, Judge, Oglala Sioux Trial Ct. (Oct. 14, 1998) (on file with

the courts that reported instances of non-recognition involved domestic violence orders after the enactment of Violence Against Women Act.[249] The remaining instances of non-recognition cover a broad range of subject matter from state agencies refusing to recognize tribal court orders for purposes of vital statistics records[250] to money judgments in consumer debt cases.

The standardized survey[251] was designed to gather general information about tribal courts and their experiences with cross-jurisdictional recognition and enforcement of judgments.[252] From the responses, the subject matter areas of child support, domestic violence protection and child custody were specifically targeted for more thorough analysis. These subject areas are extended full faith and credit by federal law and therefore provide the backdrop for determining state compliance with federal mandates. Respondent tribal judges highlighted the specific cases I discuss below, most of which are unreported.[253] These specific

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author).

249. That is, four courts out of the 15 that reported non-recognition: the Iowa Tribe of Oklahoma, the Kickapoo Tribe of Oklahoma, the Chippewa-Cree Tribe and the Mashantucket Pequot Tribe. *See supra* note 247.

250. *See* Response to Survey by Hon. Rae N. Vaughn, Senior Judge, Mississippi Band of Choctaw Indians (Mar. 23, 1999) (stating that the "Mississippi Department of vital statistics does not recognize tribal court orders") (on file with author). The Department of Vital Statistics has refused to accept court tribal court orders for purposes of modifying birth certificates, specifically, court orders establishing paternity in situations where the natural parents are unmarried at the time of birth. Telephone Interview with Hon. Rae N. Vaughn, Senior Judge, Mississippi Band of Choctaw Indians (Aug. 17, 1999).

251. The Survey contained the following open-ended questions:

1. Do you recall any circumstance(s) when a judgment, order, or decree of your tribal court was not recognized in another tribal court? (Explanation and cite requested);
2. Do you recall any circumstance(s) when a judgment, order, or decree of your tribal court was not recognized in a state court? (Explanation and cite requested);
3. In your experience, are the following federal full faith and credit mandates being followed by state courts?
   (a) The Indian Child Welfare Act (full faith and credit to tribal court orders relating to placement of children);
   (b) The Prevention of Violence Against Women Act, (full faith and credit to domestic violence protective orders);
   (c) The Full Faith and Credit for Child Support Orders Act (full faith and credit to child support awards).

In addition, the survey requested general information on the structure of the tribal court system and solicited suggestions from tribal judges on what they believed to be the best approach to resolving recognition and enforcement issues between state and tribal judiciaries.

252. It is important to note that the reported instances of non-recognition are balanced by reports from other tribal judiciaries of growing success rates of recognition and improving local tribal-state relations. *See infra* Part V.C.

253. The only case discussed in this section which was published in a widely circulated database was the unpublished opinion of *Benjamin W.E. v. Susan C.*, No. 16474-8-III, 1998 WL 289167 (Wash. Ct. App. May 26, 1998). The Southern Ute case, which gave rise to the Washington proceeding is unpublished and only available in the court files of the Southern Ute Tribe. *See* Order, Susan C. v. Sam E. (Southern Ute Tribal Ct. July 21, 1995) (No. 91-DV-07). The cases discussed, *infra*, which originated from the Ho-Chunk Tribal Court, the State of Oklahoma, the Mashantucket Pequot Court, and the State of Connecticut either involve pending criminal proceedings, sealed juvenile proceedings, or other unpublished documents. Therefore, information was obtained from examination of the court records or through interviews with the judges and attorneys who were actively involved in the

instances of non-recognition provide a glimpse of the practical realities faced by tribal courts.

1. *Child Support Orders—The Duckwater Shoshone Courts and the States of Utah and Nevada*

The federal full faith and credit mandate for child support orders unambiguously includes tribal court orders:

> The appropriate authorities of each State shall enforce according to its terms a child support order made consistently with this section by a court of another State . . . "State" means a State of the United Sates, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country.[254]

Yet a policy directive prepared by the State of Utah Department of Human Services, and still in use, blatantly violates the federal mandate on child support orders by including in its regulations, the following instruction to case workers: "Do not enforce a tribal court order on or off the reservation."[255]

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proceedings.

254. Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (1994 & Supp. IV 1998). "Indian country" is defined in 18 U.S.C. § 1151 to include:

> (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.

255. Attachment to Letter from Denise Thacker, ORS Agent, Utah Dep't of Human Services Office of Recovery Services, to Elko County State Collections (Aug. 18, 1998) (on file with author). In a letter addressed to the Nevada State Collections Department, the State of Utah Department of Human Services Office of Recovery Services provided a copy of the Utah policy directive on case management stating the following:

> There are several situations involving Native American obligors which require different case handling. SERVICE OF PROCESS. Do not serve a Native American on the reservation or at a Post Office Box on the reservation. If service is necessary to establish or modify an order, serve the Native American obligor off the reservation at home or work. If the obligor lives and works on the reservation you may petition the tribal court to establish a support order, but practically speaking, it may not be possible to proceed with case work. Review at a later date for changes in the obligor's circumstances. ENFORCEMENT. Do not enforce upon or attach any asset located on the reservation, including any income source, personal property or real property. *Do not enforce a tribal court order on or off the reservation.* If the obligor has a tribal court order for support, you may petition the tribal court to enforce the order. TAX INTERCEPT. Do not intercept federal tax refunds to Native American obligors unless the obligor has a support order that was taken through a state district court or administrative body (ORS/CSS). Do not intercept state tax refunds to Native American obligors unless the obligor has a support order or a judgment taken through a state district court or administrative body. Do not intercept taxes based on tribal court orders. Delete cases involving Native American obligors from federal or state tax certification if they are not properly certified according to the above criteria. If taxes are inadvertently intercepted, refund

In 1990, the Duckwater Shoshone Court of Indian Offenses[256] issued an order requiring child support payments.[257] The State of Nevada later became involved by assisting the mother in her child support collection efforts against the father, who is incarcerated by the State of Utah. Nevada asked for assistance from Utah's child support enforcement agencies, but failed. Utah's child support enforcement agency closed their collection case because a tribal court issued the original order.[258]

Upon notification that Utah refused to enforce the order, the Chief Judge of the Duckwater Shoshone Tribal and Juvenile Courts contacted officials in Utah and Nevada, providing detailed information about the Duckwater Shoshone Judicial System[259] and reminding Utah of the federal full faith and credit mandate requiring enforcement.[260] He also informed the U.S. Attorney's office of the state of Utah's failure to enforce pursuant to federal law. To date, Utah officials have not re-opened the case and assisted Nevada with collections. The U.S. Attorney for the District of Utah has taken no action.[261]

The policy that justified Utah's refusal to enforce the order has not been updated since October 1992. Congress enacted the Child Support Orders Act federal mandate for nation-wide child support enforcement, including tribal court orders, in 1994. Years later, Utah has not updated

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as quickly as possible. If an intercept or certification involving a Native American obligor is contested, consult with your Regional Director. Note: Set aside orders which were improperly taken against Native American obligors. Do not attempt to enforce such orders. Tribal court orders supersede administrative orders. Take steps to ensure that the administratively ordered obligations do not continue to accrue past the date of the tribal court order. (emphasis added)

256. The Duckwater Court of Indian Offenses was established in 1975 and abolished in 1996. *See* 61 Fed. Reg. 10,673, 10,674 (1996). The Duckwater Shoshone Tribal Court became operational in 1995. *See* Response to Survey by Hon. Ronald E. Johnny, Chief Judge, Duckwater Shoshone Judicial System (Oct. 26, 1998) (on file with author).

257. *See* Letter from Hon. Ronald E. Johnny, Chief Judge, Duckwater Tribal & Juv. Cts., to Robin Arnold-Williams, Executive Director, Dep't of Human Services Office of Recovery Services (Oct. 12, 1998) (on file with author) (citing Judgment Order Awarding Child Support (Duckwater Ct. Ind. Off. Nov. 26, 1990)).

258. *See* Letter from Denise Thacker, ORS Agent, Utah Dep't of Human Services Office of Recovery Services, to Elko County State Collections (Aug. 18, 1998) (copy on file with author).

259. An incorrect assumption pointed out by Judge Johnny concerns the classification of the Duckwater Shoshone CIO as a "tribal court." *See* Letter from Hon. Ronald E. Johnny, *supra* note 247. At the time the child support order was entered, Duckwater Shoshone courts were operated as a Court of Indian Offences. *See* Letter from Hon. Ronald E. Johnny, *supra* note 247 (citing 58 Fed. Reg. 54,406, 54,412 (1993); 25 C.F.R. 11.1(a)(15) (1984) (identifying Duckwater Shoshone CFR court)).

Judge Johnny points out that Courts of Indian Offenses are federal courts. Letter from Hon. Ronald E. Johnny, *supra* note 247 (citing Duro v. Reina, 495 U.S. 676, 691 (1990); United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987)). *But c.f.* Parker v. Saupitty, 1 OKLA. TRIB. 1, 4 (Comanche CIO 1979), *available at* 1979 WL 50343 (finding that CFR court derives its authority from the sovereignty of the tribes which it serves, and not as an arm of the federal government).

260. *See* Letter from Hon. Ronald E. Johnny, *supra* note 247.

261. Telephone Interview with Hon. Ronald E. Johnny, Chief Judge, Duckwater Shoshone Judicial System (Aug. 26, 1999) (indicating no response from Utah or the U.S. Attorney for Utah).

its agency procedures to reflect the change in federal law, and federal agencies will not force compliance.

Again, the practical effects of non-enforcement of tribal court child support orders frustrate many policy directives. In this case, there are parental assets in Utah owed to a child in Nevada that the child must do without because of state intransigence. Interestingly, this is not due to the mother relocating to another state. Even if she currently resided in Utah, she would not receive state enforcement assistance to recover the child's money against the father. The policy mandates of the Child Support Orders Act seek to eliminate collection problems by "facilitat[ing] enforcement of child support order[s]" in order to provide greater financial stability for children.[262] The Child Support Orders Act's policy has been circumvented, quite simply, as the Chief Judge of the Duckwater Shoshone puts it, because "Utah state agencies . . . do not abide by federal law."[263]

2. *Domestic Violence Protection Orders—The Mashantucket Pequot Tribe and State of Connecticut.*

The Mashantucket Pequot tribal court[264] entered a domestic violence protective order instructing an individual I will call Jack, to refrain from threatening or causing bodily harm to an individual I will call Jane. Jane alleges that Jack violated the order by attacking her within the jurisdiction of the State of Connecticut.[265]

In this situation, federal law requires Connecticut to accord the Mashantucket Pequot protection order full faith and credit and enforce the order as if it were an order issued by a Connecticut court.[266] The

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262. *See* Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 1994 U.S.C.C.A.N (108 Stat. 4063) 3259, 3260.

263. Response to Survey by Hon. Ronald E. Johnny, Chief Judge, Duckwater Shoshone Judicial System (Oct. 6, 1998) (on file with author).

264. The court system was established in 1992 and includes a court of general and original jurisdiction, as well as subject-matter specific courts, such as the Gaming Enterprise Division by tribal ordinance. *See* Newton, *supra* note 16, at 300 (citing Mashantucket Pequot Tribal Court Ordinance No. 011092-02 (1992)). The Division of Gaming Enterprise has jurisdiction only over claims authorized by the Mashantucket Pequot Sovereign Immunity Waiver Ordinance.

265. *See* Response to Survey by Hon. Jill Shibles, Chief Judge, Mashantucket Pequot Tribal Ct. (Mar. 24, 1999) (on file with author).

266. *See* 18 U.S.C. § 2265 (1994).

> Full Faith and Credit. Any protection order issued . . . by the court of one State or Indian Tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

Id. § 2265(a). Subsection b is consistent with other full faith and credit statutes that require the issuing court to have jurisdiction over parties and provide the minimum due process standards of notice and hearing. *See id.* § 2265(b). The Violence Against Women Act, however, requires that personal and subject matter jurisdiction be measured by the laws of the issuing forum. *See id.* § 2265(b)(1).

Connecticut criminal statutes, however, do not clearly accommodate this federal mandate, and appear to prevent effective cross-jurisdictional enforcement of orders. Connecticut law defines the crime of violation of a protective order as violations of an order issued pursuant to Connecticut law.[267] Connecticut's family law statutes reference the Violence Against Women Act and direct that Connecticut protective orders are to be enforced in all other jurisdictions, but include no procedures for Connecticut to provide the same treatment to orders of other jurisdictions.[268] In this instance, the failure to recognize foreign judgments does not single out tribal court orders for special disregard, but treats all foreign judgments similarly.[269]

This non-enforcement leading to failure to prosecute for criminal violation of a standing protective order is of particular importance in situations of violence against Indian women because of a reprehensible gap in criminal jurisdiction for these types of crimes. Federal law divests tribes of criminal jurisdiction over non-Indians and, at times, over non-member Indians even when the perpetrator is a resident of the reservation.[270] Federal jurisdiction of crimes within Indian country is limited to specific enumerated crimes, and does not include misdemeanor violations of protective orders.[271] The lack of comprehensive criminal jurisdiction in Indian country means the majority of batterers who violate protective orders are subject to no prosecution at all, particularly if state criminal statutes narrowly define violations of protective orders so as to preclude prosecution. Although Indian women are more likely to experience domestic violence than any other category of citizens,[272] they are

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267. A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection e of section 46b-38c or section 54-1k has been issued against each person, and such person violated such order. *See* CONN. GEN. STAT. ANN. § 53a-110b. (West 1998). The references to § 46b-38c and § 54-1k make it a violation only when orders are entered pursuant to Connecticut's family law statutes which allow Connecticut courts to issue protective orders. *See id.* § 53a-110b(a).

268. *See id.* §§ 46b-38c, 54-1k (West 1998). For instance, Connecticut statutes provide for a 24-hour registry of protective orders "issued under" Connecticut's statute for issuance of protective orders, yet fail to provide for registration for orders from foreign jurisdictions. *See id.* § 46b-38c(e). However, Connecticut has recently made advances in the area of recoginizing money judgments. *See infra* Part IV.C.2.

269. There is no Connecticut caselaw addressing the issue of whether an order of another state would be honored.

270. In *Duro v. Reina*, 495 U.S. 676 (1990), the United States Supreme Court held that Indian nations do not retain criminal jurisdiction over non-member Indians. Later the same year, Congress overturned the Court's decision by statutorily recognizing tribal criminal jurisdiction over all Indians. *See* 25 U.S.C. § 1301(2).

271. *See* Indian Major Crimes Act, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)).

272. Results from a study conducted between 1992-1996 which included the National Crime Victimization Survey indicate that Indian people experience a disproportionate number of assaults. *See* LAURENCE A. GREENFELD & STEVEN K. SMITH, AMERICAN INDIANS AND CRIME, *in* DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, at v-vi (Feb. 1999). The rate of violence experienced by Indian women is nearly 50% higher than that of black men. *See id.* American Indians experience

not receiving the protection envisioned in Violence Against Women Act.[273]

The Violence Against Women Act presents other practical problems in terms of notice, often requiring an individual to obtain two protective orders, one from a tribal court and one from a state court. The Iowa Tribe of Oklahoma and the Kickapoo Tribe of Oklahoma experienced this problem when attempting to provide notice of protection orders to state law enforcement officials in Oklahoma, where no electronic database or other registration procedures are available to tribal courts. Judges from both tribes indicate that when domestic violence victims present tribal orders to state law enforcement officials, they are routinely told that they must also obtain a state order because the state officials can "do nothing" with the tribal order.[274] Some tribal court judges counsel individuals who are granted a tribal court protective order to also seek a state order in order to minimize potential problems.[275]

3. *Child Custody and Placement*

Custody proceedings involving Indian children fall into two distinct categories for purposes of recognition, depending on who is seeking custody. Custody battles between parents are outside the scope of the Indian Child Welfare Act, which carries a federal full faith and credit mandate. Custody battles between parents are governed by the Child

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violence more than twice the national average, and 70% of the crimes are committed by non-Indians. *See id.*; Fox Butterfield, *Indians Are Crime Victims At Rate Above U.S. Average*, N.Y. TIMES, Feb. 15, 1999, at A5.

A survey of Navajo women in portions of New Mexico and Arizona indicates that 28% of women age 50 and over and 52% of women under 50 report being struck at least once. *See* Means v. District Court of the Chinle Judicial District, at 3 n.8, No. SC-CV-61-98 (Navajo Nation Sup. Ct. May 11, 1999) (citing Kunitz, Levy, McCloskey & Bagriel, *Alcohol Dependence and Domestic Violence as Sequelae of Abuse and Conduct Disorder in Childhood*, 22 CHILD ABUSE & NEGLECT 1079, 1088 (1998)). In comparison, 9% to 30% of women in other populations report being struck at least once. *See id.*

273. The Mashantucket Pequot example is not an isolated occurrence. The most common problem reported is associated with providing notice to other jurisdictions that a tribal protective order has been issued, as a preemptive measure. Although the Colville Tribe reports success as a participant in the State of Washington's electronic registration database, other tribes report particular problems with local law enforcement officials. Hon. Mary T. Wynne, former Chief Judge of the Colville Tribal Court, Presentation to the National American Indian Court Judges Association, National Tribal Judicial Conference, Washington D.C. (Mar. 24, 1999). The Colville Tribal Court reports good communication between state and tribal officials, particularly in the subject matters covered in Violence Against Women Act, referencing the willingness and cooperation of sheriffs in both Okanogan and Ferry counties to enforce Colville domestic violence orders outside the reservation boundaries and on the Colville reservation in areas under state jurisdiction. *See* Responses to Survey by Hon. Frank S. LaFountaine, Colville Tribal Ct. (Feb. 21, 1999) (on file with author).

274. *See* Response to Survey by Hon. Phil Lujan, Dist. Ct. Judge, Sac & Fox Nation (Oct. 1, 1998) (on file with author); Telephone Interview with Hon. Charles H. Tripp, Chief Judge, Kickapoo Tribal Ct. (June 20, 1999).

275. Interview with Hon. Patrick E. Moore, District Court Judge, Muscogee (Creek) Nation, in Okmulgee, Okla. (Nov. 6, 1998).

Custody Agreement and the Parental Kidnapping Prevention Act, but neither expressly include tribal court proceedings within its scope.

a. Indian Child Welfare Proceedings: The Ho-Chunk Nation and State of Oklahoma

The Indian Child Welfare Act directs state, federal and tribal courts to recognize a tribal court order concerning custody of an Indian child:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.[276]

This clear federal mandate applies particularly in instances where the child is a ward of the tribal court,[277] as in the following pending Ho-Chunk proceeding.

In late summer, 1998, on a petition of the tribe's child and family service officials, the Ho-Chunk Nation Tribal Court[278] made a family of Indian children wards of the court. The court then entered an order placing the children in foster care.[279] At the time the children were

276. The Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(d) (1994).

277. *See id.* § 1911(a) ("Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.").

278. The Ho-Chunk Tribal Court, established in 1995, entertains limited jurisdiction as dictated by the tribal legislature. *See* Letter and Response to Survey from Hon. Mark Butterfield, Chief Judge, Ho-Chunk Nation Trial Ct. (Oct. 20, 1998) (on file with author). The Ho-Chunk court system consists of three divisions: The Trial Court, the Supreme Court and the Traditional Court. *See id.* Trial level judges are appointed by the legislature for three year terms. *See id.* Supreme Court judges are elected by the membership of the tribe. *See id.* The Traditional Court consists of 12 elders who are acknowledged clan leaders or senior men of standing in the community. *See id.*

The subject matter areas entertained by the court generally consist of juvenile proceedings, child support enforcement, employment law, and internal governmental matters. *See* HO-CHUNK NATION TRIAL COURT REPORT ON TRIBAL SOVEREIGNTY (1996-1997) (on file with author). During 1996 and 1997 there were 266 civil cases filed in the Ho-Chunk Trial Court. *See* Letter from Judges Mark Butterfield & Joan Greendeer-Lee, Ho-Chunk Trial Ct., to Judge Eugene White-Fish, Forest County Potawatomi Community (Mar. 22, 1998) (on file with author) (responding to questions concerning jurisdiction over non-Indians and tribal sovereign immunity). Only 32 of these cases involved non-Indian parties, 26 of which were filed by non-Indian employees. *See id.*

In 1996, 59 of the 94 cases before the tribal court involved internal matters of the Ho-Chunk Nation and its members, such as membership, trust funds, constitutional challenges, probate, and child support obligations against a tribal member. *See* HO-CHUNK NATION TRIAL COURT REPORT ON TRIBAL SOVEREIGNTY (1996-1997) (on file with author). The remaining 35 cases involved non-Indians in areas such as employment disputes, contract claims, and tort actions. *See id.*

279. Butterfield Interview, *supra* note 243. As of August 1999, these juvenile proceedings are pending in Ho-Chunk Nation tribal court, with the minor children placed in an undisclosed foster home. Telephone Interview with Hon. Mark Butterfield, Chief Judge, Ho-Chunk Nation Trial Court (Aug. 20, 1999) [hereinafter Butterfield Telephone Interview]. The proceedings are sealed and, as a

removed from the physical custody of their natural mother, they were spending the summer in the Ho-Chunk Nation and planning a return to Oklahoma, where they would be in the custody of their natural father during the school year. This custody arrangement had been established in a previous custody order entered by an Oklahoma court.[280]

At summer's end, the mother could not return the children to Oklahoma because they were in the legal custody of the Ho-Chunk Nation. Oklahoma issued a warrant for the mother's arrest under a state kidnapping statute for her failure to comply with the Oklahoma custody order, and she was subsequently arrested by Wisconsin state officials and extradited to Oklahoma.[281] She spent approximately three months in jail prior to a pretrial release.[282] Her felony jury trial was scheduled in Ottawa County, Oklahoma for the fall of 1999.[283] On the day of the jury trial, the judge dismissed the case *sua sponte* as moot, because the children had then been returned to their father.[284] The state court judge never addressed the existence of the Ho-Chunk order to the Ho-Chunk nation's assumption of jurisdiction over the children.[285] In the year since the warrant was issued, neither the prosecutor nor the district court judge in Oklahoma had made any effort to communicate with the tribal court.[286]

b. Divorce Proceedings: The Southern Ute Tribe and Washington State

The type of scenario described in the introduction, when an unsatisfied parent in a divorce proceedings physically removes a child from one jurisdiction to another to avoid further tribal court rulings, is perhaps the most complicated issue presented in the area of recognition and enforcement. The Southern Ute Tribe, along with four other

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matter of Ho-Chunk law, the style and number of the case cannot be disclosed. The procedural history of the case is reported by the presiding judge.

280. Telephone Interview with Nathan Young, Attorney (Aug. 19, 1999). Nathan Young is the mother's defense attorney in the criminal proceedings in Ottawa County, Oklahoma. *See id.*

281. *See id.*

282. *See id.* The defendant was jailed for one month pending extradition from Black River Falls, Wisconsin, and subsequently jailed two months in Ottawa County, Oklahoma before posting bond for pretrial release. *See id.*

283. *See id.* After pretrial motions were considered and a preliminary hearing was held, the case was scheduled on an upcoming felony jury docket. *See id.*

284. *See id.*

285. *See id.* No written order of dismissal was issued by the state court. *See id.*

286. Butterfield Telephone Interview, *supra* note 279. Judge Butterfield indicated that the tribal court has never been contacted by any Oklahoma official regarding this matter. The state has not asked to review the tribal court record.

The experience with the state of Wisconsin has been relatively cooperative, with the majority of enforcement problems arising in other states. Although the Ho-Chunk judges note much room for improvement in the area of recognition and enforcement in state courts, they note that Ho-Chunk judgments "fa[re] better in Wisconsin than outside the state." Response to Survey from Hon. Mark Butterfield, Chief Judge, Ho-Chunk Trial Court (Oct. 20, 1998) (on file with author).

respondents to this study, report similar experiences.[287] In no other area of law is recognition of judgments across jurisdictions more unpredictable, or more dangerous to children.

The Parental Kidnapping Prevention Act was intended to reduce cross-jurisdictional conflict in parental custody disputes.[288] Although the Parental Kidnapping Prevention Act was enacted two years after the Indian Child Welfare Act, which specifically mandated full faith and credit for tribal court orders, it is silent as to tribes. The Parental Kidnapping Prevention Act's definition of "State," makes no reference to "Indian country" as do later laws such as the Child Support Orders Act or the Violence Against Women Act.[289] The Parental Kidnapping Prevention Act language mirrors the full faith and credit implementing statute (28 U.S.C. § 1738) and raises the same question of whether tribes should be considered "territories or possessions." The Fourth Circuit has classified tribes as "territories" for Parental Kidnapping Prevention Act purposes in an opinion reminiscent of *Mackey,* although without reference thereto.[290] At least one reported tribal court decision agrees with the Fourth Circuit interpretation.[291] This statutory silence creates two kinds of problems: (1) whether the states must recognize tribal child custody orders; and (2) whether the tribes must recognize the orders of state courts or other tribal courts as final.

In addition to uncertainty surrounding the Parental Kidnapping Prevention Act's scope of applicability, conflicting interpretations of tribal court jurisdiction over divorce proceedings involving non-Indians also create problems. Even if the Parental Kidnapping Prevention Act expressly included tribes within its definition of "States," the outcome of many of these divorce cases would not change.

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287. *See* Response to Survey by Hon. Phil Lujan, Sac & Fox Nation Trial Ct. (Feb. 10, 1999) (on file with author) (indicating that non-recognition in these type of proceedings has "happened several times" in conflicts with Texas, Arkansas, and Utah); Letter and Response to Survey by Hon. Liz Callard, Associate Judge, Southern Ute Tribal Ct. (Dec. 2, 1998) (on file with author) (referencing Susan C. matter, *supra*, note 1); Response to Survey by Hon. Patrick Lee, Oglala Sioux Trial Ct. (Oct. 14, 1998) (on file with author) (indicating a refusal to return child to custodian per Oglala custody order and another tribal court ignored Oglala order); Letter and Response to Survey by Hon. Michael Stancampiano, Associate Judge, Southern Ute Tribal Ct. (Oct. 1, 1998) (on file with author) (referencing Susan C. matter, *supra* note 1).

288. *See* 28 U.S.C. § 1738A (1994 & Supp. IV 1998).

289. *See id.* 1738A(b)(8) (defining "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States").

A detailed legislative history to the Parental Kidnapping Prevention Act can be found in *Eberhard v. Eberhard*, 24 INDIAN L. RPTR. 6059, 6063-6064 (Chy. R. Sx. Ct. App. Feb. 18, 1997) (holding tribes are bound by scope of the Parental Kidnapping Prevention Act). *But see* Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N.M. L. REV. 19 (1998).

290. *See In re* Larch, 872 F.2d 66 (4th Cir. 1989).

291. *See Eberhard*, 24 INDIAN L. RPTR. at 6064.

Revisiting the Southern Ute-Washington scenario is illustrative. According to the tribal court record, Susan C. initiated the proceedings and the tribal court had personal and subject matter jurisdiction. This should have foreclosed collateral review. Instead, the state court framed the issue as follows: Will a tribe's exercise of jurisdiction in a divorce proceeding between a reservation Indian and a non-Indian residing off the reservation preclude collateral attack in state court? The answer is unclear. The only clear pronouncement regarding tribal court jurisdiction in divorce proceedings is that exclusive jurisdiction lies with the tribe only when both parties are tribal members and domiciled within Indian country.[292] When non-Indians are involved, state courts have at least concurrent jurisdiction,[293] and results could differ depending on jurisdiction. If states adopt narrow views of tribal jurisdiction over the divorce proceeding and ancillary custody determinations, as Washington did in the Susan C. scenario, even an amendment to the general full faith and credit statute unequivocally including tribes (an unlikely political development) will not put an end to the problem. The only solution is to include tribes within the parameter of the Parental Kidnapping Prevention Act and the Child Custody Act as equal partners with the states in terms of jurisdiction.

C. PRESENT SUCCESSES AND OPTIMISM FOR THE FUTURE

This section briefly highlights successes and discusses the political climates that give rise to better relationships. The Southern Ute Tribe, despite the problems experienced with other states, reports it is experiencing an increasingly cooperative environment with Colorado, a state with no official policy. This spirit of cooperation is partially conditioned on the fact that the tribe plays a vibrant role in the local economy as one of La Plata County's largest employers of Indians and non-Indians alike.[294]

All garnishment proceedings of wages from tribal business have to proceed through the tribal court, so there are a number of cross-jurisdictional enforcement proceedings.[295] The state and tribe have established uniform forms for domestic violence orders and therefore have little uncertainty among law enforcement on both sides.[296] Increased coopera-

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292. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 342 (1982 ed.).

293. *See generally* Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988) (tribal jurisdiction upheld when non-Indian plaintiff and Indian defendant both resided on the reservation); Wells v. Wells, 451 N.W.2d 402 (S.D. 1990) (state may exercise concurrent jurisdiction unless both parties are members residing on the reservation); Byzewski v. Byzewski, 429 N.W.2d 394 (N.D. 1988).

294. Callard/Stancampiano Interview, *supra* note 2.

295. Callard/Stancampiano Interview, *supra* note 2.

296. Callard/Stancampiano Interview, *supra* note 2; *see also* Letter and Response to Survey from Hon. Michael Stancampiano, Associate Judge, Southern Ute Tribal Ct. (Oct. 1, 1998) (on file with

tion is partially attributed to familiarity between state and tribal judges in the area. Tribal court judge Elizabeth Callard served as a state court judge prior to her appointment to the tribal bench.[297]

The Navajo Nation court system, which maintains the largest docket of any tribal court, has experienced many challenges to recognition over the years, and has faced a particularly challenging political climate due to the fact that the reservation falls within the boundaries of three different states: New Mexico, Arizona, and Utah, each of which approaches the recognition of tribal court judgments from a different policy. Although the Navajo judiciary indicates "the situation in [the] region is confused," the situation is improving somewhat.[298] The Navajo Nation is finding the most success with informal meetings with state justices and judges. Chief Justice Yazzie has met on occasion with the chief justices of Arizona, New Mexico, and Utah. In Arizona, a recent trend of favorable decisions is underway, and a proposed tribal court recognition and enforcement rule to be submitted for approval of the Arizona Supreme Court is in the final stages.[299] In the past, Navajo judgments have not been recognized on the basis of the Navajo repossession statute because the Navajo law violated state public policy concerns.[300] The Navajo repossession statute prohibits self-help repossessions within the tribe's territorial jurisdiction and requires the creditor to obtain written consent of the debtor or an order of the District Court of the Navajo Nation allowing removal of property.[301] Although this same approach to repossession has been adopted by states, such as Wisconsin and Louisiana, the Navajo approach has been frowned upon by reviewing courts under a comity analysis.[302]

VI. CONCLUSION

Federal laws mandating full faith and credit for tribal court judgments in the limited subject matter areas of domestic violence protective orders, child support orders, and orders pertaining to child custody have been on the books for over five years, yet many states are not abiding by federal law. From the reports of tribal judges, I have documented several instances in which federal law has been misapplied, and in some cases, blatantly ignored by reviewing jurisdictions.

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author).

297. Callard/Stancampiano Interview, *supra* note 2.

298. Interview with James Zion, Solicitor for the Courts of the Navajo Nation, Albuquerque, N.M. (Jan. 12, 1999) [hereinafter Zion Interview].

299. *See* Proposed Rules, *supra* note 177.

300. *See* 7 NAVAJO NATION CODE § 607 (1995) (repossession of personal property).

301. *See id.*

302. *See* LA. CODE CIV. PROC. ANN. art 3541 (West Supp. 2000) (requiring secured creditor to obtain writ of attachment); WIS. STAT. ANN. § 425.206(1)(b)(West Supp. 1999); *see also* Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275, 297 (1991).

The practical problems encountered by tribal courts have relatively little to do with a lack of uniformity in which states adopt their own approach to recognition, but instead, rest on a failure to comply with existing federal law. In fact, the data suggests that noncompliance with federal law is quite prevalent even in jurisdictions that have purportedly adopted quite progressive "full faith and credit" approaches.[303] As one respondent stated "we really don't need a new law, we simply have to understand and agree on an interpretation of the current law."[304]

The current federal laws do not, however, provide enforcement mechanisms to require states to follow the law, and, as indicated in the survey responses, the local U.S. Attorney's office can be unresponsive. For this reason, federal laws must be amended to provide private causes of action to compel recognition.

The most troubling result of this unfettered lack of compliance is that the subject matters most frequently at issue are those which go directly to a tribal government's ability to regulate its domestic affairs and protect individuals from violence. Of the tribal courts reporting instances of non-recognition, only one tribe reported non-recognition outside of the realm of domestic relations' law.[305] All other instances of non-recognition involved orders that lie at the very heart of a tribe's ability to regulate domestic relations through dissolution proceedings, custody proceedings, paternity determinations, and prevention of domestic violence.[306]

This data suggests a deeper problem than a few isolated cases of hardship for tribal court litigants who were unsuccessful in having their judgments recognized cross-jurisdictionally, or even the failure of federal mandates. At bottom, non-recognition is a challenge to tribal sovereignty. A government's survival is inextricably bound to its ability to regulate domestic affairs issues,[307] to have the control to improve the social conditions of its citizens, and to have its determinations validated, rather than circumvented, by other sovereigns.

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303. Some of the most blatant non-recognition examples highlighted by the respondent judges occurred in states such as Oklahoma and Washington, that have adopted comparatively progressive recognition and enforcement standards, yet on a case-by-case basis do not abide by federal law.

304. *See* Response to Survey by Hon. David D. Raasch, Chief Judge, Stockbridge-Munsee Band of Mohicans (Sept. 27, 1998) (on file with author).

305. The Navajo Nation indicates non-recognition in consumer debt cases involving the Navajo repossession statute. Zion Interview, *supra* note 298.

306. *See* subject matters outlines in Appendix A.

307. *See* Michael E. Connelly, Note, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1978: Are the States Respecting Indian Sovereignty?* 23 N.M. L. REV. 479 (1993) (noting that tribal control over the placement of minor tribal members in custody proceedings is crucial to governmental survival).

To the questions presented at the outset of this article, the data provides one clear-cut answer. There is a documented lack of state compliance with federal law. With respect to whether states with articulated policy directives, be they more akin to comity or full faith and credit, recognize tribal judgments at a higher rate than those states with no such policy, the findings reveal that even the most progressive approaches are still plagued by non-compliance at the local level.

The lack of compliance with federal mandates poses a threat to tribal sovereignty but more importantly to mainstream concerns; it also fosters inefficient allocation of judicial resources by allowing dissatisfied litigants the opportunity to shop forums. Such behavior, particularly in the realm of domestic relations law, is contrary to federal policy directives that have already been addressed by uniform jurisdiction law and kidnapping prevention legislation.

If states are to sit in review of tribal court judgments and, at times, function as the only means of local enforcement of those judgments, there must be meaningful avenues for federal intervention to force compliance. As it stands, federal full faith and credit mandates are toothless. In order to protect tribal litigants, particularly those seeking enforcement in child support collection efforts similar to the Utah example, Congress must provide for a federal cause of action to compel state action. Otherwise, federal law is exempting a class of individual litigants, Indian and non-Indian alike, from federal protection based on the happenstance that their lawsuits arose under jurisdiction of a tribal court.

APPENDIX A

SURVEY RESPONSES

TRIBAL COURT	NON-RECOGNITION BY A STATE COURT	NON-RECOGNITION BY A TRIBAL COURT	SUBJECT MATTER(S)
CHEROKEE (OK)	NO	NO	
COEUR D'ALENE	NO	NO	
CHIPPEWA-CREE	YES	NO	PROTECTIVE ORDER; CHILD CUSTODY ORDER
COLVILLE	NO	NO	
CONFEDERATED SALISH & KOOTENAI	NO	YES	DID NOT SPECIFY
DUCKWATER SHOSHONE	YES	NO	CHILD SUPPORT ORDER
EASTERN CHEROKEE	NO	NO	
GILA RIVER	NO	NO	
HO-CHUNK	YES	NO	INDIAN CHILD WELFARE PLACEMENT; IMPROPERLY MODIFIED CHILD SUPPORT ORDER
IOWA (OK)	YES	NO	PROTECTIVE ORDER
KICKAPOO (OK)	YES	NO	PROTECTIVE ORDER
MASHANTUCKET PEQUOT	YES	NO	PROTECTIVE ORDER
MENOMINEE	YES	YES	CHILD CUSTODY ORDER
MILLE LACS BAND OF OJIBWE	NO	NO	
MISSISSIPPI BAND OF CHOCTAW	YES	NO	PATERNITY RULINGS FOR VITAL STATISTICS RECORDS
MUSCOGEE (CREEK)	NO	NO	
NAVAJO	YES	NO	REPOSSESSION IN CONSUMER DEBT
OGLALA SIOUX	NO	YES	CHILD CUSTODY ORDER
OTOE-MISSOURIA	YES	NO	PROPERTY DIVISION IN DIVORCE PROCEEDING
PRAIRIE ISLAND COMMUNITY OF MDEWAKANTON SIOUX	NO	NO	
SAC & FOX (OK)	YES	NO	CHILD CUSTODY DISPUTES BETWEEN PARENTS
SAN ILDEFONSO PUEBLO	NO	NO	
SPOKANE	NO		
SOUTHERN UTE	YES	NO	CHILD CUSTODY DISPUTE BETWEEN PARENTS; MENTAL HEALTH COMMITMENT ORDER
STOCKBRIDGE-MUNSEE BAND OF MOHICANS	NO	NO	
TUNICA-BILOXI	NO	NO	
YSLETA DEL SUR PUEBLO	NO	NO	

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