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Kiss the Ring, but Never Touch the Crown: How U.S. Policy Denies Indian Women Bodily Autonomy and The SAVE Native Women Act's Attempt to Reverse that Policy

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KISS THE RING, BUT NEVER TOUCH THE CROWN: HOW U.S. POLICY DENIES INDIAN WOMEN BODILY AUTONOMY AND THE SAVE NATIVE WOMEN ACT'S ATTEMPT TO REVERSE THAT POLICY

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I. Introduction

Gender violence is a silent crisis affecting many women in Indian Country. One third of Indian women are raped and three out of every five Indian women are assaulted by a partner.[1] Police routinely triage rape and sexual assault cases.[2] What is more, law enforcement and social services agencies designed to help these women in the aftermath of such violence lack the administrative freedom required to be effective.[3]

Gender violence certainly exists outside of Indian Country in myriad forms. But the causes and effects of this violence seem to be distinct in Indian Country. Many have argued that violence by non-Indians against Indians can be attributed to a jurisdictional "black hole."[4] Although a lack of jurisdiction may be a variable that permits gender violence to go unpunished in Indian Country, it is neither the alpha nor the omega of the gender violence occurring in Indian Country.[5] Gender violence directed against Native people, and the silence surrounding it, is part and parcel a byproduct of colonization.[6]

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1. *Statement of Associate Attorney General Thomas J. Perrelli, Before the Committee on Indian Affairs on Violence Against Native American Women*, U.S. DEP'T OF JUST. (July 14, 2011), http://www.justice.gov/iso/opa/asg/speeches/2011/asg-speech-110714.html [hereinafter *Perrelli Statement*]

2. *See id.*

3. *See id.* (detailing the institutional failings in this regard).

4. *See generally* Marie Quasius, *Native American Rape Victims: Desperately Seeking an* Oliphant-*Fix*, 93 MINN. L. REV. 1902 (2009); Laura E. Pisarello, *Lawless By Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515 (2010); Rebecca A. Hart, *No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services*, 25 WIS. J.L. GENDER & SOC'Y 209 (2010).

5. *See generally* Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455 (2005) [hereinafter Deer, *Sovereignty of the Soul*].

6. *See* Part II.C.

Gender violence against Indian people aims to degrade the Indian body, erode tribal sovereignty, and assimilate Indian culture.[7] Within Indian Country, opaque jurisdictional rules paralyze law enforcement.[8] Courts addressing such problems are consistently hamstrung by the courts of another jurisdiction.[9] Perpetrators go free. Victims remain without vindication.

This, however, is only half the story. The impacts of gender violence do not end when the perpetrator leaves. Rape, specifically, "is laden with psychological and spiritual ramifications."[10] Rape is a lived experienced.[11] Rape survivors could provide excellent insight into how rape incidents are perceived and managed in their particular communities. Legislation addressing rape and other forms of gender violence need to be consonant with those stories.

This comment addresses two legal issues relating to gender violence against Indian women: criminal jurisdiction and civil jurisdiction. These issues will be presented against the backdrop of proposed legislation, the Stand Against Violence and Empower Native Women Act ("SAVE").[12] This comment will test the effects that the proposed SAVE legislation might have on the gender-related problems occurring inside Indian Country.

SAVE seeks to ameliorate gender violence against Indian women, employing tribal sovereignty as its galvanizing tool.[13] This comment argues that SAVE, if passed, will effectively strengthen tribal sovereignty. But SAVE will likely be a mere palliative remedy for Native women, failing to resolve the larger systemic issues responsible for the crisis-level rates of gender violence. Absent comprehensive action that addresses the causes and effects of violence against Native women, piecemeal legislation, such as SAVE, will not significantly mitigate violence against Native women.

A fundamental reconfiguration of self-government by Indian nations — not "as primarily the administration of a jurisdictional grid" but as "lived connections to land and one's people" — is required to effect substantial

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7. ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 7-8 (2005) [hereinafter SMITH, CONQUEST].

8. *Perrelli Statement*, *supra* note 1 ("In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished.").

9. *See* discussion *infra* Part III(e)(ii).

10. Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 123 (2004-2005) [hereinafter Deer, *Indigenous Jurisprudence*].

11. *Id.* at 138.

12. S. 1763, 112th Cong. (2011).

13. *See id.*

change in Native peoples' daily lives.[14] Native sovereigns must respond to Native peoples' unique needs, regardless of whether those people are wholly within the territorial boundaries of that Indian nation. This comment concludes that SAVE does increase powers available to tribal judicial systems, but falls short of providing essential services to ameliorate gender violence and its effects in Indian Country.

Before delving into this comment's substance, it is important to address distinctions in terminology. This comment uses the term "gender violence" to refer to all forms of violence directed toward an individual based on gender. Sexual violence goes beyond "individual acts of rape — rather it encompasses a wide range of strategies designed not only to destroy peoples, but to destroy their sense of being a people."[15]

Gender violence perpetrators often act to reinforce patriarchal norms against both men and women.[16] Hatred of the feminine, or misogyny, can be directed at anyone regardless of sex.[17] Too often, misogynistic violence directed at men is discredited because the victim's sex blurs the gender-based reasons for the attack (e.g. perpetrators attack male victims for exhibiting feminine gender qualities).[18] Using "gender violence" instead of assault, rape, etc., underscores the patriarchal dynamic involved in episodes of gender violence on the reservation.

Part II of this comment provides a greater context for gender violence, beginning with a brief history of gender violence, then delving into specific circumstances surrounding Indian gender violence. It discusses the interplay between gender violence, colonization, and genocide. Part III summarizes the relevant legislation, case law, and legal issues affected by, and affecting, the SAVE Native Women Act. Part IV overviews SAVE's form and function and provides some analysis of SAVE, keeping in mind both criminal and civil jurisdiction issues in Indian Country. Part V discusses jurisdictional questions that arise due to this proposed legislation.

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14. *See* Mark Rifkin, *The Erotics of Sovereignty*, *in* QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS, AND LITERATURE 172, 174 (Qwo-Li Driskill et al. eds., 2011).

15. SMITH, CONQUEST, *supra* note 7, at 3 ("We cannot limit our conception of sexual violence to individual acts of rape - rather it encompasses a wide range of strategies designed not only to destroy peoples, but to destroy their sense of being a people.").

16. *See* PAULA GUNN ALLEN, THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS 203 (2d prtg. 1992).

17. *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 258 (Ballantine Books 1993) (1972).

18. *Id.*

Part VI provides a brief outline of alternatives to the SAVE legislation. This comment concludes in Part VII.

II. Background

A. Gender Violence in Law

The law of rape evolved in favor of males.[19] It began with the concept that anatomy reduces women to passive victims in the eyes of the law.[20] And under the primitive doctrine of *lex talionis*, female rape survivors had no recourse through which to seek justice under the law.[21]

"By anatomical fiat — the inescapable construction of their [genitals] — the human male was a natural predator and the human female served as his natural prey."[22] According to this perspective, females deployed "protective mating" strategies, including monogamy, to ward off violent sexual advances by their male counterparts.[23] Protective mating, often taking the form of marriage, reduced the role and status of women to mere property.[24]

"Rape entered the law through the back door . . . as a property crime of man against man."[25] The earliest laws governing rape indemnified the "owner" of the woman according to the woman's status as virginal daughter or wife.[26] Because rape was viewed as a property crime, rapists could pay to excuse their sinister deeds, and faced little threat of prosecution, as rape remained a private cause of action.[27] As a private cause of action, the suit merely compensates the "owner" of the woman, who lost the value to exchange the woman's virginity for some form of consideration.[28]

The law treated rape of a married woman differently. When a man raped a wife, society found her culpable for the attack, and punished her in kind

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19. *See* BROWNMILLER, *supra* note 17, at 16-18.

20. *See id.* at 16, 317.

21. *Id.* at 16. "The law of retaliation, under which punishment should be in kind - an eye for an eye, a tooth for a tooth . . . ." BLACK'S LAW DICTIONARY 932 (8th ed. 2004).

22. BROWNMILLER, *supra* note 17, at 16.

23. *See id.*

24. *See id.* at 16-18.

25. *Id.* at 18.

26. *See id.* at 18-23 (discussing Babylonian, Mosaic, and Assyrian legal treatments of rape).

27. *See id.* at 18.

28. *Id.* ("Criminal rape, as a patriarchal father saw it, was a violation of the new way of doing business. It was, in a phrase, the theft of virginity, an embezzlement of his daughter's fair price on the market.").

with the rapist.[29] Moreover, marriage nullified any claim a woman might have against her husband-attacker, as the marriage itself served as "consent" for all of the husband's advances.[30]

Around the thirteenth century in England, the Statutes of Westminster reformulated the logic behind rape's illegality.[31] For the first time, rape offended public morality and could be prosecuted by either the offended parties or the State.[32] Additionally, the Statutes of Westminster collapsed the distinction between the rape of a virginal daughter and the rape of a wife.[33] The laws emanating from this tradition maintained requirements that the victim resist the attacker.[34] This requirement applied to the lesser "misdemeanor" crime of "ravishment" as well, which applied when a woman failed to "object strenuously enough to her own 'defilement.'"[35] Although this view of rape continued to rest on property law precepts, it expanded to recognize the agency of victims by framing the offense as "an issue of public safety and state concern," rather than purely a property crime.[36] But since these thirteenth century developments, the law on rape has been slow to evolve.[37]

In 2012, the United States Department of Justice altered its definition of rape.[38] Rape is now defined as "[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[39] This new definition recognizes the possibility of male rape, and removes the former

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29. *Id.* at 19 ("Regardless of how the incident occurred, the crime was labeled adultery and both participants were bound and thrown into the river. Appeal from such stern justice is revealing. A husband was permitted to pull his wife from the water if he so desired; the king, if he wished, could let his errant male subject go free.").

30. *Id.* at 29.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.*

36. *Id.*

37. *See id.* at 30; Deer, *Indigenous Jurisprudence*, *supra* note 10, at 124-25 (detailing the various presumptions utilized against women in the 1970s Anglo-American rape law, which included "biased suppositions about victims who had previously engaged in sexual intercourse outside of marriage").

38. Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Announces Revisions to the Uniform Crime Report's Definition of Rape: Data Reported on Rape Will Better Reflect State Criminal Codes, Victim Experiences (Jan. 6, 2012), *available at* http://www.justice.gov/opa/pr/2012/January/12-ag-018.html.

39. *Id.*

"struggle" requirement.[40] The new definition also reduces the elements of rape to (1) an act by the perpetrator and (2) the withholding of consent by the victim.[41]

Focusing on the consent of the victim certainly reflects progression in the law, but the definition falls short of encompassing rape's full effect on an individual or community.[42] The law must recognize the situational power at play during incidents of gender violence.[43] A victim's rights need not be adverse to a defendant; rather, legal requirements for dealing with victims ought to focus on healing, not hurting.[44] Unfortunately, despite this new definition, the problem of gender violence persists in Indian Country.[45]

B. Gender Violence Against Indian Women

Little historical documentation exists detailing the rape of Indian women from the Indian victim's perspective.[46] Indian women remained silent about the gender violence they experienced to a greater degree than their black and white counterparts here in America.[47] What does exist from the tribal perspective consists primarily of oral history within the tribe.[48]

But there is no shortage of the white man's historical perspective. This documentation tends to exhibit hubris. Take, for example, a diary passage written by an associate of Christopher Columbus, Michele de Cuneo:

> When I was in the boat, I captured a very beautiful Carib woman . . . having brought her into my cabin, and she being naked as is their custom, I conceived desire to take my pleasure. I wanted to put my desire to execution, but she was unwilling for me to do so, and treated me with her nails in such [ways] that I

40. *See id.*

41. *See id.*

42. *See* Deer, *Indigenous Jurisprudence*, *supra* note 10, at 123-24 (discussing the unique implications rape has on Native women).

43. *See* BROWNMILLER, *supra* note 19, at 256 (explaining how a rapist's authority in an emotional setting or dependent relationship could weaken a victim's physical resistance).

44. *See* Deer, *Indigenous Jurisprudence*, *supra* note 10, at 135-36.

45. It is too early to have any empirical evidence, but a mere redefinition of one type of gender violence by the Department of Justice does not address the larger systemic problems that contribute to that violence.

46. BROWNMILLER, *supra* note 17, at 140.

47. *Id.* ("Testaments comparable to those that white abolitionists took from black slaves do not exist for the Indian. Any documentation of the rape of white and Indian women at the hands of their enemy must be lopsided for this reason.").

48. *Id.* ("The Indian woman gave her testimony to no one; it was never solicited, except perhaps orally within her tribe.").

> would have preferred never to have begun. But seeing this . . . I took a rope-end and thrashed her well, following which she produced such screaming and wailing as would cause you not to believe your ears. Finally we reached an agreement such that, I can tell you, she seemed to have been raised in a veritable school of harlots. . . .[49]

"The rape of a 'squaw' by white men was not deemed important."[50] There are ample, gruesome accounts of the gender violence directed toward Indian femininity:

> You learned, I think, very limited [amounts] in your history books in this country about what we've suffered. The oral stories that we know are much more barbaric, like the Sand Creek massacre, where the stories in our tribe tell how they cut off the vaginas and the breasts of our women, and they put them on their saddle horns, and let them dry as decorations. They cut the babies out of pregnant grandmothers [sic] stomachs, I mean its [sic] very barbaric. I don't know how you can ever say it was civilized people who came to create a society here. That is the violence that we grew up with in war. It is the violence that our grandmothers survived.[51]

But this violence would not only be promulgated and glorified during war. So often, the violence manifested itself in religious contexts as well, using Christian ritual to bless genocide:

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49. Deer, *Sovereignty of the Soul*, *supra* note 5, at 458 (quoting Michele de Cuneo, *Letter to a Friend*, *in* THE DISCOVERY OF AMERICA AND OTHER MYTHS 129 (Thomas Christensen & Carol Christensen eds., 1992)).

50. BROWNMILLER, *supra* note 17, at 140.

51. *Respondents to Angela Davis's Address*, *in* INCITE! WOMEN OF COLOR AGAINST VIOLENCE, COLOR OF VIOLENCE: VIOLENCE AGAINST WOMEN OF COLOR -- CONFERENCE SUMMARY 7, 13 (Apr. 28-29, 2000) (comments by Gail Small) ("My perspective on violence against women and against children basically incorporates the whole perspective of colonization, of our people and our homeland. And I look at it as never, ever, being at peace, never finding peace and tranquility. Ever since the wars began for our homeland, we've been at war."). *Compare id.* (telling the story of sexual violence against Indian women with first-hand accounts) *with* BROWNMILLER, *supra* note 17, at 150-53, (noting that many stories of sexual violence against Indian people were lost because no one in white society would record or publish those stories) *and* Andrea Smith, *Not an Indian Tradition: The Sexual Colonization of Native People*, HYPATIA, Spring 2003, at 70, 75 [hereinafter Smith, *Indian Tradition*] (silencing Indian claims of sexual violence).

> One woman, big with child, rushed into the church, clasping the alter and crying for mercy for herself and unborn babe. She was followed, and fell pierced with a dozen lances . . . the child was torn alive from the yet palpitating body of its mother, first plunged into the holy water to be baptized, and immediately its brains were dashed out against a wall.[52]

The violence did not abate over time. Today, Indian women face hardships that, while perhaps not as publically graphic, are just as violent as the incidents described above. In a study of 105 Native American female prostitutes, the Minnesota Indian Women's Sexual Assault Coalition found that 92% of interviewees had been raped.[53] Eighty-four percent experienced physical assault in prostitution, and "72% suffered traumatic brain injuries in prostitution."[54] As the study explained, "[r]esearch . . . clearly indicates that indigenous women are overrepresented in prostitution, reflecting a race hierarchy within the sexist and classist institution of prostitution itself."[55] Despite this statistic, "most research on violence against Native women in the United States fails to include prostitution and sex trafficking as forms of sexual violence."[56] The breadth of gender violence directed toward Indian women knows few bounds, but consistently knows the same perpetrator: non-Indians.

Unlike most incidents of rape, rape committed against Indian women is overwhelmingly inter-racial, not intra-racial.[57] U.S. Department of Justice statistics indicate "that most Native rape victims report their assailant to be non-Native."[58] In fact, "over 70% of the assailants are white," and according to the Department of Justice, "nine in ten American Indian victims of rape or sexual assault had white or black assailants."[59] The need for criminal prosecution of non-Indian rapists cannot be hyperbolized. The impact of this demographic divide is brought into sharp focus when discussing jurisdictional impotency, as detailed *infra*.

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52. Smith, *Indian Tradition*, *supra* note 51, at 75 (citation omitted).

53. MELISSA FARLEY ET AL., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA 3 (2011).

54. *Id.*

55. *Id.* at 17.

56. *Id.* at 14.

57. Deer, *Sovereignty of the Soul*, *supra* note 5, at 457.

58. Deer, *Indigenous Jurisprudence*, *supra* note 10, at 128.

59. Deer, *Sovereignty of the Soul*, *supra* note 5, at 457.

C. Gender Violence as Colonialism

Why is this violence so prevalent and gruesome? There is no beginning or end to the relationship between colonial violence and gender violence.[60] Today, however, the latter reinforces the former: "Colonialism needs heteropatriarchy to naturalize hierarchies and unequal gender relations."[61] The colonizer considers Native bodies as something other than their own; something specifically inferior.[62]

This mindset is normalized through history and culture.[63] Early colonizers made use of biblical comparisons to Canaanites to cast images of Indians as sexually abhorrent; as polluted.[64] "Because Indian bodies are 'dirty,' they are considered sexually violable and 'rapable,' and the rape of bodies that are considered inherently impure or dirty simply does not count."[65] When a white man did express genuine interest in an Indian woman, his affections often coincided with a race and gender hierarchy in conflict with indigenous conceptions of sexual autonomy.[66] "According to . . . colonial logic[], Native women need to be managed, because they lack control over their sexuality and therefore their bodies."[67]

This hierarchy imposes stereotypes on both Native women's desires and land's "natural" use to justify the exploitation and violence inflicted.[68] "These images of Native women equate the Native female body with the conquest of land in the 'New World.'"[69] The images conflate "Native women's bodies with racialized and sexualized narratives of the land," constructing it "as penetrable and open to ownership through heteropatriarchal domination."[70]

60. Smith, *Indian Tradition*, *supra* note 51, at 71.

61. Chris Finley, *Decolonizing the Queer Native Body (and Recovering the Native Bull-Dyke): Bring "Sexy Back" and out of Native Studies' Closet*, *in* QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS, AND LITERATURE, *supra* note 14, at 31, 34.

62. *See id.*

63. *See* SMITH, CONQUEST, *supra* note 7, at 17-20.

64. *Id.* at 10.

65. *Id.*

66. Deer, *Indigenous Jurisprudence*, *supra* note 10, at 130-31.

67. Finley, *supra* note 61, at 35.

68. *See id.* at 34.

69. *Id.*

70. *Id.* at 35.

But this merely hints at the underlying purpose of gender violence directed at Indian communities.[71] What is more, gender violence is a means by which colonialism can flourish:

> [G]ender violence is a primary tool of colonialism and white supremacy. Colonizers did not just kill off Indigenous peoples in this land, but Native massacres were always accompanied by sexual mutilation and rape. . . . [T]he goal of colonialism is not just to kill colonized peoples, but to destroy their sense of being people. It is through sexual violence that a colonizing group attempts to render a colonized people inherently rapable, their lands inherently invadable, and their resources inherently extractable.[72]

Gender violence cannot be isolated to specific incidents.[73] Gender violence is systemic.[74] Explicit or not, America's policy was to exterminate the Indian population.[75] Gender violence is but one method of achieving that policy.[76]

Gender violence in U.S. courts manifests itself according to the same colonial mindset.[77] Attacks against Native American women have been treated with a lesser degree of seriousness than attacks against other women because "their abuse was seen as being outside the law."[78] In fact, such discrimination has been codified in some states. In 1968, the Ninth Circuit Court of Appeals upheld a statute that imposed a harsher penalty on a rapist for the rape of a white woman compared to an Indian woman.[79] Such discrimination is typical of a society imbued with the genocidal logic of

71. *See generally* SMITH, CONQUEST, *supra* note 7, at 7-33 (discussing sexual violence as a tool of genocide).

72. Andrea Smith, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*, *in* QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS, AND LITERATURE, *supra* note 14, at 59 [hereinafter Smith, *Queer Theory*].

73. *See* Smith, *Indian Tradition*, *supra* note 51, at 76-78.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See* Deer, *Indigenous Jurisprudence*, *supra* note 10, at 125 ("The colonialist mindset could not conceive of a legal wrong in raping a Native woman.").

78. *Id.*

79. *Id.*

colonialism.[80] And still, the law continues to bless the theft of Indian land and the denigration of Native bodies.[81]

III. Summary of the Law

This section discusses the various statutes and cases affected by and affecting SAVE. SAVE is an amendment to several laws, so this section will begin with a summary of each law. The laws include the Indian Civil Rights Act ("ICRA"),[82] the Tribal Law and Order Act ("TLOA"),[83] and the Violence Against Women Act ("VAWA").[84] An overview of key cases and legal doctrines follows and provides a background for discussion of the legal issues implicated by SAVE.

A. The Indian Civil Rights Act

Passed in 1968, in the wake of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, ICRA has the same flavor as the Civil Rights Act and Voting Rights Act.[85] Like the other acts, ICRA limits the power of government to enact certain laws and policies pertaining to its citizens.[86] Whereas the Civil Rights Act aimed to remedy state government discrimination against African Americans, ICRA generally restricted what powers tribal courts may use against any criminal defendant, Indian or non-Indian.[87] Specifically, the law limited a tribal government's authority to pass certain laws, exercise police powers, and prosecute Indian people in certain ways.[88]

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80. *See* M. A. Jaimes Guerrero, *"Patriarchal Colonialism" and Indigenism: Implications for Native Feminist Spirituality and Native Womanism*, HYPATIA, Spring 2003, at 58, 60-61.

81. *See generally* Deer, *Indigenous Jurisprudence*, *supra* note 10, at 125-27 (discussing the federal government's continued colonial practice of failure to respond to rape of Native women).

82. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006).

83. Tribal Law and Order Act of 2010, Pub L. No. 111-211, §§ 211-214, 124 Stat. 2258 (2010).

84. Violence Against Women Act of 1994, Pub. L. No. 103-322, 42 U.S.C. § 13981 (1994).

85. *Compare* Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006), *with* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), *and* Voting Rights Act, 42 U.S.C. § 1973 (2006).

86. *Compare* 25 U.S.C §§ 1301-1303 *with* 42 U.S.C. § 1981 *and* 42 U.S.C. § 1973.

87. *See* 25 U.S.C. §§ 1301-1303.

88. *See id.* § 1302.

The language of ICRA constrained tribal legislative powers by mirroring the First, Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution.[89] Additionally, it placed severe restrictions on a tribal court's power to sentence convicted criminals, stating that no Indian tribe, in exercising powers of self-government, shall "impose for conviction of any [one] offense any penalty or punishment greater than imprisonment for a term of [one] year or a fine of $5,000, or both."[90] What is more, it does not extend the exercise of tribal powers over non-Indians.[91]

Today, ICRA recognizes the inherent power of Indian nations over all Indian people. But the original version of SAVE withheld this language, succumbing to the Supreme Court's misguided interpretation in *Duro v. Reina*.[92] This decision limited a tribe's exercise of inherent sovereignty solely to members of that specific tribe.[93] Subsequently, the "Duro Fix," an Amendment to ICRA, nixed the application of this precedent.[94] ICRA now acknowledges that tribes hold inherent power "to exercise criminal jurisdiction over all Indians," regardless of tribal affiliation.[95]

B. The Tribal Law and Order Act

The TLOA strived to increase and enhance federal and tribal law enforcement and prosecution methods in Indian Country.[96] The legislation increased federal accountability for criminal activity in Indian Country.[97] Moreover, the TLOA recognized that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country."[98] In an effort to meet these obligations, the TLOA allocated additional resources for federal law enforcement use and prosecution in Indian Country.[99] Among other things, this legislation increased the

89. *See id.*

90. *Id.* § 1302(a)(7)(B).

91. *See id.* §§ 1301, 1302.

92. *See generally* Duro v. Reina, 495 U.S. 676 (1990), *superseded by statute as recognized in* United States v. Lara, 541 U.S. 193 (2004).

93. *See Duro*, 495 U.S. at 679.

94. *See generally Lara*, 541 U.S. 193.

95. *See* 25 U.S.C. § 1301(2).

96. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 164-65 (2010).

97. *See* Tribal Law and Order Act of 2010, Pub L. No. 111-211, §§ 211-214, 124 Stat. 2258 (2010).

98. *Id.* § 202(a)(1).

99. *Id.* §§ 211-214.

permitted sentencing authority of tribal courts.[100] But section 206 makes clear that "[n]othing in this Act confers on an Indian tribe criminal jurisdiction over non–Indians."[101]

Nevertheless, the TLOA attempted to bolster tribal law enforcement by implementing and coordinating requirements with state and federal officials, and providing tribal law enforcement access to the National Criminal Information Center database.[102] Importantly, this coordination effort required the Department of Justice to share prosecution information with tribal justice officials.[103] This regulation was designed to keep tribal justice officials informed of the criminal prosecutions affecting their tribes — even if prosecution is impossible under TLOA.[104] Last, TLOA made funds available for tribal law enforcement agencies.[105] These funds were desperately needed.

> As of June 2000, American Indian tribes operated 171 law enforcement agencies and the BIA operated another thirty-seven. Although these agencies are responsible for the lion's share of direct law enforcement in Indian Country, most do not have the manpower, training, or financial resources needed to police adequately the often-enormous areas for which they are responsible.[106]

Although these numbers may have changed since 2000, law enforcement in Indian Country remains woefully underfunded.[107] TLOA funding allocations vitally impact programs, but do not replace the pressing need to develop additional, more effective crime-fighting initiatives.

SAVE builds on the TLOA by expanding tribal criminal jurisdiction over non-Indians in cases of domestic or dating violence.[108] Further, SAVE

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100. *See id.* § 234(a)(3) (increasing the length of sentence and amount of fine imposed).

101. *Id.* § 206.

102. *Id.* § 233.

103. *See generally id.* § 251 (requiring the FBI Director to work with tribal law enforcement for purposes of establishing and using tribal data collection systems).

104. Hart, *supra* note 96, at 166-67.

105. *Id.* § 243.

106. Hart, *supra* note 96, at 160 (footnotes omitted).

107. See U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 75-79 (2003), *available at* http://www.usccr.gov/pubs/na0703/na0204.pdf [hereinafter QUIET CRISIS].

108. S. 1763, 112th Cong. sec. 201, § 204(b)(1) (2011).

offers grants to tribal governments, making more funds available to support and build tribal law enforcement agencies.[109]

C. The Violence Against Women Act

Despite the Supreme Court's ruling in *United States v. Morrison*,[110] VAWA remains (mostly) good law.[111] VAWA laid the groundwork for federal gender-violence investigation, prosecution, and sentencing.[112] VAWA includes a grant of tribal jurisdiction that reads:

> [A] tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.[113]

This language has been read to bestow no special jurisdictional powers to tribes.[114] Nevertheless, this legislation critically outlined the extent of civil jurisdiction possessed by tribes over protective order litigation.

VAWA ensures that the courts give tribal protective orders full faith and credit.[115] But tribal protective orders only receive full faith and credit if the protective order is issued against persons over whom the tribe has jurisdiction.[116] The tribal court must also comply with due process requirements, giving the person against whom the order is issued notice and an opportunity to be heard.[117]

Once properly issued, the statute gives broad discretion for Indian nations to enforce protective orders.[118] Notice need not be provided to the person against whom the protective order has been issued for domestication of a foreign protective order in tribal court.[119] In practice, this means that tribes are fully empowered to enforce state-issued protective orders, and vice versa.

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109. *Id.* sec. 201, § 204(g).
110. 529 U.S. 598 (2000).
111. *See id.* at 603 (striking the portion of VAWA that provided a civil rights remedy).
112. *See* 18 U.S.C. § 2265 (2006).
113. *Id.* § 2265(E).
114. *See* Martinez v. Martinez, No. C08-5503, 2008 WL 5262793, at *3-4 (W.D. Wash. Dec. 16, 2008).
115. 18 U.S.C. § 2265(a).
116. *Id.* § 2265(b).
117. *Id.*
118. *Id.* § 2265(d).
119. *Id.* § 2265(d)(1).

D. Criminal Jurisdiction

Criminal jurisdiction exercised by Indian nations and the United States on one another's citizens has long been called into question. The values undergirding each system are not always compatible. This tension has led to culling the authority each system may have to mete out justice to citizens of the other system.

The United States Supreme Court first recognized the prosecutorial limitations of Indians by non-Indians in *Ex parte Crow Dog*.[120] The facts of this case are simple: Crow Dog, a member of the Brule Sioux, murdered Spotted Tail, a member of the same tribe.[121] The Court decided whether a U.S. territorial court had jurisdiction to prosecute the murder.[122]

In *Crow Dog*, the Court recognized the Sioux Nation's right of self-determination: "The pledge to secure to these people . . . an orderly government . . . necessarily implies . . . it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs. . . . "[123] Reading past the paternalistic language, the opinion premises its holding on the idea that the Sioux Nation is distinct, requiring specific statutory language to abrogate the treaty that ensured that it would retain exclusive criminal jurisdiction over Indian-on-Indian crimes.[124]

Nearly a century later, the Court, in *Oliphant v. Suquamish Tribe,*[125] divested all Indian nations of the power to prosecute non-Indians.[126] In this case, the Suquamish Tribe arrested and began prosecuting two non-Indians for the assault of a Bureau of Indian Affairs officer.[127] The opinion surveyed relevant Suquamish treaties and tribal criminal statutes.[128] Likewise, the Court spent a large effort surveying jurisdictional assertions made by other Indian nations vis-à-vis their respective treaties or criminal statutes.[129] The Court set this surveying aside, however, and held that

120. *See generally* 109 U.S. 556 (1883).
121. *Id.* at 557.
122. *Id.* at 570.
123. *Id.* at 568.
124. *Id.* at 570-71.
125. 435 U.S. 191 (1978), *superseded by statute as recognized in* United States v. Lara, 541 U.S. 193 (2004).
126. *Oliphant*, 435 U.S. at 212.
127. *Id.* at 194.
128. *Id.* at 195.
129. *See id.* at 195-99.

Indian tribes gave up the right to prosecute non-Indians (unless Congress allows otherwise) based on their "[submission] to the overriding sovereignty of the United States."[130]

The Court's decision is based on three rationales.[131] The first is a general practice of the Court obscuring and over-simplifying the law and facts in order to reach a favorable outcome.[132] Basically, the Court agrees with the political branches of the U.S. government that Indian tribes could not exercise criminal jurisdiction over non-Indians because they are "diminished sovereigns."[133] Second, the Court interpreted the treaty language acknowledging the Tribe's dependence on the United States as a relinquishment of criminal jurisdiction by the Tribe.[134] This rationale is heavily buttressed by the third reason. Without express treaty language to the contrary, treaty provisions are "read against a backdrop of the common federal understanding that Indian tribes had no criminal jurisdiction over non-Indians."[135] This directly contravenes the well-established Indian treaty canons of construction, which demand that treaties shall be construed in favor of tribes.[136]

The third reason that the Court proffered in reaching its decision rested on a general distaste for tribal jurisdiction over non-Indians.[137] "[W]aiting in the wings was the notion of 'intrinsic limitations' on tribal governmental powers."[138] The Court refused to recognize a tribal government "inconsistent with" this perceived dependent status, regardless of the treaty language present or historical understanding.[139] Rather, the heart of the decision rested on the principle that the Suquamish Indian Tribe could not exercise jurisdiction over non-Indians because to do so would be inconsistent with its dependence on the United States.[140]

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130. *Id.* at 210.

131. *See* Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 60 (2003).

132. *Id.*

133. *See id.*

134. *See id.*

135. *Id.*

136. *See id.*

137. *See id.*

138. *Id.*

139. *See id.*

140. *Id.* at 208-09.

Much like a balloon, sovereignty may be deflated, but it can be re-inflated.[141] This rule, developed in *United States v. Lara,* is necessary to understand the function of portions of the SAVE Native Women Act.[142] The *Lara* Court addressed Congress's ability to restore inherent tribal powers, such as those powers used to prosecute non-member Indians in a tribal court.[143] *Lara*, through retroactive fiat, declared Congress capable of rekindling tribal sovereign authority through its plenary power over Indian affairs.[144] Today, ICRA is interpreted to recognize the inherent tribal sovereignty over all Native American criminal defendants.[145] The SAVE Native Women Act attempts to follow this rubric, giving a tribe the authority to prosecute domestic violence offenses committed by non-Indians. [146] While questions of tribal criminal jurisdiction have become clearer, the constitutionality of tribal civil jurisdiction has not been directly tested.

E. Civil Jurisdiction

In *Montana v. United States*,[147] the Court curtailed the Crow Tribe's civil jurisdictional authority.[148] The Court's reasoning echoed that espoused in *Oliphant* three years earlier: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[149] The Court then expanded this language to declare a permanent presumption "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[150] This became known as the *Montana* rule, to which two narrow exceptions were applied. The first permits regulation of nonmember activity that is the product of "consensual [commercial] relationships with the tribe or its members . . . ."[151] The second exception allows regulation where the nonmember activity "threatens or has some

141. *See generally* United States v. Lara, 541 U.S. 193 (2004).

142. *See generally id.*

143. *See id.* at 199-208.

144. See *id.* at 210.

145. Will Trachman, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CALIF. L. REV. 847, 849-50 (2005).

146. *See* S. 1763, 112th Cong. sec. 201, § 204(b) (2011).

147. 450 U.S. 544 (1981).

148. *See id.* at 564-66.

149. *Id.* at 545-46.

150. *Id.* at 565.

151. *Id.*

direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[152]

Courts have been stingy when applying these exceptions. One federal district court read the exceptions so narrowly as to exclude a tribe's civil adjudicatory authority over a domestic dispute between nonmember residents within the tribe's reservation.[153] The SAVE Native Women Act responds to these narrow judicial interpretations with an unmistakable grant of civil authority over protective orders.[154]

IV. The Stand Against Violence and Empower Native Women Act: Sections, Features, and Analysis of the Bill

A. Goals of the Bill

SAVE addresses the epidemic of gender violence in Indian Country by establishing three express goals: (1) "decrease the incidence of violent crime against Indian women," (2) "strengthen the capacity of Indian tribes to exercise [their] sovereign authority," and (3) "ensure that perpetrators . . . are held accountable."[155]

Over a dozen senators sponsored the bill[156] and have incorporated numerous Department of Justice suggestions with regard to the problem of gender violence in Indian Country.[157] These goals are noble, and SAVE is a step toward their attainment. But there are several practical limitations of SAVE that make the ultimate accomplishment of these goals less likely.

B. Funding and Grants

One of the biggest practical limitations in the way of accomplishing the Act's goals is finance. Funding the proposed programs poses a challenge that SAVE strives to remedy. Most tribes are not wealthy and rely heavily on outside support for law enforcement programs.[158] SAVE addresses this need head-on by opening up additional avenues for the federal government

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152. *Id.* at 566.

153. Martinez v. Martinez, No. C08-5503, 2008 WL 5262793, at *7 (W.D. Wash. Dec. 16, 2008).

154. *See* S. 1763, 112th Cong. § 202(e) (2011).

155. *Id.* pmbl.

156. Bill Summary & Status: 112*th* Congress (2011-2012) S.1763, U.S. S. COMM. ON INDIAN AFFAIRS, http://www.indian.senate.gov/issues/2011-11-07.cfm (last visited May 18, 2012) (listing one sponsor and fourteen cosponsors).

157. *Perrelli Statement*, *supra* note 1.

158. *See* Hart, *supra* note 96, at 160.

to provide grants to the tribal governments.[159] These funds make SAVE's implementation more plausible.[160] SAVE makes available additional grants for tribal governments and expands the purposes to which those funds may be applied.[161] Moreover, SAVE makes clear that new funds would supplement, not supplant, other governmental funds provided to tribes.[162] This means that SAVE does not substitute the underfunded programs under one law for the underfunded programs under SAVE.

Section 204(g) designates the purposes for which grants may be made to tribal governments. Grants to tribal governments may be used to: (1) strengthen the criminal justice system, including law enforcement, prosecution, trial, appeals, probation, detention and its alternatives, and writing criminal statutes, and to provide "culturally appropriate services and assistance for victims and their families;" (2) provide minimum services to comply with U.S. due process standards, including no-cost, effective counsel for defendants; (3) pay for jury trials; and (4) provide for victims' rights that comply with U.S. law and are "consistent with tribal law and custom."[163]

SAVE's grants to tribal governments acts to strengthen tribal sovereignty and enables the provision of services not otherwise possible. Moreover, the allowance of funding for programs specific to each tribe's culture works toward building an indigenous jurisprudence of gender violence. Currently, hardly any tribal law on "sexual violence incorporates a unique and independent indigenous perspective."[164] An independent indigenous effort to create laws is one way in which this bill can succeed. Part of re-conceptualizing jurisdiction entails changing the ways the government legislates tribal authority. Writing laws congruous with Native experiences provides the perfect forum in which to experiment with nuanced ideas about jurisdiction. This is a necessary first step to end the harms of gender violence in a way that addresses needs specific to Native American women.

C. Data on Domestic Violence

Section 104 alters the scheme designed to monitor and collect data about violence against women as per the Violence Against Women and

159. S. 1763, 112th Cong. secs. 102, 201, § 204(g) (2011).
160. *See generally* QUIET CRISIS, *supra* note 107.
161. S. 1763, 112th Cong. secs. 102, 201, § 204(g).
162. *Id.* sec. 201, § 204(h).
163. *Id.* sec. 201, § 204(g).
164. Deer, *Indigenous Jurisprudence*, *supra* note 10, at 128.

Department of Justice Reauthorization Act of 2005.[165] The alterations broaden the scope of the inquiry made by tribal coalitions, including a new focus on sex trafficking in Indian Country.[166]

Expanding the scope of inquiry is necessary. As aforementioned, most studies that document violence against Indian women fail to include data involving sex trafficking or prostitution.[167] Sex trafficking occurs at epidemic levels in Indian Country.[168] Yet, likely due to definitional confusions, a lack of arrests and prosecutions renders data about sex trafficking on Indian lands recondite.[169]

A grant established for the collection and analysis of data regarding violence against Native American women under the SAVE Native Women Act is delegated to tribal coalitions.[170] A tribal coalition differs from tribal governments in the same way that NGOs differ from the United States government.[171] Tribal coalitions are entities wholly separate and distinct from tribal governments.[172] The Attorney General awards grants to these coalitions based on his or her satisfaction that the statutory criteria for tribal coalition grants have been met,[173] of which there are three: (1) the tribal coalition accedes to all elements of a tribal coalition defined in the Violence Against Women Act, (2) the Office on Violence Against Women recognizes the tribal coalition, and (3) the coalition "provides services to Indian tribes."[174] Additionally, other organizations that propose to start a tribal coalition where none exists may be eligible for such funds.[175]

D. Special Domestic Violence Jurisdiction

Section 204 outlines the method by which a tribe may begin exercising special domestic violence jurisdiction.[176] It states: "At any time during the

165. S. 1763, 112th Cong. sec. 104, § 904(a).

166. *Id.* sec. 104, § 904(a)(2)(C).

167. FARLEY ET AL., *supra* note 53, at 14.

168. *See generally id.*

169. *Id.* at 14. The part about jurisdictional confusion is a proposition that I am making. i feel like the paper supports this conclusion. If not, there is adequate support for the remainder of the sentence on that page, at least with regards to recondite data.]

170. S. 1763, 112th Cong. sec. 102, § 2001(d)(1).

171. *See* 42 U.S.C. § 13925(a)(29) (2006) (stating a tribal coalition means a "nonprofit, nongovernmental [organization] . . . addressing domestic violence and sexual assault against American Indian or Alaska Native women").

172. *Id.*

173. *See* S. 1763, 112th Cong. sec. 102, § 2001(d)(2)(A).

174. Id. sec. 102, § 2001(d)(2)(A)(i)-(iii).

175. *Id.* sec. 102, § 2001(d)(2)(III)(A)(ii).

176. *See id.* sec. 201, § 204(b).

2-year period beginning on the date of enactment of this Act, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under section 204(a) of *Public Law 90-284* on an accelerated basis."[177] Another portion of SAVE provides the guidelines for the Attorney General to use in making decisions to approve or disapprove a tribe's request:[178]

> The Attorney General (or a designee of the Attorney General) may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior (or a designee of the Secretary), consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204 of Public Law 90-284.[179]

Moreover, SAVE provides special rights for defendants coming before tribal courts:

> In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant (1) all applicable rights under this Act; (2) if a term of imprisonment of any length is imposed, all rights described in section 202(c); and (3) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant.[180]

These rights will likely need to be protected to the satisfaction of the Attorney General before granting approval of grants to a tribe.[181]

E. Expanding Tribal Criminal Jurisdiction

While not wholly overturning *Oliphant*, SAVE carves out a discrete exception from the blanket prohibition on the exercise of tribal criminal jurisdiction over non-Indian people.[182] *Oliphant* stands for the principle that, absent express congressional approval, Indian nations do not have the

177. *Id.* sec. 201, § 204(b)(2)(A) (emphasis added).
178. *Id.* sec. 201, § 204(b)(2)(B).
179. *Id.*
180. *Id.* sec. 201, § 204(e).
181. *Id.* sec. 201, § 204(g)(2)-(3).
182. *See id.* sec. 201, § 204(b); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

power to try and sentence non-Indians.[183] SAVE abides by this rule, providing congressional approval and recognition of Indian government power to exercise limited criminal jurisdiction over non-Indians.

SAVE permits a participating tribe "to exercise special domestic violence criminal jurisdiction over all persons."[184] Special domestic violence criminal jurisdiction entails the authority to prosecute criminal conduct that is either (1) an "[a]ct of domestic violence or dating violence that occurs in the Indian country of the participating tribe," or (2) an act occurring in Indian Country of a participating tribe that violates a protection order.[185]

Jurisdictional expansion generally strengthens tribal governments. This expansion, while narrow in subject matter, is an excellent step forward because it addresses two contributing facets of gender violence: an inability to protect victims and punish perpetrators. With jurisdictional authority a tribe is better positioned to prevent repeat offenses and remove the perpetrator from the community.

"[T]he expanded tribal court criminal jurisdiction under the proposed statute would still be subject to federal review of tribal criminal convictions, adding another safeguard for non-Indians."[186] This attention to the rights of non-Indians is the product of a myopic focus on measuring indigenous judicial systems against the framework of the American judicial system. If tribal judgments are repeatedly overturned upon *habeas* review, then self-determination becomes nothing more than a pretext for increased federal involvement in Indian affairs. This is especially true given the nature of *habeas* review of a tribal court judgment: "[O]btaining habeas review of tribal decisions is significantly easier than for state or federal adjudications."[187] Persistent review by federal courts may eviscerate any chance of developing tribal jurisprudence because reviewing federal courts are bound by federal standards, not by tribal interpretations of the law.

In no way can this expansion cover the gamut of gender violence experienced by Native American women. For instance, the definitions for

183. *See Oliphant*, 435 U.S. at 210 (stating that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . give up their power to try non-Indian citizens . . . except in a manner acceptable to Congress").

184. S. 1763, 112th Cong. sec. 201, § 204(b)(1).

185. *Id.* sec. 201, § 204(c)(1)-(2).

186. Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 588 (2009).

187. *Id.*

"domestic violence" and "dating violence" include only persons that have had some sort of social relationship with the victim, usually of an intimate nature.[188] This means that tribes remain unable to prosecute or adjudicate gender violence crimes perpetrated by strangers to the victim. Moreover, the jurisdictional grant places a geographic limitation on the exercise of jurisdiction, in that a tribe only has jurisdiction over conduct that "occurs in the Indian [C]ountry of the participating tribe."[189] This raises new questions, such as whether a tribe can pass long-arm statutes if the criminal conduct occurred in the participating tribe's Indian Country but the perpetrator now resides outside of Indian Country. What if the person is a stranger to the victim and the tribe, but decides to remain in the participating tribe's Indian Country? Would the tribe have jurisdiction in that case? These are issues that SAVE, as written, leaves unanswered. Future courts will be forced to wrestle with these questions in the absence of congressional clarity — an inauspicious fate for tribal governments seeking stability.

F. Protective Orders

Tribal protective orders already exist.[190] SAVE aims to confirm Congress's intent that these tribal protective orders may be issued and enforced against anyone.[191] This is an affirmation of civil jurisdiction, but it also contains quasi-criminal enforcement tools. Specifically, tribal protective orders may be enforced by "exclud[ing] violators from Indian land."[192] This exclusion or banishment is a traditional form of indigenous punishment.[193] Although not meant to be an extension of criminal jurisdiction, this section contemplates dealing with gender violence using traditional indigenous methods. Regardless of method, clarifying Congress's intent to grant tribes full authority to issue and enforce protective orders over non-Indians is necessary, given recent district court rulings.[194]

188. S. 1763, 112th Cong. sec. 201, § 204(a)(1)-(2).

189. *Id.* sec. 201, § 204(c).

190. 18 U.S.C. § 2265(e) (2006).

191. *Perrelli Statement*, *supra* note 1.

192. S. 1763, 112th Cong. sec. 202, § 2265(e).

193. See Deer, *Indigenous Jurisprudence*, *supra* note 10, at 139-43.

194. *See, e.g.*, Martinez v. Martinez, No. C08-5503, 2008 WL 5262793, at *3-4 (W.D. Wash. Dec. 16, 2008).

Section 202 of SAVE is intended to reverse the federal district court decision, *Martinez v. Martinez*,[195] in which the court held that an Indian nation lacks authority to issue a protective order against anyone except its own tribal members.[196] SAVE's broad language affords tribes jurisdiction to enter protection orders against anyone — Native American or otherwise.[197] Moreover, the remedies for violation of a tribal protective order are fully enforceable through civil contempt proceedings.[198]

Under SAVE, the following violations trigger tribal jurisdiction to enforce protective orders:

> [the violation] occurs in the Indian country of the participating tribe; and [] violates the portion of a protection order that—(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and (ii)(I) was issued against the defendant; (II) is enforceable by the participating tribe; and (III) is consistent with *section 2265(b) of title 18, United States Code*.[199]

The emphasized portion of the above quotation is an excerpt from the VAWA.

Section 202 unmistakably expresses a congressional intent that tribal courts exercise "full civil jurisdiction to issue and enforce protection orders" over any person for "matters arising anywhere in the Indian country of the Indian tribe."[200] This language makes the involved person's status irrelevant to the tribal jurisdiction question. Instead, a reviewing court will focus on whether the dispute arose in the Indian Country of the Indian tribe that is asserting jurisdiction.

Almost certainly, the tribal protective order portion of the bill would be interpreted as a reaffirmation of tribal sovereignty. The section permits the

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195. *Id.*; *Perrelli Statement*, *supra* note 1 "[A]t least one Federal court has opined that tribes lack civil jurisdiction to issue and enforce protection orders against non-Indians who reside on tribal lands. That ruling undermines the ability of tribal courts to protect victims. Accordingly, new Federal legislation could confirm the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that tribal courts have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian."); S. 1763, 112th Cong. sec. 201, § 204.

196. *Martinez*, 2008 WL 5262793, at *3-4.

197. *See* S. 1763, 112th Cong. sec. 202, § 2265(e).

198. *Id.*

199. *Id.* sec. 201, § 204(c)(2) (emphasis added).

200. *Id.* sec. 202, § 2265(e).

full and unfettered use of civil remedies to enforce tribal protective orders. The absence of status limitations means that tribes would have jurisdiction to enforce these protective orders against all people whose conduct violates a protective order while within the Indian Country of the participating tribe.

One may reasonably argue that the SAVE Native Women Act overturns the Washington state district court decision in *Martinez v. Martinez*.[201] The federal court refused to recognize that the Suquamish Tribe could exercise jurisdiction over a dispute between two individuals who did not hold membership in that tribe and lived on non-Indian fee land within the reservation.[202] The *Martinez* court applied the two exceptions of the *Montana* test to reach its conclusion.[203] After deciding that the parties' nonmember status rendered the first exception inapplicable, because neither had a consensual commercial relationship with the tribe, the court briefly moved its efforts to the second exception, which deals with activities that may "imperil the subsistence of the tribal communities."[204] Rather than determine if divorce, child custody, and protective orders have any bearing on the subsistence of the tribal community, however, the court disregarded the argument as inapplicable because of the parties' nonmember status.[205] As nonmembers, the court reasoned, the parties' domestic relations do not directly affect the Tribe's health or welfare.[206]

The court's reasoning is flawed. Domestic relations form the foundation of any community. Unregulated domestic disputes blight a community — a blight that is replicated and remains unrepaired. Importantly, the SAVE Native Women Act acknowledges the centrality of family life to community well being.[207] For this reason, SAVE expands tribal jurisdiction regarding protective orders to any person.

The legislation needs to make clear Congress's desire to permit tribes to wield this jurisdiction over anyone within their reservations. Section 1151(a)'s language does yield to this point with the inclusion of "notwithstanding the issuance of any patent."[208] Recently, however, the Supreme Court narrowly construed this specific language in matters

201. See *Martinez*, 2008 WL 5262793, at *6-7 (finding the Suquamish Tribe without jurisdiction to enter protective orders or divorces for two non-members Native Americans residing within the Suquamish reservation).

202. *Id.* at *2.

203. *Id.* at *5-7.

204. *Id.* at *6.

205. *Id.*

206. *Id.*

207. *See generally* S. 1763, 112th Cong. sec. 201, § 204(b)(2) (2011).

208. *See* 18 U.S.C. § 1151(a).

relating to the exercise of regulatory jurisdiction over non-Indians.[209] Simply referring to the Indian Country statute does not delineate clear jurisdictional boundaries that can be applied by law enforcement. With courts actively dispossessing Indian nations of sovereign authority, it would behoove Congress to be more precise with language concerning permitted tribal jurisdiction.

G. Definition of Indian Country

Section 1151 defines Indian Country to include reservations, dependent Indian communities, and allotment lands.[210] In *Martinez*, the parties lived together on non-Indian fee lands that lay within the Suquamish reservation.[211] Recall that the touchstone for the *Montana* rule is the status of the land.[212] Based on this touchstone, because non-Indians held the Martinez land in fee, the court presumed that tribal jurisdiction was invalid.[213] SAVE's fix to the *Martinez* case does address the issue. If SAVE is enacted, a court will be able to point to the grant of special domestic violence criminal jurisdiction as express statutory authority for tribal jurisdiction over a protective order dispute, making the issues in a case like *Martinez* fall under the "matters arising . . . within the authority of the Indian tribe."[214]

H. Increased Sentencing

The SAVE Native Women Act does not increase tribal courts' available sentencing range when exercising their special domestic violence jurisdiction.[215] SAVE would, however, increase the permitted sentencing by federal courts of repeat offenders that received prior convictions in tribal courts.[216] This change would double the available sentencing range for persons previously convicted by tribal courts for domestic violence or stalking offenses.[217]

In the opinion of this author, the biggest boost to tribal self-governance would result from nixing tribal sentencing limitations. These limitations, stemming from ICRA, often make prosecutions for particularly heinous

209. *See generally* Strate v. A-1 Contractors, 520 U.S. 438 (1997).
210. 18 U.S.C. § 1151 (2006).
211. *Martinez*, 2008 WL 5262793, at *1.
212. *Id.* at *5.
213. *Id.* at *4.
214. S. 1763, 112th Cong. sec. 202, 18 U.S.C. § 2265(e).
215. *See generally* S. 1763, 112th Cong. (2011).
216. *Id.* sec. 205, § 2265A(b)(1)(B).
217. *Id.*; *see also* 18 U.S.C. § 2265(A) (2006).

crimes ineffectual.[218] What impact does a one-year jail sentence and minimal fine have on behavior such as rape? SAVE's current form will not alter the sentencing authority available to tribal courts.[219] While SAVE provides some increased sentencing to federal courts, these increases will not meaningfully alter the position most Native women and Indian nations face with respect to gender violence. Without a change to tribal sentencing, any extension of tribal sovereignty will be less effective to combat gender violence in Indian Country because the sentencing available sends a permissive signal to would-be criminals.

Increasing tribal authority over sentencing increases a tribe's ability to deter future crimes and provides proportional treatment for similar offenses.[220] Without this, much of the integrity of the criminal system in Indian Country is lost. If a tribal court cannot adequately punish offenses, then enforcement of those offenses will not be taken seriously, directly undermining the tribal government's sovereign authority.

I. Double Jeopardy

SAVE would create a situation where a non-Indian defendant can be tried and incarcerated by an Indian nation, and upon release, that same defendant could be tried and incarcerated by the federal government. This is truly a concern that ought to be addressed fully, but there are *de facto* barriers to the scenario unfolding this way. First, federal prosecutors presently refuse to prosecute most non-Indians that commit crimes against Indians.[221] So, why would they be more willing to prosecute them now that the non-Indian can be prosecuted by an Indian nation?

Additionally, SAVE provides *habeas* relief to defendants:

> A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 may petition that court to stay further detention of that person by the participating tribe. (2) Grant of stay. A court shall grant a stay described in paragraph (1) if the court (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and (B) after giving each alleged victim in the matter an opportunity to be heard, finds, by clear and convincing evidence that, under conditions imposed by the court, the petitioner is not likely to

218. Indian Civil Rights Act, 25 U.S.C. §§ 1302(7) (2006).
219. *See generally* S. 1763, 112th Cong.
220. *See* Hart, *supra* note 96, at 178.
221. SMITH, CONQUEST, *supra* note 7, at 32.

> flee or pose a danger to any person or the community if released.[222]

Not only would this relief prevent double jeopardy, but it could also exonerate a non-Indian defendant entirely. If a court were to grant a stay, it would then be up to the federal prosecutors to charge that particular individual. Given federal prosecutors' proclivity for not charging non-Indians for crimes committed against Indians, then upon a successful petition for *habeas corpus*, the grant of a stay would effectively become an exoneration of the charges.

J. Prosecuting Sterilization Abuse

The phrase "better dead than pregnant" exemplifies the belief undergirding the population-control policies implemented at the end of the Second World War.[223] The reasons for population control are varied, including environmental, economic, and social concerns.[224] "In particular, Native women, whose ability to reproduce continues to stand in the way of the continuing conquest of Native lands, endangering the continued success of colonization."[225]

Reacting to this perception, the Indian Health Services ("IHS") began "a fully federally funded sterilization campaign in 1970."[226] IHS doctors routinely performed sterilization procedures without the Indian women's consent.[227] Moreover, Indian women faced twice the likelihood of sterilization as compared to white women.[228] Given the diminished sovereignty of Native nations, little could be done to reverse the trend. Not only was the federal government funding these procedures, it also held exclusive jurisdiction to prosecute the doctors committing these crimes against these indigenous women.[229]

The SAVE Native Women Act could be the legislation necessary to end and prevent attacks against Indian women's wombs. SAVE provides participating tribes with special domestic violence jurisdiction in concurrence with the federal government.[230] It permits the exercise of

222. S. 1763, 112th Cong. sec. 201, § 204(f).
223. SMITH, CONQUEST, *supra* note 7, at 80-81.
224. *Id.* at 79.
225. *Id.*
226. *Id.* at 81.
227. *Id.* at 83.
228. *Id.*
229. *Id.* at 96-98.
230. S. 1763, 112th Cong. sec. 201, § 204(b) (2011).

jurisdiction over perpetrators of dating or domestic violence.[231] This is a narrow grant of jurisdiction, primarily aimed at a partner of the victim.[232] But SAVE also permits the tribe to prosecute persons whose conduct violates a protective order.[233]

Protective orders issued under this act would likely still be subject to jurisdictional limitations created under VAWA regarding the enforcement of protective orders.[234] Depending on the specificity accorded any given protective order, tribes could use this portion of SAVE to prevent doctors from nonconsensual sterilizations. The tribe would need to issue a protective order against specific doctors known to sterilize women without their consent. If the doctor chooses to proceed with the illegal sterilizations, then the tribe would have jurisdiction to prosecute that doctor for violating the protective order. This would require compliance with the above-stated elements, of course.

V. Questions That Arise from the Save Native Women Act

A. How Does Concurrent Jurisdiction Affect Tribal Prosecution?

Will concurrent jurisdiction alter prosecution in tribal courts? This is definitely a question that arises with the enactment of SAVE. The problem today is that the sovereign with sole jurisdiction generally has its own community and citizenry to worry about, so grants of resources and power to another sovereign will not have high priority. And in this instance, whether the federal government will increase enforcement and prosecution in response to SAVE is unknown. Likely, Congress will welcome any decreased reliance on federal authorities due to federal authorities' purported desire for tribal self-determination and prosecution of these crimes.[235]

The SAVE Native Women Act responds, in part, to Department of Justice requests to share jurisdiction with tribal courts. Despite recent allocations of federal resources to Department of Justice operations in

231. *Id.* sec. 201, § 204(c)(1).

232. *See id.* sec. 201, § 204(a) (defining the types of relations that fall under the grant of special domestic violence criminal jurisdiction).

233. *Id.* sec. 201, § 204(c)(2).

234. *See id.* sec. 202, 18 U.S.C. § 2265(e) ("...a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person...in matters arising anywhere in the Indian country of the Indian tribe or otherwise within the authority of the Indian tribe.").

235. *Perrelli Statement, supra* note 1 ("Tribal governments — police, prosecutors and courts — should be essential parts of the response to these crimes.").

Indian Country, the incidents of violent crime wholly outnumber the resources available to combat them.[236] Concurrent jurisdiction permits tribal resources and manpower to be expended in addition to the federal resources, helping to ensure greater prosecution and conviction rates. Concurrent jurisdiction could also expand trust responsibilities, discussed *infra*.

B. Will Jurisdictional Expansion Address the Root Causes of Gender Violence on the Reservation?

In a word, "no." Addressing the problems caused by gender violence does necessitate expanding tribal jurisdiction over these types of crimes. But gender violence does not emanate from within Indian societies solely as a result of a lack of criminal jurisdiction. The prevalence of gender violence in Indian Country is closely tied to the normalization of colonial violence against native people, particularly native women.[237]

That being said, expansion of criminal jurisdiction over the crime of rape is absolutely necessary:

> Department of Justice representatives have informally reported that U.S. attorneys decline to prosecute about 75 percent of all cases involving any crime in Indian country. U.S. attorneys are particularly reluctant to prosecute rape cases; indeed, the Department of Justice reported in 1997 that only two U.S. attorneys regularly prosecute rape cases in Indian country.[238]

There needs to be a more concerted effort to prosecute these crimes. SAVE's jurisdictional expansion authorizes tribal governments to up the ante on prosecutions against domestic violence perpetrators. Unlike the TLOA, however, SAVE does not create additional federal obligations for prosecutions. Ideally, SAVE's emphasis on tribal attempts to prosecute would create a rigorous and autonomous tribal judiciary.

The underlying problem, though, remains unaddressed — continued adherence to the logic of genocide:

> [N]ative peoples are entrapped in a logic of genocidal appropriation. This logic holds that Indigenous peoples must disappear. In fact, they must *always* be disappearing, in order to

236. *Id.*

237. SMITH, CONQUEST, *supra* note 7, at 8-10, 178. *See generally* Smith, *Queer Theory*, *supra* note 72.

238. SMITH, CONQUEST, *supra* note 7, at 32.

> allow non-Indigenous people's rightful claim over this land. Through this logic of genocide, non-Native people then become the rightful inheritors of all that was Indigenous — land, resources, Indigenous spirituality, or culture.[239]

The consequences for Native women are far worse than disappearing. It means that their uteruses become a target for destruction by the dominant society. "[I]t is because of a Native American woman's sex that she is hunted down and slaughtered, in fact, singled out, because she has the potential through childbirth to assure the continuance of the people."[240]

Colonial logic prevails in white American society. This logic is highlighted with reference to the national embrace of miscegenation between Indian women and white men.

> Under the logics of patriarchy and white supremacy, when a Native woman reproduces with a white man the child of this union becomes a white inheritor of the land. The child, although racially half Native, through white supremacy and patriarchy becomes white, since inheritance under patriarchy is passed on through the father. Indigeneity, unlike blackness, is erased through miscegenation with whiteness, since colonizing logic stipulates that Native people need to disappear for the settlers to inherit the land.[241]

Without addressing these underlying cultural mores that seek, through any means, to appropriate Indian lands, it will be impossible to effectively remedy the problem of gender violence in Indian Country. There will always remain a great incentive to rape the people to gain access to the land that no extension of jurisdiction will be able to guard against the onslaught of colonizers.

C. Does the Requirement of Attorney General Approval for Special Domestic Violence Jurisdiction Undermine the Goal of the Bill?

The required Attorney General approval for special domestic violence jurisdiction provides two levels of uncertainty: 1) will the tribe have the political wherewithal to ask for the special domestic violence jurisdiction; and 2) will the Attorney General approve the request if made? It is understandable that the federal government would be hesitant to share

239. Smith, *Queer Theory*, *supra* note 72, at 50.
240. SMITH, CONQUEST, *supra* note 7, at 79.
241. Finley, *supra* note 61, at 35-36.

criminal jurisdiction with another sovereign if that other sovereign refused to comply with the norms of U.S. criminal prosecutions. But this is another form of colonization and paternalism.

Presumptions about the superiority of the U.S. legal system are undergirded by an exceptionalist attitude about American culture that effectively blinds one to atrocities committed by the American legal system. Despite this, the rubric implemented by the Attorney General to assess tribal grant requests mandates that each tribe give a *pro forma* acknowledgment to U.S. notions of justice.[242] Contrast this with tribal notions of justice:

> Law must not be confused with justice. Laws may be followed to the letter, but that does not mean justice has been done. Tribes are interested in a holistic, universal, larger sense of justice . . . . The goals of the tribal court are to protect heritage, tradition, culture, religion, and family tribal members, as well as those who may be visiting or who are passing through tribal territories.[243]

This discrepancy between notions of justice leads to animosity between the different cultures. The U.S. legal system embodies its goals for justice throughout the Constitution with a focus on defendant's rights and orderly, peaceful procedure.[244] However, these goals are consistently contradicted by general U.S. policies such as tolerance for domestic violence in military homes.[245] With this in mind, it is not difficult to understand how divergent indigenous notions of justice may be, and with this divergence, misunderstanding and animosity may follow.

If the Attorney General cannot reconcile indigenous values with his or her own, his or her position of power can be used to eliminate those indigenous values. The power dynamic is entirely one sided and does a disservice to the idea of "inherent powers." This portion of SAVE cuts against the notion that Congress truly affirms and recognizes the inherent

242. *See* S. 1763, 112th Cong. sec. 201, § 204(e)(3) (2011) (attaching conditions of Constitutionality to Congress' recognition and affirmation of a tribes inherent power to exercise special domestic violence criminal jurisdiction).

243. Rudy Al James, *Traditional Native Justice: Restoration And Balance, Not "Punishment", in* UNLEARNING THE LANGUAGE OF CONQUEST: SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA 108, 114 (Wahinkpe Topa (Four Arrows) ed., 2006).

244. *See* U.S. CONST. amend. V, VI, VIII.

245. SMITH, CONQUEST, *supra* note 7, at 183-84.

power of Indian nations to prosecute gender violence crimes of non-Indians committed against Indian people in Indian Country.

SAVE's special domestic violence jurisdiction section uses the language traditionally reserved for power delegations that would be constrained by constitutional principles.[246] Typically, an affirmation of inherent powers is effected through Congress's plenary power and is therefore unconstrained by constitutional principles.[247] This portion of SAVE would be unnecessary if interpreted as a true affirmation and recognition of tribal inherent power to prosecute non-Indians for gender violence and related crimes.

D. Delegated or Inherent Jurisdiction?

SAVE likely affirms the inherent sovereignty of tribes over some criminal defendants. Delegated jurisdiction is jurisdiction granted to Indian nations by Congress, whereas inherent jurisdiction is jurisdiction held by Indian nations from time immemorial.[248] As when Congress enacted the "Duro fix" to address the problems associated with the Supreme Court's decision in *Duro v. Reina*, SAVE seeks similarly to fix problems associated with decisions like *Martinez v. Martinez*. It likely follows that SAVE may experience a similar path as the Duro legislation. Litigation ensued and each side fought all the way up to the Supreme Court on the issue of whether Congress can restore a tribe's inherent authority to exercise criminal jurisdiction over nonmember Indians. Therefore, litigation will likely ensue as it did in *Lara*, but this time on the issue of a tribe's inherent authority to exercise criminal jurisdiction over non-Indians. Whether the final outcome on this bill will mirror the "Duro fix," however, remains to be seen.

This is a pivotal issue for the bill. If the bill is interpreted as a reaffirmation of a tribe's inherent power to exercise criminal jurisdiction over non-Indians, then SAVE is a direct, albeit narrow, reversal of *Oliphant*. Reaffirming inherent sovereignty can be straightforward. "Congress need only definitively state its desire to reaffirm the inherent tribal sovereign power of criminal jurisdiction over all crimes arising on the

246. *See* S. 1763, 112th Cong. sec. 201, § 204(e)(3) (requiring tribes to abide by the U.S. Constitution in exchange "for Congress to recognize and affirm the inherent power of the participating tribe to exercise criminal jurisdiction over the defendant" pursuant to SAVE).

247. *See* United States v. Lara, 541 U.S. 193, 200-02 (2004).

248. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a) (Nell Jessup Newton et al. eds., LexisNexis 2005).

reservation, regardless of the perpetrator."[249] But if a court interprets SAVE's language as delegating criminal jurisdiction over non-Indians, then SAVE merely complies with *Oliphant*, which mandated that Congress create a tribe's ability to exercise criminal jurisdiction over a non-Indian.[250] Although both principles require legislation, the former requires more precise language.[251]

This bill has language that the judiciary will need to interpret. The granting language states the scope of tribal jurisdiction as follows:

> Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by this Act, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.[252]

The bill's writers indicate their intent to recognize that an inherent power, rather than a delegation from Congress, lies at the heart of this legislation. First, in section 204(e)(3), the writers specifically limit the bill's scope, by explicitly requiring the courts to provide defendants with all other rights mandated under the Constitution of the United States.[253] A delegation of power would already entail those rights, as congressional power is limited by the Constitution, and Congress cannot delegate power it does not have.

Another example can be found in section 204(f)(1), where defendants can petition for a writ of *habeas corpus* in a federal court if they are detained and awaiting trial by a participating tribe.[254] This again demonstrates that Congress is reaffirming inherent powers because any delegated criminal jurisdiction would automatically come with the defendant's power to petition for *habeas corpus*, as per the U.S. Constitution.[255] But the inclusion of a writ for *habeas corpus* could also potentially be interpreted to increase federal oversight over tribal judiciaries.

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249. Ennis, *supra* note 186, at 573.
250. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).
251. *See* United States v. Lara, 541 U.S. 193, 200 (2004).
252. S. 1763, 112th Cong. sec. 201, § 204(b)(1) (2011).
253. *Id.* sec. 201, § 204(e)(3).
254. *Id.* sec. 201, § 204(f)(1).
255. *See* U.S. CONST. art. I, § 9, cl. 2.

Some might say that without direct language reaffirming an inherent power, SAVE must be considered a delegation of power. The limitations aforementioned might be mere formality. But this seems unlikely, given that SAVE's text is also missing any language of delegation. Moreover, SAVE specifically addresses concurrent jurisdiction, signifying that no power has been delegated (i.e. transferred) from the federal government to tribal governments.[256] Rather, the federal government maintains its power, while simultaneously recognizing the inherent power of Indian sovereigns to police criminal conduct.[257]

Section 204(d) provides numerous ways for a defendant to move for dismissal.[258] Most importantly are the motions to dismiss based on 1) non-Indian status or 2) a "lack [of] sufficient ties to the Indian tribe."[259] The first cause for dismissal likely addresses a congressional desire to leave non-Indian on non-Indian crime within the domain of states. Whether the power is delegated or inherent, a court could decide either way on the dismissal motion. This dismissal avenue severely narrows a tribe's exercise of jurisdiction.

The second cause for dismissal supports the proposition that SAVE reaffirms inherent sovereignty. Inherent sovereignty cannot extend beyond the physical reach of any sovereign. The "ties to the tribe" exception reinforces this notion and is a logical limitation on jurisdiction. If a federal court cannot establish a real connection to a defendant, then it cannot exercise jurisdiction over that particular defendant.[260] Such a limitation corresponds to an expression of inherent sovereignty because a delegated power might permit further reach of the jurisdiction granted to the tribe.

What is more, the "ties to the tribe" exception provides a new conceptual limit to jurisdiction. In a light most favorable to Indian nations, this would mean that jurisdiction would be responsive to the experience of the community. In a light unfavorable to Indian nations, the "ties to the tribe" would be just another way to absolve non-Indians of their criminal conduct. Turning the *Montana* exceptions on their head, this exception would deny Tribal jurisdiction over criminal conduct where a consensual relationship or a direct effect on tribal interests is absent.[261]

256. S. 1763, 112th Cong. sec. 201, § 204(b)(2).
257. *See id.*
258. *Id.* sec. 201, § 204(d).
259. *Id.* sec. 201, § 204(d)(2)-(3).
260. This is a basic tenant of in personum jurisdiction.
261. *See* S. 1763, 112th Cong. sec. 201, § 204(d)(3); *cf. Montana*, 450 U.S. at 546.

VI. What Are the Alternatives?

An alternative to SAVE's approach to the problem of gender violence in Indian Country is not easy to imagine. An executive order could accomplish the same thing, but that method has not been tested in courts. Courts have tested congressional affirmation of inherent powers in *United States v. Lara* and found such affirmation permissible.[262] Using an executive order may accomplish the same result, but it may be tenuous, given the lack of jurisprudential clarity on that particular method.[263] Moreover, any such executive order would convey merely a delegated power to an Indian nation.[264]

Creating an indigenous jurisprudence of gender violence is one necessary alternative. First, a Native American paradigm of gender violence deconstructs the dominant Anglo-American narrative of gender relations.[265] Moreover, any re-conceptualization of the law will offer an opportunity to strengthen tribal leadership and sovereignty. Historical circumstances enable this opportunity:

> Because sexual violence has been inextricably linked to colonization and imperialism, and has served as a means by which to terrorize and subdue indigenous nations, then the indigenous re-definition of rape must empower the tribal governments to assert control over the response to rape and the promotion of justice on their own terms.[266]

These terms can be best ascertained from individual Indian people and their experiences with gender violence.

Incorporating oral tradition into Native American legal tradition proves highly beneficial to the judiciary and empowers Native people that find themselves before the tribe's judicial system. The example of the Navajo courts system elucidates this point:

> Although there has been criticism that the American judicial model imports very different societal values into Navajo courts, the existence of an independent Navajo judiciary reinfused

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262. *See generally* United States v. Lara, 541 U.S. 193 (2004).

263. *See* Sioux Tribe of Indians v. United States, 316 U.S. 317, 330 (1942) (indicating, in reference to land grants, that executive order grants of rights and interests to Indian nations are different and lesser than similar congressional grants).

264. *See id.*

265. Deer, *Indigenous Jurisprudence*, *supra* note 10, at 135.

266. *Id.*

> traditional cultural elements into legal relationships among the tribe and on the reservation. Because Navajo courts are free to rely on tribal custom where there is no applicable federal law, Navajo judges have had the opportunity over the past fifty years to develop a "Navajo common law."[267]

The Navajo courts provide but one successful example of Native people's judicial independence from the American legal system. In the case of gender violence, the same will be true. Native nations must be allowed the latitude to develop their own legal systems to combat the issue of Native American gender violence.

VII. Conclusion

The perils Native American women face may seem insurmountable. But the appearance of catastrophe need not interfere with progress; rather, that appearance ought to serve as impetus for change. Decolonizing Native nations must entail decolonizing Native bodies, transforming the relationship Native people maintain with their bodies. More than a call for domestic self-government, Native American women must seek bodily sovereignty. More than mere choice, Native people must demand realistic access to reproductive healthcare. In the legal system, Native bodies deserve the same dignity afforded other bodies. Native governments must have the ability to preserve the dignity of those Native bodies.

The SAVE Native Women Act steps closer to those aspirations. SAVE creates a network of agencies, governmental and non-governmental, examining the problem of gender violence in Indian Country. It helps to fund the development of tribal agencies and organizations that can deal with the perpetrators and the victims accordingly. Tribes are now able to better manage internal strife with the addition of full civil jurisdiction over protective orders. SAVE also makes it possible for tribes to begin developing their own rape law.

By leaving room for indigenous perspectives to build tribal law, a fuller remedy for the problem of gender violence in Indian Country can be fashioned. If Congress enacts the SAVE Native Women Act, Indian people will finally be able to avail themselves of the same gender-violence remedies afforded to the rest of the non-Indian population.

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267. Andrew Gilden, *Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 MICH. J. GENDER & L. 237, 257 (2007).