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Aboriginal and Treaty Rights and Violence Against Women

John Borrows

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# Aboriginal and Treaty Rights and Violence against Women

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# Aboriginal and Treaty Rights and Violence against Women

**Abstract**

Violence against Indigenous women is a crisis of national proportions. Unfortunately, Indigenous peoples have been prevented from arguing that Indigenous communities are a constitutional site of activity for dealing with such violence. This article suggests that Aboriginal and treaty rights under section 35 of the Constitution could play a significant role in ensuring that all levels of government are seized with the responsibility for dealing with violence against women. This article explores how section 35 could be reinterpreted in ways that place issues of gender and violence at the heart of its analysis.

**Keywords**

Indigenous Woman; Violence Against Women; Treaty Rights

## Aboriginal and Treaty Rights and Violence Against Women

JOHN BORROWS\*

Violence against Indigenous women is a crisis of national proportions. Unfortunately, Indigenous peoples have been prevented from arguing that Indigenous communities are a constitutional site of activity for dealing with such violence. This article suggests that Aboriginal and treaty rights under section 35 of the *Constitution* could play a significant role in ensuring that all levels of government are seized with the responsibility for dealing with violence against women. This article explores how section 35 could be reinterpreted in ways that place issues of gender and violence at the heart of its analysis.

La violence faite aux femmes autochtones est une crise d'échelle nationale. Malheureusement, on ne permet pas aux autochtones de faire valoir que leurs collectivités constituent un endroit constitutionnel où on peut s'occuper de cette violence. Cet article suggère que les droits autochtones et les droits issus des traités, reconnus et confirmés par l'article 35 de la *Constitution*, pourraient jouer un rôle important pour faire en sorte que tous les paliers de gouvernement soient saisis de la responsabilité d'aborder la violence faite aux femmes. Cet article se penche sur la manière dont l'article 35 pourrait être réinterprété afin qu'il intègre au cœur de son analyse les questions de sexe et de violence.

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**INDIGENOUS WOMEN IN CANADA** are beaten, sexually assaulted, and killed in shockingly high numbers.<sup>1</sup> They experience violence at rates three times higher than other women.<sup>2</sup> This violence is also extremely brutal in comparison to that experienced by the general population.<sup>3</sup> Indigenous women are five times more likely to be killed or to disappear as compared to non-Indigenous women.<sup>4</sup> They also experience much higher rates of intimate partner violence than other women.<sup>5</sup> Incarceration rates of Indigenous women are also greater than those of the general population of women due, in part, to their response to this violence.<sup>6</sup> There is a crisis in Canada's criminal justice system relating to this issue,<sup>7</sup> yet there has been no significant constitutional response despite recommendations

1. "In 2009, close to 67,000 Aboriginal women aged 15 or older living in the Canadian provinces reported being the victim of violence in the previous 12 months. Overall, the rate of self-reported violent victimization among Aboriginal women was almost three times higher than the rate of violent victimization reported by non-Aboriginal women. Close to two-thirds (63%) of Aboriginal female victims were aged 15 to 34. This age group accounted for just under half (47%) of the female Aboriginal population (aged 15 or older) living in the ten provinces." See Statistics Canada, *Violent victimization of Aboriginal women in the Canadian provinces, 2009* by Shannon Brennan (Ottawa: StatCan, 17 May 2011) at 5, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>> [Statistics Canada]. For further commentary, see Anita Olsen Harper, "Is Canada Peaceful and Safe for Aboriginal Women?" (2006) 25:1-2 Can Woman Stud 33 at 33, 36-37.
2. Statistics Canada, *ibid* at 7. For a more general discussion of Aboriginal women and the law, see Patricia Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack, ed, *Locating Law: Race/Class/Gender/Sexuality Connections*, 2d ed (Halifax: Fernwood, 2006) at 73-94.
3. See generally Manitoba, Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: Queen's Printer, 1991) at 475-87 (Chairs: AC Hamilton & CM Sinclair) [Aboriginal Justice Inquiry of Manitoba].
4. Amnesty International, "No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada" (London: Amnesty International, 2009) at 1, online: <<http://www.amnesty.ca/sites/default/files/amr200122009enstolensistersupdate.pdf>>.
5. Canada, Canadian Centre for Justice Statistics, *Victimization and offending among the Aboriginal population in Canada*, vol 26:3 (Ottawa: Statistics Canada, 2006), online: <<http://publications.gc.ca/collections/Collection-R/Statcan/85-002-XIE-002-XIE2006003.pdf>>.
6. Patricia Monture-Angus, "Women and risk: Aboriginal women, colonialism, and correctional practice" (1999) 19:1-2 Can Woman Stud 24; Fran Sugar & Lana Fox, "Nistum Peyako Seh'wawin Iskwewak: Breaking Chains" (1989-1990) 3:2 CJWL 465.
7. *R v Gladue*, 1999 SCC 679 at para 64, [1999] 1 SCR 688.

in numerous high profile government reports.<sup>8</sup> While federal legislative action has directed judges to consider the special circumstances of Aboriginal peoples in some instances,<sup>9</sup> these efforts are woefully inadequate in addressing broader issues of violence against women within and beyond Indigenous communities.<sup>10</sup>

At the same time, Indigenous women have demonstrated great leadership in bringing issues of violence more fully into the public spotlight.<sup>11</sup> They have established shelters, arranged counselling, organized vigils, volunteered in

8. See Nova Scotia, Royal Commission on the Donald Marshall, Jr, Prosecution, *Digest of Findings and Recommendations* (Halifax: The Commission, 1989) (Chair: T Alexander Hickman); Ontario, The Osnaburgh-Windigo Tribal Council Justice Review Committee, *Report of the Osnaburgh-Windigo Tribal Council Review Committee* (Toronto: Government of Ontario, 1990) (Chair: Alan Grant); Canada, Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: The Commission, 1991); Manitoba, Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: The Inquiry, 1991); Alberta, Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, vol 1 (Edmonton: The Task Force, 1991); Saskatchewan, Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (Regina: The Committee, 1992) (Chair: Patricia Linn); British Columbia, Cariboo-Chilcotin Justice Inquiry, *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria: Cariboo-Chilcotin Justice Inquiry, 1993) (Commissioner: Anthony Sarich); Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996); Canada, Royal Commission on Aboriginal People, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Canada Communication Group, 1996) at 54; Saskatchewan, Commission on First Nations and Metis Peoples and Justice, *Legacy of Hope: An Agenda for Change* (Saskatoon, The Commission, 2004); Ontario, Ministry of the Attorney General, *Report of the Ipperwash Inquiry* (Toronto, Queen's Printer for Ontario, 2007).
9. See *Criminal Code*, RSC 1985, c C-46, s 718.2(e). For further discussion of this issue, see Elizabeth Adjin-Tettey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19:1 CJWL 179.
10. There is a "near fatal lack of resources" available for dealing with violence on reserves. See Anne McGillivray & Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 79-80. See also Angela Cameron, "*R v Gladue*: Sentencing and the Gendered Impacts of Colonialism" in John D Whyte, ed, *Moving Toward Justice* (Saskatoon: Purich, 2008) 160; Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18 CJWL 479.
11. Neil Andersson et al, "Rebuilding from Resilience: Research Framework for a Randomized Controlled Trial of Community-led Interventions to Prevent Domestic Violence in Aboriginal Communities" (2010) 8:2 Pimatisiwin 61.

clinics, coordinated media campaigns, appeared before parliamentary committees, cultivated the arts, worked in the civil service, and been elected as chiefs and councilors—all with a firm public resolve to end violence against women.<sup>12</sup> The Native Women's Association of Canada has long been at the forefront of these efforts.<sup>13</sup> Its advocacy, research, and on-the-ground efforts have made a huge difference for thousands of people.<sup>14</sup> In fact, Indigenous women across the country have creatively developed detailed policy proposals and grassroots models for dealing with violence against women.<sup>15</sup> Their work includes support for Indigenous self-determination that recognizes and affirms women's rights.<sup>16</sup> The

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- 12. For example, see Native Women's Association of Canada, online: <<http://www.nwac.ca/media>> (for information about the broad array of activities undertaken by Indigenous women to deal with the violence against women). See also National Aboriginal Circle Against Family Violence, "Ending Violence in Aboriginal Communities: Best Practices" (Ottawa: National Aboriginal Circle Against Family Violence, 2005).
  - 13. Recently, the Assembly of First Nations has also become more active in addressing violence against women. See "Demanding Justice and Fulfilling Rights: A Strategy to End Violence Against Indigenous Women & Girls," online: <[http://www.afn.ca/uploads/files/missing\\_and\\_murdered\\_indigenous\\_women/afn\\_draft\\_strategy\\_to.ensure\\_rights\\_of\\_indigenous\\_women\\_&\\_girls\\_e.pdf](http://www.afn.ca/uploads/files/missing_and_murdered_indigenous_women/afn_draft_strategy_to.ensure_rights_of_indigenous_women_&_girls_e.pdf)>.
  - 14. The work of the Native Women's Association of Canada was very significant in securing Indian status for hundreds of thousands of people who were disenfranchised on a sexually discriminatory basis. See Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987). Loss of status made Aboriginal women more vulnerable to violence because of the precarious position in which they were placed relative to Indian men. Indian women's inability to reside or own property on reserve, participate in the political life of the community, and access the support of extended family and kin exposed them to greater challenges in confronting and fleeing abuse. The work of the Native Women's Association of Canada and their allies helped address some of these challenges. See *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153, 306 DLR (4th) 193.
  - 15. For examples of advocacy, see Native Women's Association of Canada, "What Their Stories Tell Us: Research findings from the Sisters In Spirit initiative" (Ottawa: 2010), online: <[http://www.nwac.ca/sites/default/files/imce/2010\\_NWAC\\_SIS\\_Report\\_EN\\_Lite.pdf](http://www.nwac.ca/sites/default/files/imce/2010_NWAC_SIS_Report_EN_Lite.pdf)> [*What Their Stories Tell Us*]; Jeannette Corbiere Lavell, "Statement of the Native Women's Association of Canada et al.: Combating violence against Indigenous women and girls, Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples" (delivered at the Eleventh Session of the Permanent Forum on Indigenous Issues, New York, NY, 7-18 May 2012), online: <<http://www.nwac.ca/sites/default/files/imce/UNPFI%2011th%20Session%20-NWAC%20and%20AFN%20Statement%20on%20VAIWG%20-%20May%2010%202012.pdf>>. For protocols dealing with sexual violence in Aboriginal communities, see Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice: Studies from Hollow Water, the Iona Community, and Plum Village* (London, UK: Jessica Kingsley, 2009).
  - 16. Sharon McIvor, "Aboriginal Women's Rights as "Existing Rights" (1995) 15:2-3 Can Woman Stud 34.

knowledge and experience of these women—and, in particular, their poignant calls for structural change—must be heeded.<sup>17</sup>

Despite these efforts, violence against women has not received the attention it deserves. Political discourse within Indigenous communities is strongly influenced by how Indigenous issues have been framed by the courts. In particular, section 35(1) of the *Constitution Act, 1982*<sup>18</sup> has taken centre stage in these debates. It has spawned a political approach that largely emphasizes land and resource conflicts between the Crown and Indigenous governments to the exclusion of other human rights issues. As a result, too many chiefs and leaders have become overly focused on issues recognized by the courts, inadvertently drawing attention away from pressing structural inequalities related to violence against Indigenous women. On the one hand, it is not unreasonable for leaders to devote their attention to matters that have gained broader legal traction in the judicial realm, because Canadian governments do not generally respond to Indigenous issues unless courts compel them to take action. On the other hand, since the courts are not particularly sensitive to Indigenous peoples' lived realities, Indigenous leaders must ensure that their political agendas are not solely dictated by what judges regard as being central to section 35(1) jurisprudence.

To help refocus Indigenous political discourse surrounding section 35(1), this article argues that Indigenous peoples' constitutional rights must be reframed and transformed in ways that address other pressing needs including, most importantly, violence against women. This reframing should be done with the recognition that, beyond the results of formal litigation, section 35(1) has great significance for political struggles both external and internal to Indigenous communities.<sup>19</sup> As such, this article explores the connections between Indigenous

17. For commentary on Native women's advocacy related to violence against women, see Native Women's Association of Canada, "Gendering Reconciliation, Arrest the Legacy, From Residential Schools to Prisons" (Ottawa, 2012), online: <<http://www.nwac.ca/gendering-reconciliation>>; Wendee Kubik, Carrie Bourassa & Mary Hampton, "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada" (2009) 33:1-2 *Humanity & Soc'y* 18.
18. Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].
19. In a related context, the political nature of constitutional discourse is discussed in Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Alan Hutchinson, *Waiting for Cora: A Critique of Laws and Rights* (Toronto: University of Toronto Press, 1995); Ted Morton & Rainer Knopf, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1989); Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: Oxford University Press, 2001); Andrew Petter, *The Politics of the Charter: The*

governance and violence against women while placing these issues more squarely in a political light. It argues that Indigenous communities should be regarded as possessing shared constitutional responsibility for addressing violence against women. Unless section 35(1) becomes a site of political action related to violence against women, Indigenous women and their allies will not be sufficiently empowered to affect the development of the national and local policies necessary to create lasting change.<sup>20</sup>

Part I of this article discusses why responsibility for addressing violence against women has not been considered as lying within the sphere of section 35(1) and outlines critical responses to these concerns. Part II analyzes the Supreme Court of Canada's (SCC) exceedingly narrow interpretation of Aboriginal and treaty rights and considers why jurisdiction related to violence against women would not likely be affirmed under the SCC's current dominant interpretive approach. Part III identifies alternative means of recognizing and affirming Indigenous peoples' responsibilities for dealing with violence against women within existing section 35(1) jurisprudence. Canada's *Constitution* could readily embrace approaches that put the health, well-being, and safety of Indigenous women at the centre of community life. If decision makers were willing to treat Indigenous rights not only as flowing from historic sources but also as rooted in contemporary jurisdictional concerns, section 35(1) could make a significant difference to everyday political discourse and practice concerning violence against women.

## I. THE PROBLEM AND/OR THE ANSWER?: INDIGENOUS SELF-DETERMINATION AND VIOLENCE AGAINST WOMEN

Law influences and is intertwined with politics;<sup>21</sup> thus, any attempt to change the discourse relating to violence against women within and beyond Indigenous

*Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

20. "For Indigenous women, the systematic violation of their collective rights as Indigenous People is the single greatest risk factor for gender based violence – including violence perpetrated within their communities." See Mairin Iwanka Raya, "Indigenous Women Stand Against Violence: A Companion Report to the United Nations Secretary-General's Study on Violence Against Women" (International Indigenous Women's Forum: New York, 2006) at 7, online: <<http://www.un.org/esa/socdev/unpfii/documents/vaiwreport06.pdf>>.
21. Robert A Williams Jr, "Vampires Anonymous and Critical Race Practice," (1997) 95:4 Mich Law Rev 741; Robert A Williams Jr, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color," (1987) 5:1 L & Inequality 103.

communities must address the question: Why is there no section 35(1) jurisprudence dealing with this issue? At one level, the answer is simple: Section 35(1) does not specifically deal with violence against Indigenous women because, thus far, courts have not construed these powers as falling within Indigenous peoples' jurisdiction. At another level, there is no jurisprudence recognizing Indigenous jurisdiction in this field because Indigenous communities are not fully trusted to deal effectively with violence against women.<sup>22</sup> These two issues, jurisdiction and trust, are intertwined, and the relationship between them cannot be easily disentangled. For example, if Indigenous peoples attempted to assume fuller legal responsibility related to violence against women, a lack of official recognition would leave them without the resources and broader support necessary to realize tangible change related to actual on-the-ground attitudes, activity, and service delivery. Resulting failures would further fuel negative perceptions of Indigenous justice and diminish government and community willingness to support official recognition of jurisdiction in the future. Understanding the vital connection between active, supportive recognition of Indigenous jurisdiction and its proper implementation should reinforce our awareness of the fact that law and politics are not distinct fields. This article therefore contextualizes violence against women in a broader constitutional light.<sup>23</sup>

Thus, if communities are going to deal effectively with violence against women, it is essential to interrogate why Indigenous peoples currently lack official jurisdictional recognition in this field. The first point to note is that the failure to recognize Indigenous governance is part of a broader dilemma that Indigenous people encounter before the courts. The SCC has limited its discussion of Indigenous governance to very few cases and has not, contrary to its own admonition, taken a large, liberal and generous approach to this issue.<sup>24</sup> For

22. See e.g. Teressa Nahane, "Dancing with a Gorilla: Aboriginal Women, Justice & the Charter" (Paper delivered at the Round Table on Justice Issues 2004-2005), online: <<http://www.nwac.ca/sites/default/files/reports/DancingwithaGorilla.pdf>>; Thomas Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's Press, 2000); Frances Widdowson & Albert Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen's Press, 2008).
23. Val Napoleon discusses the need for a broader political and gendered analysis of Indigenous issues. See "Aboriginal Feminism in a Wider Frame" (2007) 41:3 Canadian Dimension 44.
24. The SCC has held that Aboriginal and treaty rights should be construed in broad ways that favour Aboriginal interpretations. See *R v Gladstone*, [1996] 2 SCR 723 at para 9, 137 DLR (4th) 648; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR]; *R v Sappier*; *R v Gray*, 2006 SCC 54, 274 DLR (4th) 75 [*Sappier*]; *R v Taylor and Williams*, 34 OR (2d) 360, [1981] 3 CNLR 114 (CA) [*Taylor and*

example, in *R v Pamajewon*, the first decision to discuss Indigenous governance explicitly under section 35(1), the SCC held that Indigenous communities could not claim broad management rights over reserve lands.<sup>25</sup> While the Court's reasons have not escaped critical commentary,<sup>26</sup> this narrow framing all but halted the advancement of successful self-governance claims under section 35(1).<sup>27</sup> The *Pamajewon* decision was reinforced one year later in *Delgamuukw v The Queen*, in which the SCC declined to address issues related to self-governance because of the "difficult conceptual issues" raised by this claim.<sup>28</sup> Both of these decisions

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*Williams* cited to OR]; *R v Simon*, [1985] 2 SCR 387, 24 DLR (4th) 390 [*Simon* cited to SCR]; *R v Horseman*, [1990] 1 SCR 901 at paras 2-4, 4 WWR 97 [*Horseman*]; *R v Badger*, [1996] 1 SCR 771 at paras 4, 41, 133 DLR (4th) 324 [*Badger*]; *R v Sundown*, [1999] 1 SCR 393 at paras 24-25, 170 DLR (4th) 385 [*Sundown*]; *R v Marshall*, [1999] 3 SCR 456 at paras 9-14, 177 DLR (4th) 513 [*Marshall*]; *R v Marshall*, [1999] 3 SCR 533 at para 19, 179 DLR (4th) 193; *R v Marshall*; *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at para 26 [*R v Marshall*; *R v Bernard*]; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 at para 19 [*Morris*]. The leading cases in the United States applying similar canons of construction are *United States v Winans*, 198 US 371, 371 NE (2d) 127 (1905); *Winters v United States*, 207 US 564 at 576-77, 564 SE (2d) 802 (1908); *Choate v Trapp*, 224 US 665 at 675, 32 S Ct 565 (1912); *Carpenter v Shaw*, 280 US 363 at 367, 50 S Ct 121 (1930); *Choctaw Nation v United States*, 318 US 423 at 431-32, 423 NE (2d) 900 (1943); *McClanahan v Arizona State Tax Commission*, 411 US 164 at 174, 93 S Ct 1257 (1973); *Minnesota v Mille Lacs Band of Chippewa Indians* 526 US 172 at 195-98, 119 S Ct 1187 (1999).

25. *R v Pamajewon*, [1996] 2 SCR 821 at para 27, 138 DLR (4th) 204 [*Pamajewon*].
26. See Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Sup Ct L Rev (2d) 595 [Slattery, "The Generative Structure of Aboriginal Rights"]; Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47:3 McGill LJ 473; Russell L Barsh & James Y Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993; Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*" (1997) 42:4 McGill LJ 1011; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 Am Indian L Rev 37.
27. *R v Ignace* (1998), 156 DLR (4th) 713 at para 11, 103 BCAC 273; *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, Local 444, 2007 ONCA 814, 287 DLR (4th) 452 [*Mississaugas of Scugog Island First Nation*]; *Sawridge Band v Canada*, 2006 FC 1501 at para 42, [2006] 4 CNLR 279; *Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 125-26, [2001] 1 SCR 911 [*Mitchell*]; *NIL/TU, Child and Family Services Society v BC Government and Service Employees' Union* (23 March 2006), B72/2006 at paras 54-66, online: BCLRB <[http://www.lrb.bc.ca/decisions/B072\\$2006.pdf](http://www.lrb.bc.ca/decisions/B072$2006.pdf)>; *NIL/TU, O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 80, [2010] 2 SCR 696. Note how the claim to Indigenous governance virtually disappeared by the time *NIL/TU, O v BC Government* got to the SCC because of the narrow reading of *Pamajewon* in the lower court (*supra* note 25).
28. *Delgamuukw*, *supra* note 24 at paras 170-71.

created a void at the centre of section 35(1) jurisprudence. Section 35(1) allows communities to claim rights in relation to historically specific practices but has been interpreted in a way that simultaneously denies them the means to organize their broader social relationships.<sup>29</sup> This has suppressed Indigenous governmental activity and innovation in responding to the crisis of violence against Indigenous women within their own communities and beyond.

Contrast this situation with the constitutional circumstances of Native American tribes in the United States, which possess inherent authority to exercise criminal and civil jurisdiction on their reserves.<sup>30</sup> Tribal power in the United States flows from a legally recognized, autonomous, and inherent source of sovereignty that existed before the country's creation and survives to the present day.<sup>31</sup> While this authority is subject to the judicially created federal plenary power to regulate Native American affairs<sup>32</sup> and is constrained by legislative restrictions crafted in this light,<sup>33</sup> tribes still possess substantial inherent powers related to their internal governance.<sup>34</sup> For example, the US Bill of Rights<sup>35</sup> does not apply directly to tribes,<sup>36</sup> and while the federal government has passed legislation directing tribes to protect their members' rights,<sup>37</sup> these laws cannot generally be enforced in federal courts and, therefore, must be secured before tribal courts.<sup>38</sup> Thus, as a practical matter, tribes in the United States have significant jurisdiction

- 29. For an excellent discussion of this issue, see Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).
- 30. For the first case dealing with tribal criminal jurisdiction, see *Ex Parte Crow Dog*, 109 US 556 (1883), 3 S Ct 396. For commentary on this case, see Sidney Harring, *Crow Dog's case: American Indian sovereignty, tribal law, and United States law in the nineteenth century* (Cambridge, UK: Cambridge University Press, 1994). For the leading case dealing with tribal civil jurisdiction, see *Williams v Lee*, 358 US 217, 79 S Ct 269 (1959).
- 31. *Johnson v McIntosh*, 21 US 543, 5 L Ed 681 (1823); *Cherokee Nation v State of Georgia*, 30 US 1, 8 L Ed 25 (1831). These principles were reaffirmed in *United States v Lara*, 541 US 193, 124 S Ct 1628 (2004).
- 32. For critical discussions of the plenary power, see Nell Jessup Newton, "Federal Power Over Indians: Its Scope, Sources and Limitations" (1984) 132:2 U Pa L Rev 195; Philip P Frickey, "Domesticating Federal Indian Law" (1996) 81 Minn L Rev 31:1; Robert N Clinton, "There is No Federal Supremacy Clause for Indian Tribes" (2002) 34:1 Ariz St LJ 113; David H Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law" (1996) 84:6 Cal L Rev 1573.
- 33. *The Major Crimes Act*, 18 USC § 1153 (1885) (outlining some of these limits).
- 34. *United States v Wheeler*, 435 US 313, 98 S Ct 1079 (1978).
- 35. US Const amends I-X.
- 36. *Talton v Mayes*, 163 US 376, 16 S Ct 986 (1896).
- 37. *Indian Civil Rights Act*, 25 USC § 1302(8) (1968).
- 38. *Santa Clara Pueblo v Martinez*, 436 US 49, 98 S Ct 1670 (1978).

to legislate and adjudicate issues related to violence against women.<sup>39</sup> As a result, tribes and tribal courts have taken important steps in addressing this issue even as substantial work remains to be done.<sup>40</sup> The recognition that legal rights vest Indigenous governments with responsibilities for dealing with violence against women greatly aids political action in this field.

Unfortunately, Indigenous women in Canada are denied similar rights and corresponding access to political power, both of which are essential to their safety and to their communities' broader health. This must change. Indigenous peoples must be regarded as partners in Confederation who are capable of exercising jurisdiction related to the country's most pressing social and political issues.<sup>41</sup> They cannot effectively participate in the creation of healthy societies if they do not have the jurisdictional tools to address the violence and social dysfunction that plague too many communities. While the exercise of such power will not eradicate violence against women (the causes of and solutions to which go much deeper than constitutional reform), social distress could nevertheless be modestly yet meaningfully curtailed if authority and resources were available to address violence against women.<sup>42</sup> Unless Indigenous governance structures, such as councils, courts, and clans, address issues central to the safety of Indigenous women, they will continue to be marginalized within Canada and within their communities.<sup>43</sup> Violence against women does not only arise from poor interpersonal relationships; rather, it is connected to larger social structures of inequality that can be found in any society.<sup>44</sup> Violence against women is, therefore, intimately linked with the broader colonial context that Aboriginal rights are designed to address.<sup>45</sup> Without recognizing the links between violence

39. For a general overview of the issue of violence against women on Indian reservations, see Sarah Deer et al, eds, *Sharing Our Stories of Survival: Native Women Surviving Violence* (Lanham: AltaMira, 2008).
40. Gloria Valencia-Weber & Christine P Zuni, "Domestic Violence and Tribal Protection of Indigenous Women in the United States" (1995) 69 St John's L Rev 69.
41. Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services, 1993).
42. Resources are also greatly needed to deal with violence against women. For an in-depth study of poverty and federal policy on reserves, see Hugh Shewell, *'Enough to Keep them Alive': Indian Welfare in Canada, 1873-1965* (Toronto: University of Toronto Press, 2004).
43. Foundational flaws resting at the base of constitutional law must be exposed, nullified, and repaired to effectively address this issue. See Gordon Christie, "Judicial Justification of a Recent Development in Aboriginal Law?" (2002) 17:2 CJLS 41.
44. See Hillary N Weaver, "The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women" (2009) 24:9 J Interpersonal Violence 1552; Kiera L Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 AILR 62.
45. For a discussion of how colonization is linked with violence against women, see Andrea

against Indigenous women and male-dominated colonial structures, Indigenous women will remain subject to staggeringly high levels of violence “since violence against women is one of the key means through which male control over women’s agency and sexuality is maintained.”<sup>46</sup> Thus, the web of oppressive and unequal relationships within which Indigenous women are enmeshed must be addressed as part and parcel of violence against women if the issue is to work its way onto the constitutional agenda.<sup>47</sup>

While the recognition of Indigenous jurisdiction would be an important step in addressing violence against women, one might appropriately ask whether violence against women would receive the attention and action it deserves if Indigenous peoples were recognized as possessing responsibility in this field.<sup>48</sup> To engage with this question is to acknowledge the broader issues of trust in Indigenous governance that lie behind the legal discourse. At present, Indigenous communities can be as oppressive and dismissive of this issue as other levels of

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Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, Mass: South End Press, 2005); Mary Ellen Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for Women” (1993) 6:1 CJWL 174. For a discussion of how s 35(1) is designed to address colonialism, see *R v Sparrow*, [1997] 1 SCR 1075 at 412, 70 DLR (4th) 385 [*Sparrow*]; *Delgamuukw*, *supra* note 24; *R v Côté*, [1996] 3 SCR 139 at paras 59, 177 DLR (4th) 513 [*Côté*].

46. The connection was made at page one of the Executive Summary of a 2006 Report prepared for the General Assembly, detailing global violence against women. See Secretary-General, *Ending violence against women: from words to action: Study of the Secretary General*, UN Doc A/61/122/Add.1 (2006) at 1.
47. For extended scholarship on this issue, see the following works by Patricia A Monture: “Women’s Words: Power, Identity, and Indigenous Sovereignty” (2008) 26:3 Can Woman Stud 154; “Ka-Nin-Geh-Heh-E-Sa-Nonh-Yah-Gah” (1986) 2:1 CJWL 159; *Thunder My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Press, 1995); “Standing Against Canadian Law: Naming Omissions of Race, Culture and Gender” (1998) 2 YBNZ Juris 7; “Women and Risk: Aboriginal Women, colonialism, and correctional practice” (1999) 19:1-2 Can Woman Stud 24; “The Violence We Women Do: A First Nations View” in Constance Backhouse & David H Flaherty, eds, *Challenging Times: The Women’s Movement in Canada and the United States* (Montreal: McGill-Queen’s University Press, 1992) 193; “The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice” (1992) 56:2 Sask L Rev 237.
48. For a discussion of the care required in asking and addressing this question, see Maneesha Deckha, “Gender, Difference, and Anti-Essentialism: Towards a Feminist Response to Cultural Claims in Law” in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 114; Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 75; Kim Anderson, “Affirmations of an Indigenous Feminist” in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2010) 81.

government.<sup>49</sup> As is the case with most political communities,<sup>50</sup> male domination is a troubling fact of life.<sup>51</sup> In fact, an early report of the Manitoba Justice Inquiry proclaimed that Indigenous political leaders were a large part of the problem in perpetuating violence within Indigenous communities.<sup>52</sup> The Commissioners of the Inquiry wrote:

The unwillingness of chiefs and councils to address the plight of women and children suffering abuse at the hands of husbands and fathers is quite alarming. We are concerned enough about it to state that we believe that the failure of Aboriginal government leaders to deal at all with the problem of domestic abuse is unconscionable. We believe that there is a heavy responsibility on Aboriginal leaders to recognize the significance of the problem within their own communities. They must begin to recognize, as well, how much their silence and failure to act actually contribute to the problem.<sup>53</sup>

While these words were written over twenty years ago and constructive change within some Indigenous political circles has occurred over the last few decades,<sup>54</sup> there is no reason to believe that Indigenous communities are enlightened

49. This was particularly the case during the early 1990s when constitutional discussions excluded Aboriginal women's groups. See John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" (1994) 43:1 UNBLJ 19; Sharon Donna McIver, "Self-Government and Aboriginal Women" in Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women's Press, 1999) 167; Lillian Ernestine Kroesenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Saarbrücken: Verlag Breitenbach, 1991).
50. Carol Gilligan & David AJ Richards, *The Deepening Darkness: Patriarchy, Resistance, and Democracy's Future* (Cambridge, UK: Cambridge University Press, 2009).
51. For a good overview of the struggle faced by Indigenous women in the face of male dominance, see Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 96. For another viewpoint, see Kim Anderson, "Leading by Action: Female Chiefs and the Political Landscape in Restoring the Balance" in Gail Guthrie Valaskakis, Madeleine Dion Stout & Eric Guimond, eds, *Restoring the Balance: First Nations Women, Community, and Culture* (Winnipeg: University of Manitoba Press, 2009) 99.
52. For an example of the failure of some First Nations leaders in Manitoba to deal with sexual violence in the child welfare context see Ruth Teichroeb, *Flowers on my Grave: How an Ojibwa Boy's Death Helped Break the Silence on Child Abuse* (Toronto: Harper Collins, 1997).
53. Aboriginal Justice Inquiry of Manitoba, *supra* note 3 at 487.
54. Aboriginal organizations have called for inquiries and action to deal with violence against women, particularly in relation to murdered and missing Aboriginal women. See Native Women's Association of Canada, "Collaboration to End Violence: National Aboriginal Women's Forum" (27 July 2011), online: <<http://www.nwac.ca/sites/default/files/imce/BC%20MARR%20Reports%20Compiled%20July%202027%202011%20w%20Dig.pdf>>.

havens of gender sensitivity when it comes to addressing violence against women.<sup>55</sup> Significant problems remain<sup>56</sup> despite encouraging signs of change related to this issue within Indigenous communities.<sup>57</sup>

From many vantage points, therefore, the troubling levels of violence within Indigenous communities might be considered a reason for denying jurisdiction to Indigenous peoples.<sup>58</sup> People will reasonably wonder whether societies with this degree of trauma are capable of dealing with violence against women. These essential questions must be addressed squarely. To be certain, safety must be a paramount concern in addressing violence against women.<sup>59</sup> Reserves can be dangerous places at times, and jurisdictional and other reforms should acknowledge and work in light of this fact.<sup>60</sup> At the same time we must not lose sight of the strength, creativity, and resilience of Indigenous women and their allies on the reserves and beyond; their knowledge and experience is a key source of power in addressing violence at many levels.<sup>61</sup> It must be recognized that there are many places within Indigenous communities where people enjoy safe and healthy lives.<sup>62</sup> We should take care to avoid painting all Indigenous peoples

- 55. Emma LaRocque, "Violence in Aboriginal Communities" in Katherine MJ McKenna & June Larkin, eds, *Violence Against Women: New Canadian Perspectives* (Toronto: Inanna, 2002) at 147.
- 56. Douglas A Brownridge, "Understanding the Elevated Risk of Partner Violence Against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada" (2008) 23 J Fam Violence 353; "Male Partner Violence against Aboriginal Women in Canada: An Empirical Analysis" (2003) 18:1 J Interpersonal Violence 65.
- 57. Wayne Warry, *Unfinished dreams: community healing and the reality of aboriginal self-government* (Toronto: University of Toronto Press, 1998) at 160-62.
- 58. For example, in past constitutional debates the concerns of Aboriginal women were not adequately taken into account. See Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4:1 Const Forum 110.
- 59. Judith Lewis Herman, *Trauma and Recovery* (New York: Basic Books, 1992) at 155-74.
- 60. A tragically poignant example of the failure to recognize this fact is recorded in *Jane Doe v Atawasis Agency of Northern Manitoba* (1990), 67 Man R (2d) 260, 72 DLR (4th) 738 (CA).
- 61. Those who have experienced violence usually have a good idea of which actions are effective and which are not in this field. See, more generally, Francine Pickup, Suzanne Williams & Caroline Sweetman, *Ending Violence Against Women: A Challenge for Development and Humanitarian Work* (Oxford: Oxfam, 2001).
- 62. Boyce Richardson, ed, *Drum Beat: anger and renewal in Indian country* (Ottawa: Summerhill Press, 1989) at 137-66; Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring, 2011). For a discussion of how Aboriginal communities actually contribute positively to Canadian society, see Cora Voyageur, David Newhouse & Daniel Beavon, eds, *Hidden in Plain Sight: contributions of Aboriginal peoples to Canadian identity and culture* (Toronto: University of Toronto Press, 2005).

with the same brush.<sup>63</sup> Trauma, while widespread, is not the norm in every place throughout Aboriginal Canada.<sup>64</sup> Furthermore, we should also reject the assumption that communities experiencing deep levels of violence are incapable of dealing with this issue, given the proper resources and legal tools.<sup>65</sup> People are able to change their lives amidst the most trying conditions.<sup>66</sup> While addressing violence is certainly more challenging in such contexts, and requires a significant level of support as noted above, much can be accomplished.<sup>67</sup> Thus, while we should always be deeply concerned about any (Indigenous or non-Indigenous) community's ability to effectively address violence against women, these issues should always be considered in a more nuanced light.

Secondly, it must be acknowledged that Canadian governments have not responded effectively to the nationwide crisis involving violence against Indigenous women.<sup>68</sup> In fact, even as women's organizations across Canada have been advocating for additional attention to, and services for, addressing violence against women (among other matters), they have suffered across-the-board cuts to their public funding.<sup>69</sup> Furthermore, repeated calls by national Aboriginal

63. Some communities have taken positive steps to address violence against women. See Jarem Sawatsky, *The ethic of traditional communities and the spirit of healing justice: studies from Hollow Water, the Iona Community, and Plum Village* (London, UK: Jessica Kingsley, 2009). Furthermore, the complexities of membership in multiple communities must be considered in dealing with violence against Aboriginal women. See Rauna Kuokkanen, "Intersectionality and Violence against Indigenous Women" (2013) CJWL [forthcoming].
64. I have addressed this issue in John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" *National Centre for First Nations Governance*, online: <[http://fngovernance.org/resources\\_docs/7\\_Generations\\_7\\_Teachings.pdf](http://fngovernance.org/resources_docs/7_Generations_7_Teachings.pdf)>.
65. For a discussion of the ability of traumatized communities to positively respond amidst violence, see Jack Rothman et al, eds, *Strategies of Community Intervention: Macro Practice*, 5th ed (Itasca, IL: FE Peacock, 1995); Jack Rothman, ed, *Reflections on Community Organization: Enduring Themes and Critical Issues* (Itasca, IL: FE Peacock, 1999); Barbara Levy Simon, *The Empowerment Tradition in American Social Work: A History* (New York: Columbia University Press, 1994).
66. See generally Monica McGoldrick, ed, *Re-Visioning Family Therapy: Race, Culture and Gender in Clinical Practice* (New York: Guilford Press, 1998).
67. For examples and a discussion of this issue, see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999); Gerald R Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1995); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: Broadview Press, 2005).
68. Rupert Ross, "Traumatization in Remote First Nations: An Expression of Concern" (2006) [unpublished, on file with author].
69. For a list of Women's and Indigenous organizations that have had their funding cut by the federal government in recent years see Gina Starblanket, *Beyond Culture in the Courts:*

organizations for the Canadian government to address violence against Indigenous women have been met with responses that do not confront the problem's systemic nature.<sup>70</sup> The same situation largely prevails within the provinces, where governments have not taken the initiative to address violence against Indigenous women structurally. In fact, even in those rare cases in which provinces have acted, their processes have been framed in excessively narrow terms. For example, commissions of inquiry have been established to examine select issues related to violence against Indigenous women in British Columbia<sup>71</sup> and Manitoba,<sup>72</sup> but the governments' limited focus has generally failed to generate support from the most affected Indigenous communities.<sup>73</sup> Moreover, the existence of *Charter* rights protecting, *inter alia*, life, liberty, security, and equality has had little influence in addressing this issue.<sup>74</sup> Broader structural change is needed but has not been forthcoming.<sup>75</sup> The failure of federal and provincial governments to deal

*Re-inspiring Approaches to Aboriginal and Treaty Rights in Canadian Jurisprudence* (MA Thesis, University of Victoria, Department of Political Science, 2012) [unpublished] at 89-90, online: <<http://dspace.library.uvic.ca:8080/bitstream/handle/1828/3914/Gina%20Starblanket%20UVic%20MA%20Thesis%20DSpace.pdf?sequence=3>>.

- 70. See Pauktuutit Inuit Women of Canada, "National Strategy to Prevent Abuse in Inuit Communities" (Ottawa: Pauktuutit Inuit Women of Canada, 2006), online: Inuit Women of Canada <[www.pauktuutit.ca](http://www.pauktuutit.ca)>.
- 71. British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry: Executive Summary* (British Columbia: The Inquiry, 2012), online: <[www.missingwomeninquiry.ca](http://www.missingwomeninquiry.ca)>.
- 72. Manitoba has created an Integrated Task Force for Murdered and Missing Women as a joint effort between the government of Manitoba, the RCMP, and the Winnipeg Police Services. See Government of Manitoba, News Release, "Integrated Task Force Formed – Cases of Missing and Murdered Women to be Subject of Enhanced Scrutiny" (26 August 2009), online: <<http://news.gov.mb.ca/news/index.html?item=6621>>.
- 73. Jennifer Koshan, "Aboriginal Women, Justice and the Charter: Bridging the Divide?" (1998) 32:1 UBC L Rev 23 at 1.
- 74. Diane Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40:3 Osgoode Hall LJ 297 at 320. Majury observes: "Violence against women is probably the area in which section 15 has been most frequently argued before the Supreme Court of Canada." Despite this attention, Aboriginal women, as Aboriginals and women, have not received sustained attention from the courts under the *Charter*.
- 75. "[T]he root causes and major sites of violence against Aboriginal women have been theorized too narrowly, and solutions proposed and implemented ... have not been responsive to the needs of Aboriginal women." Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women" in Susan Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) at 88-89. For a broader analysis of Canada's failure to address issues facing Aboriginal women, see Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6:1 CJWL 174.

meaningfully with violence against Indigenous women shows that the status quo is not working.<sup>76</sup> Any even-handed assessment of Indigenous jurisdiction related to violence against women must take account of this fact.

Thirdly, in considering Indigenous jurisdiction in relation to violence against women, it should be acknowledged that Aboriginal governance rights exercised under section 35(1) would not be exclusive. For example, Canadian governments can justify infringements of section 35(1) rights if the Crown's actions are honourable and in accordance with valid objectives.<sup>77</sup> Thus, if Indigenous governance powers in relation to violence against women were recognized and deployed, the Canadian government could always aid or modify this exercise through consultation and accommodation in accordance with its other obligations under section 35(1).<sup>78</sup> Nevertheless, this shared framework would not give the Crown an unfettered license to impose unjustifiable burdens on Indigenous actions addressing violence against women. Section 35(1) constrains Crown sovereignty by serving as a check against arbitrary government action. As the SCC observed in *Sparrow*, section 35(1) "gives a measure of control over government conduct and a strong check on legislative power."<sup>79</sup> The fact that Indigenous sovereignty limits that of the Crown when section 35(1) is at issue should be more explicitly conceded. This is one of the most significant implications of the constitutional requirement that infringements of Aboriginal and treaty rights be justified by valid governmental objectives, which are pursued honourably and in good faith.<sup>80</sup> In this light, Indigenous governance would be regarded as functioning analogously to the checks and balances of federalism—that is, working in a cooperative, coordinated way with the other levels of government. This means that Crown sovereignty should appropriately constrain Indigenous sovereignty, and vice versa, in dealing with the practical jurisdictional questions concerning violence against women.<sup>81</sup> Such an approach would enhance Indigenous governance

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- 76. See also Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 CJLS 91.
  - 77. *Sparrow*, *supra* note 45 at para 64.
  - 78. John Borrows, "Let Obligations Be Done" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done* (Vancouver, UBC Press, 2007) at 130.
  - 79. *Sparrow*, *supra* note 45 at para 65.
  - 80. Governments in Canada do not function as watertight compartments within Canada's constitutional scheme. See *AG Canada v AG Ontario (The Labour Conventions Case)*, [1937] AC 326 at 354, [1937] 1 DLR 673.
  - 81. If the *Constitution* does not equalize the Crown's power to infringe Indigenous jurisdiction with Indigenous peoples' power to infringe Crown jurisdiction in a coordinated, harmonized manner then critiques regarding the unilateral, coercive nature of Crown sovereignty made by the following scholars could be further strengthened. See, Gordon Christie, "Judicial

as well as Canadian responses to ensure that violence against women is dealt with in ways that draw upon the strengths of all jurisdictions across the land.<sup>82</sup>

Furthermore, it should be noted that Indigenous peoples' governmental responsibilities regarding Indigenous women under section 35(1) would also be subject to section 35(4), which states: "Notwithstanding any other provision of this *Act*, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."<sup>83</sup> This provision is an important bulwark against innovations that could otherwise undermine Indigenous women's rights. It must be remembered that this section would likely have its greatest impact on political discourse and practices; it would only take one or two cases under section 35(4) to generate a political discourse more explicitly attentive to section 35(1)'s gender equality implications. This increased emphasis on gender equality would reinforce the idea that distinctions adversely impacting Indigenous women could not be sustained under section 35(1) as they would run contrary to section 35(4)'s protections.<sup>84</sup> Thus, every time an Indigenous community exercised its governance jurisdiction under the *Constitution*, including matters related to Indigenous women, such authority would be subject to an overriding constraint protecting gender equality found in section 35(4).<sup>85</sup> While not completely

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Justification of a Recent Development in Aboriginal Law?" (2002) 17:2 CJLS 41; Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33:2 Ottawa L Rev 301; Ardit Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003).

- 82. The dominant judicial approach to Indigenous governance in Canada regards jurisdiction as being exercised through overlapping spheres. See *Starr v Houlden*, [1990] 1 SCR 1366, 68 DLR (4th) 641. Indigenous governance under s 35(1) should be treated as also operating in ways that overlap with federal and provincial governments.
- 83. *Constitution Act*, *supra* note 18, s 35(4). For a discussion of s 35(4)'s place in the *Constitution*, see *Dancing Around the Table, Part 1 and Part 2* (Ottawa: National Film Board, 1987), online: <[http://www.nfb.ca/film/dancing\\_around\\_the\\_table\\_1/](http://www.nfb.ca/film/dancing_around_the_table_1/)>.
- 84. In applying s 35(4), it must be recognized that equality does not always mean identical treatment. Thus, s 35(4) would allow differential treatment in gender relations if such distinctions did not constitute adverse discrimination. This could permit healthy gendered traditions within Indigenous communities and these would be reinforced by s 25 of the *Charter*, which prevents important collective rights from being eroded. As Justice Iacobucci observed: "[T]rue equality does not necessarily result from identical treatment." See *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 25, 170 DLR (4th) 1.
- 85. Some of the contours of s 35(4) could be drawn from Indigenous feminist scholarship. In *Sparrow*, the Court wrote: "While it is impossible to give an easy definition of ... rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake." *Supra* note 45 at para 69. For some examples of Aboriginal women's perspectives related to Aboriginal rights, see Joyce Green, ed, *Making Space for*

addressing the complex extra-legal factors involved in violence against women, section 35(4)'s protection could go some distance towards addressing the problem of male domination within some Indigenous communities and leadership circles. It could also be a significant political tool for addressing violence against women long before courts or legislatures get around to recognizing Indigenous jurisdiction relating to this issue.

In fact, difficulties related to gendered violence within Indigenous communities are likely to remain problematic until they are subject to the full legal and political force of section 35(4). Section 35(4) would play a greater role in Canada's *Constitution* if Aboriginal people exercised jurisdiction related to violence against women under section 35(1) and Aboriginal political actors placed this principle at the heart of their advocacy. When Indigenous peoples exercise their power to make political decisions under section 35(1), the fuller promise of section 35(4) should become more apparent. It will operate to expand the protections of Aboriginal women within their communities whenever women's rights are in question. Under this reading of section 35(4), there would be no possibility of Indigenous communities using their authority to engage in any traditional, customary, or other practice or law that subordinates women and subjects them to any form of adverse discrimination.<sup>86</sup> Section 35(4) could therefore have considerable remedial effect, internally as well as externally, as Indigenous peoples exercise greater authority under section 35(1). This could further alleviate concerns flowing from having Indigenous communities deal with violence against women while still being deeply mired in discrimination in too many quarters.

Finally, experience in the United States suggests that recognizing Indigenous jurisdiction over violence against women at least partially counteracts aspects of gendered discrimination within Indigenous communities. In pointing this out, I am not suggesting that the United States should be the model for dealing with violence against women in Canada. In fact, distinctive and significant challenges

*Indigenous Feminism* (Halifax: Fernwood, 2007); Bonita Lawrence & Kim Anderson, *Strong Women Stories: Native Vision and Community Survival* (Toronto: Sumach Press, 2003).

86. Formal distinctions in treatment will sometimes be necessary to accommodate differences between individuals and to thereby produce equal treatment in a substantive sense. For the leading Canadian case, see *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1. See also *Minority Schools in Albania* (1935), PCIJ (Ser A/B) No 64 at 17; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, [1966] ICJ Rep 6 at 248. For an excellent discussion of Indigenous women and international human rights see Rebecca Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination" (2010) 15:1 UCLA J Int'l L & Foreign Aff 187.

concerning violence against Indigenous women are present in the United States,<sup>87</sup> as is the case with women in most societies throughout the world to greater and lesser degrees.<sup>88</sup> This comparative experience is only invoked to illustrate the point that significant political mobilization can occur when Indigenous governments take responsibility over this area. When the locus of political authority for dealing with violence against women rests with Indigenous governments, they face much greater internal and external pressure to take action in this field.<sup>89</sup>

On the internal side of the equation, chiefs and councils find that their electoral prospects are tied to their effectiveness in addressing this issue.<sup>90</sup> If they do not take action on this front, their own constituents on the reservations demand that they do so. When Indigenous communities exercise meaningful self-determination, blame cannot be shifted as easily to other levels of government when faced with such demands. Therefore, if leaders do not listen to these voices, their chances of political success fade in some circumstances. While violence against women is not the only issue competing for attention on Indigenous legislative agendas, it has a high enough profile to be politically salient and generate extensive legislation. An Indigenous leader who ignores this issue for an extended period of time loses an important base of electoral support within his or her community. If a candidate faces political uncertainty, the failure to take account of this issue could be a swing factor in their electoral prospects. The internal incentives created by the leadership and advocacy of many Indigenous women chiefs, leaders, and organizations should not be overlooked when considering Indigenous jurisdiction in this field.

As a result of these and other incentives, Native governments in the United States have acted in significant ways to legislate in this field.<sup>91</sup> A brief review of tribal statutes demonstrates this fact. When Indigenous governments deal with general issues related to violence against women outside the context of domestic

87. Kathie Dobie, "Tiny Little Laws: A Plague of Sexual Violence in Indian Country," *Harper's Magazine* (February 2011) 55, online <<http://harpers.org/archive/2011/02/tiny-little-laws/>>.
88. Michael Penn & Rachel Nardos, *Overcoming Violence Against Women and Girls: The International Campaign to Eradicate a Worldwide Problem* (Lanham, MD: Rowman Littlefield, 2003) at 1-13.
89. Some of this pressure is intensified by the inadequacy of federal law in this field. See Kevin Washburn, "American Indians, Crime and the Law" (2006) 104:4 Mich L Rev 709 at 738.
90. For a discussion of the politics of violence against women, see Jacqui True, *The Political Economy of Violence against Women* (New York: Oxford University Press, 2012).
91. United States, Tribal Law and Policy Institute, *Tribal Legal Code Resource: Domestic Violence Laws Guide for Drafting or Revising Victim-Centered Tribal Laws Against Domestic Violence* by (West Hollywood: The Institute, 2012) (Sarah Deer et al), online: <[http://www.tribal-institute.org/download/Amended%20Domestic\\_Violence\\_Code\\_Resource\\_2012.pdf](http://www.tribal-institute.org/download/Amended%20Domestic_Violence_Code_Resource_2012.pdf)>.

violence, “it is not common to have a separate law on sexual assault jurisdiction that differs from general criminal jurisdiction.”<sup>92</sup> Thus, while some tribal governments have specific provisions addressing sexual assault,<sup>93</sup> most have all-purpose criminal codes invoking jurisdiction over violent crimes on a broader level.<sup>94</sup> Furthermore, most tribes also take general jurisdiction over this issue through civil statutes.<sup>95</sup> However, there is one special area of legislative activity that deals specifically with violence against women on reserves: domestic violence codes.<sup>96</sup> In addition to their considerable detail, these ordinances often contain important contextual statements outlining their purposes. In this way they set the tone for discussion and action related to violence against women within Native American communities. For example, the *Fort Mohave Law and Order Code* expresses faith in the importance of law in reducing and deterring domestic violence.<sup>97</sup> The *Hopi Family Relations Ordinance* identifies the scope and tragic

- 92. United States, Tribal Law and Policy Institute, *A Victim-Centered Approach to Sexual Violence and Stalking Against Native Women: Resource Guide for Drafting or Revising Tribal Criminal Laws Against Sexual Assault and Stalking*, (West Hollywood, Cal: The Institute, 2012) (Sarah Deer & Maureen L White Eagle) at 29.
- 93. See *Hannahville Indian Community Criminal Sexual Conduct Code*, § 1.2084; *Nez Perce Tribal Code*, § 4-1-48; *Little Traverse Bay Band of Odawa Indians*, § 4; *Blackfeet Tribal Law*, c 5, § 9; *Skokomish Tribal Code*, § 9.02A.020; *Fort Peck Comprehensive Code of Justice*, c 2(C), § 224.
- 94. For examples of provisions outlining concurrent criminal law jurisdiction with the federal government, see *White Mountain Apache Criminal Code*, § 1.2; *White Earth Band of Chippewa Judicial Code* title 1, c 2, § 1.
- 95. See *Salt River Pima-Maricopa Indian Community Domestic Violence Code*, art I, § B; *Sault Ste Marie Tribal Code*, § 34.102; *Turtle Mountain Band of Chippewa Indians Domestic Violence Code*, § 5000; *Ninilchik Village Ordinance No 99-01*, § 3.
- 96. For examples of domestic violence provisions, see *Makah Tribal Law and Order Code*, title 11, c 1, § 11.1.04; *Colville Law and Order Code*, c 5-5; *Confederated Tribes of Siletz Indians Domestic and Family Violence Ordinance*, § 12.505; *Kickapoo Tribe in Kansas Domestic Violence Code*, §§ 205(3), (7); *Saginaw Chippewa Domestic Abuse Protection Code*, c 1.241. For examples of tribal court procedures, see *Oglala Sioux Tribal Code*, § 218; *Oglala Sioux Tribe Domestic Violence Code*, § 99.2, c 1, § 214; *Yakama Nation Domestic Violence Code*, c 2, § 2.8. For examples of sanctions and victims’ rights, see *Sault Ste Marie Tribal Code*, § 75.103; *Jicarilla Apache Tribe*, c 5, § 3; *White Mountain Apache*, c 6, § 6.3; *Makah Tribal Code*, § 11.4.09(h); *Saginaw Chippewa Domestic Abuse Protection Code*, § 1.2404; *Omaha Tribe of Nebraska Domestic Violence Code*, § 3.08; *Muscogee (Creek) Nation Code, Domestic and Family Violence*, c 4, § 3-401. For examples of protection orders, see *Hopi Family Relations Ordinance*, c 2, § 6.01; *Salt River Pima-Maricopa Indian Community* § 1; *Nez Perce Tribal Code*, c 7, § 7-3-4; *Muscogee (Creek) Nation*, tit 6, § 3-407(c); *Confederated Tribes of Siletz Tribal Code*, § 12.504; *Ninilchik Village Ordinance No. 99-01*, § 11; *Oglala Sioux Tribe*, § 315; *Turtle Mountain Band of Chippewa Indians, Domestic Violence*, § 3060. For examples of prevention and intervention programs, see *Oglala Sioux Tribe Domestic Violence Code*, c 5, § 506.
- 97. *Fort Mojave Indian Reservation Law and Order Code*, art XIII, c A § 1301.

consequences of domestic violence for individuals, clans, and communities while making specific mention of the fact that domestic violence is not just a “family” matter.<sup>98</sup> The *Domestic Abuse of the Northern Cheyenne Tribal Code* contains strong statements criticizing the tribe’s past approaches to domestic violence,<sup>99</sup> while the *Oglala Sioux Domestic Violence Code* contains a bold declaration of purpose that underlines the cultural inappropriateness of violence against women as well as the importance of safety, protection, prosecution, and education in dealing with this issue.<sup>100</sup> These detailed statutes, along with tribal court cases that interpret them, are evidence of the pressure tribes face within their communities to deal effectively with domestic violence.<sup>101</sup> Though progress is slow in overcoming this scourge, they demonstrate that even communities facing high levels of trauma are capable of developing a response to this crisis. Again, these examples are raised to demonstrate the political implications of Indigenous jurisdiction.

Tribes in the United States also encounter external pressures to address gendered discrimination as a result of their authority related to violence against women. People outside the tribe organize themselves to persuade tribal councils to act more constructively in this field. Externally generated pressure not only comes from academics and policy institutes, but also from women’s organizations,<sup>102</sup> tribal, state, and local governments,<sup>103</sup> as well as international bodies.<sup>104</sup> Moreover, when tribes exercise jurisdiction, the US federal government is ironically more active than its Canadian counterpart in the field of violence against women on reserves, even as it acts sensitively to recognize Indigenous self-determination in this field.<sup>105</sup> Sustained legislative dialogues are developing between the federal and Indigenous governments as violence against women is recognized as an important

98. *Hopi Family Relations Ordinance*, c 1, § 3.01.

99. *Northern Cheyenne Indian Reservation*, title VII, §§ 1, 5-10.

100. *Oglala Sioux Tribe Domestic Violence Code*, title 99.2, c 1, § 101.

101. Donna Coker, “Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking” (1999) 47:1 UCLA L Rev 1.

102. See e.g. Collaboration to End Violence: National Aboriginal Women’s Forum 2011, online: <<http://www.nwac.ca/research/collaboration-end-violence-national-aboriginal-womens-forum-2011>>.

103. Office of Violence Against Women, *Tribal Communities*, (Washington DC: The United States Department of Justice, 2013), online: <[www.ovw.usdoj.gov/tribal.html](http://www.ovw.usdoj.gov/tribal.html)> [Tribal Communities].

104. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, Can TS 1982 No 31. See also *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UNGAOR, 48 Sess, UN Doc/A/Res/48/104 (1993).

105. *Tribal Communities*, *supra* note 103.

field of law-making activity within US First Nations communities.<sup>106</sup> This dialogue is leading to further innovation at the tribal level and spawning action at the federal level to create frameworks to address this issue.

For example, tribes have worked with the federal government in the United States to recognize more fully inherent tribal jurisdiction to deal with violence against women and the need to provide resources and assistance in this regard.<sup>107</sup> If such power were recognized in Canada, the federal government could likewise consider legislation similar to statutes passed in the United States Congress. The *Stand Against Violence and Empower Native Women Act* (*SAVE Native Women Act*), which was proposed as a stand-alone piece of legislation but has since become Title IX of the *Violence Against Women Act*, was designed to allow tribes to make fuller use of their own laws to address violence against women on reserves and is an example of the type of action that governments could take to support Indigenous communities.<sup>108</sup> Since tribes in the United States clearly have jurisdiction over their own members in this sphere,<sup>109</sup> the *Act* acknowledges that tribes possess jurisdiction over non-Indians<sup>110</sup> who commit violent crimes against

- 106. United States, Tribal Justice and Safety, *Indian Country Accomplishments of the Department of Justice*, (Washington: Department of Justice, 2013), online: The United States Department of Justice <[www.justice.gov/tribal/accomplishments.html](http://www.justice.gov/tribal/accomplishments.html)>.
- 107. The failure to recognize and harmonize Indigenous jurisdiction with state and federal jurisdiction is one of the most serious challenges in dealing with violence against Indigenous women. See Sumayyah Waheed, “Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution” (2004) 19:1 Berkeley Women’s LJ 287.
- 108. The *SAVE Native Women Act* was designed to “decrease the incidence of violent crimes against Indian women, to strengthen the capacity of Indian tribes to exercise the sovereign authority of Indian tribes to respond to violent crimes committed against Indian women, and to ensure that perpetrators of violent crimes committed against Indian women are held accountable for that criminal behavior, and for other purposes.” It was incorporated into the *Violence Against Women Act* upon reauthorization this year. *Violence Against Women Reauthorization Act*, USC 42 tit 9 § 901 (2013) amending 42 USC § 13925 (1994) [Title IX].
- 109. See Virginia H Murray, “A Comparative Study of the Historic Civil, Common and American Indian Tribal Law Responses to Domestic Violence” (1998) 23 Okla City UL Rev 433. Professor Sarah Deer has also written extensively on the issue of tribal law in relation to violence against women. See “Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty” (2009) 24:2 Wicazo SA Rev 149; Carrie A Martell & Sarah Deer, “Heeding the Voice of Native Women: Toward an Ethic of Decolonization” (2005) 81:4 NDL Rev 807; Sarah Deer, “Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law” (2005) 38:2 Suffolk UL Rev 455; “Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault” (2004) 4:3 Tribal Law Journal; “Toward an Indigenous Jurisprudence of Rape” (2004) 14:1 Kan JL and Pub Pol'y 121.
- 110. Title IX, *supra* note 108, s 904. This provision is designed to redress the US Supreme Court’s conclusions that tribal criminal and civil jurisdiction over non-Indians were limited. See

women on Indian lands.<sup>111</sup> At the same time, it recognizes that significant problems exist for Indigenous women off-reserve. Thus, Title IX seeks to improve Native programs under the *Violence Against Women Act*<sup>112</sup> by enhancing data gathering programs throughout the United States to better understand and respond to the sex trafficking of Native women.<sup>113</sup>

It would be a groundbreaking development if section 35(1) were to recognize that self-governing communities in Canada possess similar jurisdictional tools. This recognition would also be important in light of the fact that much of the violence faced by Indigenous women occurs off reserves.<sup>114</sup> In such circumstances, Indigenous peoples might work with the federal government to gather the type of data required under Title IX, which would bring resources and attention to bear on issues arising from the over 580 missing and murdered Indigenous women in Canada. This would make it easier to respond to the national dimension of Canada's current crisis because action would be taken on a government-to-government basis. There is also great value in the *Act's* recognition of the breadth and scope of the problem involving violence against women.<sup>115</sup> Acknowledgement of harm is an essential step towards moving beyond it.<sup>116</sup> When the *SAVE Native Women Act* was introduced, its sponsor, Senator Akaka, said:

According to a study by the Department of Justice, two-in-five women in Native communities will suffer domestic violence, and one-in-three will be sexually assaulted in their lifetime. Furthermore, four out of five perpetrators of these crimes are non-Indian, and cannot be prosecuted by tribal governments. This has contributed to a growing sense of lawlessness on Indian reservations and a perpetuation of victimization of Native women.<sup>117</sup>

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respectively, *Oliphant v Suquamish Indian Tribe et al*, 435 US 191 at 196, 98 S Ct 1011 (1978); *Montana et al v United States*, 450 US 544 at 564, 101 S Ct 1245 (1981); *Nevada v Hicks*, 533 US 353 at 359-60, 121 S Ct 2304 (2001).

111. Title IX, *supra* note 108, s 904, amending *Indian Civil Rights Act of 1968*, 25 USC § 1301-1303. For further analysis of the problem of non-Indians and violence against women, see Amy Radon, "Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation" (2004) 37:4 U Mich JL Ref 1275.

112. *Violence Against Women Act*, 42 USC § 13925 (1994).

113. Title IX, *supra* note 108, s 907. See also Sarah Deer, "Relocation Revisited: Sex Trafficking of Native Women in the United States" (2010) 36:2 Wm Mitchell L Rev 621.

114. *What Their Stories Tell Us*, *supra* note 15.

115. Herman, *supra* note 59 at 175-94.

116. Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 121. However, for a critique of the potential hollowness of acknowledgment without action, see Lee Taft, "Apology Subverted: The Commodification of Apology" (2000) 109:5 Yale LJ 1135 at 1158-59.

117. Daniel K Akaka, *Chairman Akaka introduces the SAVE Native Women Act* (YouTube, at 1:00),

Thus, while the legal context of the two countries is somewhat different, the socio-cultural conditions between them are not greatly dissimilar when it comes to Indigenous issues. In this light, Title IX is an important example of how Indigenous groups could work with governments to address domestic violence while enhancing community self-determination.<sup>118</sup>

## II. SECTION 35(1) AND VIOLENCE AGAINST WOMEN

Having discussed reasons why Indigenous communities should not be excluded from exercising jurisdiction related to violence against women, I turn now to the essential question of how this issue could be framed within section 35(1) jurisprudence. As noted, violence against women will only receive the political attention it deserves if Indigenous and Canadian governments treat it as a constitutional issue while continuing to address its other dimensions (social dislocation, poverty, colonialism, male domination on- and off-reserve, deficient fiscal policy, et cetera). In raising this issue's importance in the constitutional realm, Indigenous peoples would have at least two options for asserting jurisdiction over violence against women: They could bring a claim as either an Aboriginal right or a treaty right. Unfortunately, given the narrow way in which the SCC currently frames both of these rights, it is unlikely that a community would succeed under the dominant interpretations of section 35(1). This conclusion may be viewed as a reason for abandoning the *Constitution's* Aboriginal provisions when dealing with violence against women.

There is no question that section 35(1) has largely become a dead end in challenging Canada's continued colonial practices, particularly beyond cases that involve the allocation of resources between the Crown and First Nations. Despite its current weaknesses, however, I believe that there are at least two crucial reasons for claiming jurisdiction related to violence against women under section 35(1). First, an application of the prevailing tests in section 35(1) jurisprudence highlights fatal constitutional defects in present interpretive approaches. Second, a discussion of section 35(1)'s interpretive flaws exposes latent alternative readings that can be used to build a healthier jurisprudence. To be sure, it must be continually emphasized that action in the field of violence against women must always be broader than constitutional argument.<sup>119</sup> However, it is also important that

online: <<http://www.youtube.com/watch?v=VrXzcXynOd0>>.

118. Title IX, *supra* note 108.

119. I have written elsewhere about the grassroots development of Indigenous institutions, norms, and legal traditions. See, John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto:

constitutional avenues not be abandoned, because Indigenous women deserve and require protection at the highest levels of constitutional law as well as within the mundane details of everyday community life.

Thus, in considering Aboriginal peoples' claims to section 35(1) rights in relation to violence against women, the SCC's current tests in the field of Aboriginal and treaty rights will be outlined to reveal their critical defects. After reviewing the Court's dominant tests in each area, alternative arguments within the existing jurisprudence will be canvassed to demonstrate how current laws could be interpreted to protect against violence and enhance Indigenous self-determination in this important field.

#### A. ABORIGINAL RIGHTS: VIOLENCE AGAINST WOMEN AND THE "INTEGRAL TO THE DISTINCTIVE CULTURE" TEST

Under the Court's current approach to establishing Aboriginal rights (other than Aboriginal title)<sup>120</sup> within section 35(1), Indian, Métis, or Inuit groups must demonstrate that a practice, custom, or tradition was "integral to their distinctive culture" prior to European contact.<sup>121</sup> Applying this test to a claim of Indigenous jurisdiction in relation to violence against women, a court would insist on precision in relation to the claim's exact nature.<sup>122</sup> This means that the potential right must be framed as narrowly as possible in the first instance without an excessive level of generality and it "must be looked at in light of the specific circumstances of each case, and in light of the specific history and culture of the Indigenous group claiming the right."<sup>123</sup> As noted above in Part I, *Pamajewon* held that Aboriginal people could not claim "broad management rights over reserve lands."<sup>124</sup> As a result of this specificity requirement, a community may not be able to claim jurisdiction "for any and all purposes"<sup>125</sup> related to domestic

University of Toronto Press, 2010); *Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

120. The distinction between Aboriginal rights and title was first identified in *R v Adams*, [1996] 3 SCR 101 at para 26, 138 DLR (4th) 657. The test for Aboriginal title was first articulated in *Delgamuukw*, *supra* note 24 at para 143.
121. *Van der Peet*, *supra* note 24.
122. *Ibid* at para 53; *Pamajewon*, *supra* note 25 at para 25; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 46, 338 DLR (4th) 193 [*Lax Kw'alaams Indian Band*].
123. *Pamajewon*, *supra* note 25 at para 27. For a discussion of this principle in relation to Aboriginal governance, see John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285.
124. *Pamajewon*, *supra* note 25 at para 27.
125. For a discussion of the precise identification of practices upon which rights can be claimed, see *Sappier*, *supra* note 24 at paras 20-24.

violence. Thus, under the dominant approach, the courts may insist that a group plead the smallest increments of jurisdiction, such as the prevention of violence or the punishment of people who were violent towards Indigenous women.<sup>126</sup> Once a court has identified the correct (narrow) characterization of the claim, it would require detailed evidence that violence against women, its prevention, or the punishment of people who engage in it were “integral to the distinctive culture of the Aboriginal group claiming the right.”<sup>127</sup>

At this point, the test gets exceedingly messy for any Indigenous group claiming domestic violence jurisdiction. For example, for an Indigenous group to succeed, it would have to demonstrate that violence against women and proactive responses to it were vital to the means by which it sustained itself prior to European contact.<sup>128</sup> It would have to show that its society would have been “fundamentally altered” if such abuse did not occur and if the community did not prevent or punish those responsible.<sup>129</sup> Additionally, it would need to introduce detailed proof of such facts in support of its claim, because a significant number of Aboriginal rights cases have not succeeded due to findings that insufficient evidence was presented at each stage of the test.<sup>130</sup>

The spectacle of such a case about violence against women and the evidence it would highlight is difficult to imagine. First, a group would likely have to produce both oral and written history demonstrating the structural nature of violence against women in traditional Aboriginal society prior to European contact and the society’s responses to this violence. Thus, lawyers would have to introduce gruesome and widespread examples of pre-contact violence towards women along with proactive (preventative or punitive) responses in order to show its “centrality” to the community. To further complicate proof of jurisdiction, a community would next have to establish a “reasonable degree of continuity” of violence and response from contact to the present day, and demonstrate that modern practices of violence towards women, and responses to it, have essential similarities to past

126. The characterization of Aboriginal rights often seems to be out of the hands of Aboriginal people as courts routinely recharacterize claims in order to suit their view of the issue. For a historian’s perspective on this process, see Arthur Ray, *Telling It to the Judge: Taking Native History to Court* (Montreal: McGill-Queen’s University Press, 2011).

127. *Van der Peet*, *supra* note 24 at para 46.

128. *Ibid* at para 4; *Sappier*, *supra* note 24 at para 38.

129. *Sappier*, *ibid* at para 39.

130. Aboriginal claims which failed due to lack of precise evidence include *Van der Peet*, *supra* note 24; *Delgamuukw*, *supra* note 24; *Mitchell*, *supra* note 27; *Lax Kw’alaams Indian Band*, *supra* note 122.

violence.<sup>131</sup> An Indigenous group claiming this right would thus find itself spending millions of dollars on experts and legal fees to shame itself before the courts with such evidence.<sup>132</sup>

It is difficult to contemplate the prospect that any Indigenous group would be willing to sustain such an inquiry due to the stereotypes it could evoke in the public consciousness. Images of Indigenous men living in the pre-contact forests of North America marginalizing, sexually assaulting, beating, and killing Indigenous women would be difficult for any community to highlight, even if their purpose was to focus on remedial practices. Furthermore, even if a group surprisingly decided to expose themselves to this process and managed to escape the media circus such evidence would raise, they would still be faced with the next-to-impossible task of demonstrating that such activities, and proactive or defensive responses to them, made their society what it was.<sup>133</sup> Not to put too fine of a point on this process, but it seems both racist and sexist in the extreme to require Indigenous peoples to subject themselves to this spectacle in order to prove that they have inherent constitutional power to prevent and sanction members of their communities who are violent towards women today. Violence against women has been deeply rooted in many societies throughout the ages,<sup>134</sup> yet non-Aboriginal governments do not have to subject themselves to this painful self-criticism in order to exercise jurisdiction.<sup>135</sup> The process Indigenous peoples would have to follow to take effective legislative and judicial action in this sphere shows a deep flaw in Canada's constitutional jurisprudence.

What if Aboriginal communities somehow failed to produce sufficient evidence of pre-contact violence against women or their associated protections? It seems absurd even to contemplate the implications of such an argument. And even if the Crown managed to prove that Indigenous peoples were free of violence

131. *Lax Ku'alaams Indian Band*, *ibid* at para 46.

132. Aboriginal peoples should not have to publicly shame themselves with detailed proof of violence and effective response to take legislative and judicial action within their communities, particularly when this is an issue that poisons every society. See Charlotte Watts & Catherine Zimmerman, "Violence Against Women: Global Scope and Magnitude" (2002) 359 *Lancet* 1232; UN Study of the Secretary-General, *Ending violence against women: from words to action* (New York: UN, 2007); Andrea Parrot & Nina Cummings, *Forsaken females: the global brutalization of women* (Oxford: Rowman and Littlefield, 2006).

133. *Van der Peet*, *supra* note 24 at para 55. See also *Lax Ku'alaams Indian Band*, *supra* note 122 at para 46.

134. Parrot & Cummings, *supra* note 132.

135. For a discussion of these stereotypes in law, policy, and the media, see Robert F Berkhofer, *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Random House, 1978).

or lacked meaningful protections or sanctions against it, would this mean that such communities could not respond to the current crisis on any meaningful jurisdictional basis today? These arguments reduce Indigenous governments and their constitutional status to the crudest caricatures and stereotypes, characterizing Indigenous peoples as innocent children of the land or as brutal, uncivilized savages of the forest.<sup>136</sup>

Yet, according to the dominant reading of the *Constitution*, section 35(1) would frame discussions of violence against women in this very way. One would hate to think that the point of section 35(1) is to shamefully marginalize Indigenous governments and exclude their constitutional participation in addressing their most pressing legal issues—particularly when reconciliation and decolonization are supposed to be the constitutional goals.<sup>137</sup> This cannot be right, particularly when one remembers that the gender equality provisions of section 35(4) are part of this constitutional mix. In light of the foregoing analysis, it is clear that the “integral to a distinctive culture test” is fatally flawed when read in light of the *Constitution’s* broader structure and purpose, and in the face of present-day needs.<sup>138</sup>

## B. VIOLENCE AGAINST WOMEN AND TREATIES

Now that we have examined how violence against women would be addressed under the dominant Aboriginal rights jurisprudence, I will briefly examine how treaty rights might be deployed to deal with the same issue. We will see that the *Constitution’s* treaty provisions are just as problematic as its so-called Aboriginal rights protections. The Court’s treaty jurisprudence also emphasizes questionable historic experience rather than engaging meaningfully with the real-world, contemporary challenges faced by Indigenous women (and Indigenous communities) today.

At present, treaty rights must be proven by reference to the common intention between the relevant parties at the time the agreement was made.<sup>139</sup> If a claimed right was not “within the contemplation of the parties to the treaties,” it will not

136. *Ibid.*

137. Reconciliation as a constitutional goal within s 35(1) is discussed in *Van der Peet*, *supra* note 24 at paras 48-49; decolonization as a constitutional goal is expressed in *Côté*, *supra* note 45 at paras 53, 59; *Sparrow*, *supra* note 45 at para 65. For a wide-ranging discussion of reconciliation and decolonization, see Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010).

138. For an alternative view, see Sharon D McIvor, “Aboriginal Women’s Rights as ‘Existing Rights’ (Canada)” (1995) 15:2-3 Can Woman Stud 34.

139. *Marshall*, *supra* note 24 at para 14.

be recognized and affirmed under section 35(1).<sup>140</sup> Thus, in order for Indigenous peoples to succeed in claiming that they exercised jurisdiction over their members who practiced violence towards women, they would have to prove that this power was naturally within the contemplation of the parties when the treaty was signed.<sup>141</sup> Once this claim was proven, the Indigenous group would next have to establish that the specific manner in which Aboriginal peoples wanted to exercise the right was a “logical evolution” of the traditional practice contemplated by the signers of the treaty.<sup>142</sup> The scope of such evolution, however, must occur “within limits [since their] subject matter cannot be wholly transformed.”<sup>143</sup> While the court will interpret treaties in a large, liberal, and generous manner, resolving ambiguities in favour of Indigenous peoples,<sup>144</sup> it will not recognize treaty rights unrelated to historic context.<sup>145</sup>

As one might imagine, establishing Indigenous jurisdiction in relation to violence against women on the basis of this test would likely be difficult. There is no explicit treaty language in any agreement guaranteeing this right to Indigenous peoples. As a result, a court would have to inquire into whether this power was implied by the broader context of the treaty.<sup>146</sup> Such intention may be difficult to discern given that First Nations and the Crown were not often bargaining about the other party’s internal relations, particularly on the Indigenous side of the agreement;<sup>147</sup> they were largely focused on rights to land, trade, and resources.<sup>148</sup> They simply did not negotiate an entire way of life or how they

140. *Ibid* at para 13.

141. *Ibid* at para 78.

142. *R v Marshall*; *R v Bernard*, *supra* note 24 at paras 13, 16, 25; *R v Morris*, *supra* note 24 at paras 16–32.

143. *Marshall*, *supra* note 24 at para 19.

144. *Taylor and Williams*, *supra* note 24; *Simon*, *supra* note 24; *Horseman*, *supra* note 24 at 907; *Badger*, *supra* note 24 at paras 4, 41; *Sundown*, *supra* note 24 at paras 24–25; *Marshall*, *ibid* at paras 9–14; *R v Marshall*; *R v Bernard*, *supra* note 24 at para 26; *Morris*, *supra* note 24 at para 19.

145. *R v Sioui*, [1990] 1 SCR 1025, 70 DLR (4th) 427.

146. *Ibid*.

147. John J Borrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government” (1992) 30:2 Osgoode Hall LJ 291 [Borrows, “A Genealogy of Law”]; John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997).

148. For general treaty histories, see Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); Walter Hildebrandt et al, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen’s University Press, 1996) at 133; René Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11* (Calgary:

would live together in the future.<sup>149</sup> Thus, it would be exceedingly unfair to construe an agreement's silences as a surrender of jurisdiction related to the health, safety, and welfare of women in Indigenous communities.<sup>150</sup>

Since Indigenous peoples owned the land and exercised governance powers prior to European arrival, treaties should be seen as a grant of rights from First Nations to the Crown, reserving to the First Nations all rights not so granted. On this view, First Nations would have retained broad jurisdiction over matters not ceded through negotiations.<sup>151</sup> Women's rights were likely not within the contemplation of non-Aboriginal negotiators when treaties were signed, given the troubling attitudes towards women in English common law.<sup>152</sup> While courts may attempt to construe the peace and order clauses in the numbered treaties as recognizing jurisdiction in this broad way,<sup>153</sup> the SCC has warned that

University of Calgary Press, 2004) at 74, 133, 240, 257, 314, 340, 502; Arthur J Ray, JR Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000) at 116-17; William C Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).

149. See generally JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).
150. Silence in treaties is not to be construed against Indians. See *R v Marshall; R v Bernard*, *supra* note 24 at para 104; *R v Sioui*, *supra* note 145. Courts require "strict proof of the fact of extinguishment." *Badger*, *supra* note 24 at para 41. The Crown has the onus of proving that it clearly and plainly intended to extinguish an Aboriginal or treaty right and the "clear and plain" hurdle for extinguishment is quite high. *Van der Peet*, *supra* note 24 at para 133. For further discussion of the development of Indian canons of construction, see Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNBLJ 1.
151. *United States v Winans* (1905), 198 US 371 at 381, 25 S Ct 662. The US Supreme Court stated: "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted."
152. For instance, the legal right for a man to "beat" his wife was only removed from English law in 1891. See *R v Jackson*, [1891] 1 QB 671 at 682, 7 TLR 382 (CA). For a discussion of women's rights under the common law during this period, see Lori Chambers, "So Entirely Under His Power and Control': The Status of Wives before Reform" in Lori Chambers, ed, *Married Women and Property Law in Victorian Ontario* (Toronto: The Osgoode Society for Canadian Legal History, 1997) 14; Sarah Carter, "Categories and Terrains of Exclusion: Constructing the 'Indian Woman' in the Early Settlement Era in Western Canada" in Catherine Cavanaugh & Randi Warne, eds, *Telling Tales: Essays in Western Women's History* (Vancouver, UBC Press, 2000) 60; Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975* (Toronto: The Osgoode Society for Canadian Legal History, 2008); *Petticoats & Prejudice: Women and Law in Nineteenth Century Canada*, (Toronto: The Osgoode Society for Canadian Legal History, 1991).
153. For insight into eyewitness interpretations of these agreements, see Peter Erasmus, *Buffalo*

“[g]enerous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse.”<sup>154</sup> Given the judiciary’s hesitancy to recognize broad jurisdiction in relation to other claims,<sup>155</sup> it is unlikely that treaties will be a source of Indigenous power to deal with violence against women.<sup>156</sup> Like the jurisprudence on Aboriginal rights, this too represents a significant flaw in Canada’s current reading of the *Constitution*.

### III. ALTERNATIVE SECTION 35(1) INTERPRETATIONS: (AB)ORIGINALISM AND LIVING TREES

As the above review demonstrates, the Court’s dominant interpretation of treaty rights under section 35(1) contains many similarities to the test for Aboriginal rights. In order to succeed, claims in both categories must be rooted in historical understandings of the right at the time of European interaction (through either contact or negotiation). There are significant problems with this approach, as discussed above. Fortunately, genuine alternatives are available when construing Aboriginal and treaty rights within the existing jurisprudence that would allow Indigenous peoples to possess greater responsibility for addressing violence against women. There are at least two related strands of contemporary law that could be applied to hold that Indigenous peoples retain rights to exercise jurisdiction in relation to violence against women.

First, the courts could reject the idea that Aboriginal and treaty rights must be solely rooted in the past.<sup>157</sup> They could instead apply living tree jurisprudence

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*Days and Nights* (Calgary: Glenbow-Alberta Institute, 1976) at 248-49; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which they are Based, and Other Information Relating Thereto* (Toronto: Willing and Williamson, 1880) at 101-02.

154. *Marshall*, *supra* note 24.

155. *Beattie v Canada (Minister of Indian Affairs and Northern Development)*, 1998 1 FC 104, [1997] FCJ 745; *Mississaugas of Scugog Island First Nation*, *supra* note 28; *Conseil des Innus de Pessamit v Assoc des policiers et policières de Pessamit*, 2010 FCA 306, [2010] FCJ No 1377; *Pamajewon*, *supra* note 25.

156. Treaties “cannot be wholly transformed” by engaging in an “extended interpretation” of their original meaning. See *Marshall*, *supra* note 24 at para 19. This view was reinforced in *R v Bernard* where the SCC observed that an Aboriginal group’s historic “activity must be essentially the same” as that occurring in the past in order for it to receive recognition. See 2005 SCC 43 at para 25, [2005] 2 SCR 220.

157. See John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 Sup Ct L Rev 351 (for a discussion of the ideas developed in this section) [Borrows, “(Ab)Originalism”]. The argument in the next three paragraphs, including reproduction of selected arguments in the text and footnotes, is derived from the same source.

in recognizing and affirming Aboriginal and treaty rights under section 35(1). Living tree reasoning is the dominant mode of constitutional interpretation in Canada.<sup>158</sup> Sadly, Indigenous peoples have not been allowed to litigate claims in accordance with this doctrine.<sup>159</sup> Section 35(1) jurisprudence has been developed and applied in a discriminatory manner that places Indigenous peoples outside the constitutional mainstream. Interpreting Aboriginal and treaty rights through the same lens as other constitutional provisions would allow Indigenous peoples to exercise jurisdiction in relation to violence against women.

Aboriginal and treaty rights are not interpreted in the same way as other constitutional provisions: Aboriginal peoples can only possess constitutional rights if they are rooted in the past.<sup>160</sup> This is not true of other rights in Canada. This mode of interpretation has elsewhere been called originalism.<sup>161</sup> Originalism

158. A series of essays can be found on this topic in Ian Peach et al, eds, *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (Toronto: LexisNexis Canada, 2007). Numerous cases also uphold the dominance of living tree jurisprudence. See *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698 [*Reference re Same-Sex Marriage*]; *British Columbia (AG) v Ellett Estate*, [1980] 2 SCR 466 at 478-79, 112 DLR (3d) 59 [*Ellett Estate*]; *Canada (AG) v Hislop*, 2007 SCC 10 at para 94, [2007] 1 SCR 429; *Re Residential Tenancies Act*, 1979, [1981] 1 SCR 714 at 723, 1981 CanLII 24; *Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] 2 SCR 486 at para 52, 24 DLR (4th) 536 [*Reference re Motor Vehicle Act*]; *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56 at para 9, [2005] 2 SCR 669; *Reference Re Provincial Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at para 41, 81 DLR (4th) 16 [*Reference Re Provincial Electoral Boundaries*]; *R v Demers*, 2004 SCC 46 at para 78, [2004] 2 SCR 489; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 23, [2007] 2 SCR 3; *Ontario Home Builders' Assn v York Region Board of Education*, [1996] 2 SCR 929 at para 145, 137 DLR (4th) 449.

159. *R v Blais*, 2003 SCC 44 at paras 39-40, [2003] 2 SCR 236 (seemingly foreclosing "living tree" interpretations of section 35(1)).

160. Aboriginal and treaty rights are contingent upon a court constructing an original public meaning for a past event, when such rights were first 'recognized.' See *Van der Peet*, *supra* note 24 at para 28. Courts also look at when rights 'crystallized.' See *Delgamuukw*, *supra* note 24 at para 145. Otherwise, courts look to whether rights were 'contemplated by the parties.' See *Marshall*, *supra* note 24 at paras 58, 60. For a critique of the crystallization theory of Aboriginal rights, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall LJ 537 at 558.

161. For a discussion of originalism in the US context, see Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990); Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004); Steven G Calabresi, ed, *Originalism: A Quarter-Century of Debate* (Washington DC: Regnery, 2007); Jack M Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011) (for an account of new originalism). For academic discussion of originalism in the Canadian context, see Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011).

holds that parties cannot claim constitutional rights unless they were contemplated by the constitution's founders, or expressed or implied in public debates at the time when such provisions came into existence.<sup>162</sup> The application of originalism to Indigenous peoples is ironic because the SCC has explicitly repudiated this doctrine in all other fields.<sup>163</sup> In fact, it has boldly written that “[t]his Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution.”<sup>164</sup> While constitutional rights of all stripes find their genesis in some historic moment, only Aboriginal peoples' constitutional rights are limited by such moments. Thus, originalism is inconsistent with Canada's dominant interpretive practices,<sup>165</sup> which read the *Constitution* as a living tree.<sup>166</sup>

Interpreting section 35(1) as part of Canada's living tree would help eliminate the flaws described above in relation to Aboriginal and treaty rights.<sup>167</sup> Living

162. A Constitution's public meaning and its founders' intentions are not usually easy to agree upon within an originalist framework. Jack M Balkin observes that: “Conceived most broadly, ‘meaning’ includes a vast array of cultural associations, traditions, conventions, and background assumptions.” See “Nine Perspectives on *Living Originalism*” (2012) 3 U Ill L Rev 815 at 828. Also see Paul Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 BUL Rev 204; Mitchell N Berman, “Originalism Is Bunk” (2009) 84:1 NYL R 1; David A Strauss, *The Living Constitution* (New York: Oxford University Press, 2010); Robert W Bennett & Lawrence B Solum, *Constitutional originalism: a debate* (Ithaca: Cornell University Press, 2011); Thomas B Colby, “The Sacrifice of the New Originalism” (2011) 99:3 Geo LJ 713.

163. See Justice Ian Binnie, “Constitutional Interpretation and Original Intent” in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham: LexisNexis Canada, 2004) 345. Furthermore, the SCC did not respond positively to interpreting the *Canadian Charter of Rights and Freedoms* in light of the drafters' intent. See *Reference re Motor Vehicle Act*, *supra* note 158 at paras 49–50.

164. *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at para 150, 107 DLR (4th) 457. Academic commentary has also maintained that “originalism has never enjoyed any significant support in Canada.” See Peter W Hogg, “Canada: From Privy Council to Supreme Court” in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2007) 55 at 83. But see Adam M Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits” (2008) 41 Sup Ct L Rev 331; Bradley W Miller, “Beguiled By Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada” (2009) 22:2 Can JL & Jur 331.

165. Justice Binnie, *supra* note 163 at 348.

166. See *Edwards v Attorney-General for Canada*, [1930] AC 124 at para 44, [1929] UKPC 86.

167. At significant points in history, Indigenous peoples have also understood their constitutional relations in living tree terms. See William N Fenton, *The Great Law and the Longhouse: a political history of the Iroquois Confederacy* (Norman, Okla: University of Oklahoma Press, 1998) at 73, 103.

tree constitutionalism would allow courts to appropriately recognize and defer to historic intentions and meanings at the time of contact or treaty but would not exclude other “living” meanings that may be attributed to them.<sup>168</sup> This approach would respect historical context and guarantees while also bringing the contemporary “living tree” conception to the forefront. A methodology that venerates past and present human rights guarantees would be more consistent with Canada’s *Constitution* than exclusive reliance on the “integral to a distinctive culture” or “historic contemplation of the parties” tests currently dominating section 35(1) jurisprudence.

If living tree principles were applied to Indigenous peoples, we might one day say about Canada’s Aboriginal and treaty rights jurisprudence what has been written about other areas of constitutional law: “This metaphor has endured as the preferred approach in constitutional interpretation [dealing with Aboriginal and treaty rights], ensuring ‘that Confederation can be adapted to new social realities.’”<sup>169</sup> We would have an Aboriginal jurisprudence that holds that “frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”<sup>170</sup> We would also apply the view that “[t]here is nothing static or frozen, narrow or technical, about the Constitution of Canada.”<sup>171</sup> Thus, with respect to Aboriginal and treaty rights, we would say: “If the Canadian Constitution is to be regarded as a ‘living tree’ and legislative competence as ‘essentially dynamic’...then the determination of categories existing in 1867 becomes of little, other than historic, concern.”<sup>172</sup> This would allow us to reinforce an approach that holds that “the past plays a critical but nonexclusive role in determining the content of the rights and freedoms” within the Constitution.<sup>173</sup> As such, we could conclude in relation to Aboriginal and treaty rights: “The tree is rooted in past and present institutions, but must be capable of growth to meet

168. First Nations often described their constitutional relations by reference to living forces.

For example, treaties were to be for as long as the “sun shines, the river flows and the grass grows.” When Alexander Morris proposed Treaty 6 he said: “What I trust and hope we will do is not for to-day or to-morrow only; what I will promise and what I believe and hope you will take, is to last as long as that sun shines and yonder river flows.” See *supra* note 155 at 202. See also *ibid* at 51 (for similar wording during Treaty 3 negotiations).

169. *Reference Re Provincial Electoral Boundaries*, *supra* note 158 at para 42.

170. *Reference re Same-Sex Marriage*, *supra* note 158 at para 22.

171. *Ellett Estate*, *supra* note 158 at para 29.

172. *Ibid* [emphasis in original].

173. *Reference Re Provincial Electoral Boundaries*, *supra* note 158 at para 42.

the future.”<sup>174</sup> If originalism were rejected in favour of living tree constitutionalism, Aboriginal and treaty rights would be more strongly rooted in “a philosophy which is capable of explaining the past and animating the future.”<sup>175</sup> Interpreting Aboriginal and treaty rights as living traditions would mark an important maturation point in the ongoing evolution of Canada’s organic *Constitution*.<sup>176</sup> This would rank in significance alongside the achievement of responsible government, the extension of women’s political rights, and the extension of civil rights before the *Charter* came into force.<sup>177</sup> We must not “read the provisions of the Constitution like a last will and testament lest it become one.”<sup>178</sup> This applies as much to Aboriginal and treaty rights regarding violence against women as it does to other parts of Canada’s *Constitution*.<sup>179</sup>

There is a second way of curing the flaws in the current approach to section 35(1) and thereby allowing Indigenous peoples to exercise jurisdiction over violence against women in a manner consistent with section 35(4). This approach is based on a related jurisprudential strand that regards broad jurisdictional Aboriginal rights claims as pre-dating the creation of Canada and continuing through to the present day. Courts have at times assumed that Indigenous peoples exercised governance powers prior to Crown assertions of sovereignty without requiring strict proof of such power.<sup>180</sup> These are reasonable assumptions given how jurisdiction is generally treated in the wider Canadian context.<sup>181</sup> This is also the legal justification for the exercise of Native self-governance in the United States.<sup>182</sup> This approach is also present within Canadian jurisprudence and could

174. *Ibid.*

175. *Ibid.*

176. John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at 118-21.

177. William Kaplan, *State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989); *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689; *Reference Re Alberta Statutes*, [1938] SCR 100, 2 DLR 81; *Saumur v City of Quebec*, [1953] 2 SCR 299, [1953] 4 DLR 641; *Switzman v Elbling*, [1957] SCR 285, 7 DLR (2d) 337.

178. *Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

179. This paragraph is taken from Borrows, “(Ab)Originalism,” *supra* note 157 at 397-98.

180. Chief Justice Lamer observed that Imperial powers treated Indians as independent nations. *Siou*, *supra* note 145 at para 69.

181. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 32 [*Haida Nation*].

182. United States Department of the Interior, *Handbook of Federal Indian Law* by Felix S Cohen (Washington: Department of Interior, 1941) at 122-23; Charles Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987) at 60.

rightly be regarded as undergirding Indigenous jurisdictional issues in this field.<sup>183</sup> For example, these powers were evident in *Calder v AGBC*, wherein Justice Judson wrote: “[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”<sup>184</sup> Organization is essential to governance.<sup>185</sup> The fact that Indigenous peoples were “organized in societies” prior to the arrival of Europeans implies that Indigenous governance, which includes the power to deal with violence against women (in an admittedly imperfect way),<sup>186</sup> was an important element of their “pre-contact” societies.<sup>187</sup> These governance powers were not voluntarily surrendered as a result of the Crown’s own assertion of sovereignty.<sup>188</sup> As has been noted, Indigenous peoples continued to exercise their powers of governance after the Crown’s assertion of sovereignty in many ways.<sup>189</sup> Moreover, they continue to live in “organized societies” in the present day by governing themselves in accordance with their customs, laws, and traditions,<sup>190</sup> though there has been extensive regulation of these powers through instruments such as the *Indian Act*.<sup>191</sup> Fortunately, as the SCC noted in *Sparrow*, “that the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.”<sup>192</sup>

Indigenous jurisdiction over violence against women could thus be recognized under Canadian law through a broader reading of the doctrine of continuity.<sup>193</sup> As Chief Justice McLachlin succinctly stated in *Haida Nation*,

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183. Slattery, “The Generative Structure of Aboriginal Rights,” *supra* note 26 at 6.

184. *Calder v British Columbia (Attorney General)*, [1973] SCR 313 at 328, 1973 CanLII 4 [emphasis added].

185. This paragraph is largely extracted from John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right” (2005) 38:2 UBC L Rev 285 at 292-93.

186. Robert A Williams Jr, “Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context” (1990) 24:4 Ga L Rev 1019.

187. The reserved rights theory of Aboriginal governance is also consistent with the proposition articulated by the SCC in *Van der Peet*, *supra* note 24 at para 30.

188. However, it has been held that “discovery” diminished Indian rights to land. See *Guerin v Canada* [1984] 2 SCR 335 at para 88, 13 DLR (4th) 321.

189. The SCC accepted the idea in *Sioui*, *supra* note 145. The Court cites *Worcester v State of Georgia*, 31 US 515, 8 L Ed 483 (1832).

190. *Canada’s Indigenous Constitution*, *supra* note 120 at 196; John Borrows, “Stewardship and the First Nations Governance Act” (2003) 29:1 Queen’s LJ 103.

191. For example, First Nations exercise pre-existing governance powers through the Indian custom council system under the *Indian Act*, RSC 1985, c I-5. The legislation makes reference to “custom of the band” (at s 2(1)).

192. *Sparrow*, *supra* note 45 at para 36. For an application of this principle in a specific community context, see Borrows, “A Genealogy of Law,” *supra* note 147.

193. Royal Commission on Aboriginal Peoples, *supra* note 41. Numerous cases have proceeded under the doctrine of continuity. See *Johnstone v Connolly* (1869), 17 RJRQ 266, 1 CNLC

“[p]ut simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”<sup>194</sup> The Canadian government has also recognized an approach to Aboriginal self-government that draws upon the doctrine of continuity.<sup>195</sup> These views assume the existence of Indigenous governance powers and bring life to Canada’s living tree, thereby correcting flaws in current interpretive approaches.<sup>196</sup> As Chief Justice McLachlin wrote in *Mitchell*:

European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.<sup>197</sup>

Indigenous women should be able to claim Aboriginal rights to safety within their societies under the doctrine of continuity. This approach does not require Indigenous peoples to prove historical exercise of each small increment of jurisdiction under the “integral to a distinctive culture” test. It also demonstrates that Canada’s *Constitution* does not have to be read in ways that are inconsistent with its broader aims. *Pamajewon* will not be the last word in defining Aboriginal governance rights under section 35(1),<sup>198</sup> and the prominence of the doctrine of continuity can be an important antidote to the flaws outlined earlier in this section.<sup>199</sup>

151 (CA), aff’g *Connolly v Woolrich* (1867), 17 RJRQ 75, 1 CNLC 70 (Qc Sup Ct); *R v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211, 1889 CarswellNWT 14 (WL Can) (NWT CA); *R v Bone* (1899), 4 Terr LR 173, 3 CCC 329 (NWT SC); *Re Noah Estate* (1961), 32 DLR (2d) 185, 36 WWR 577 (NWT TC); *Re Deborah E4-789*, [1972] 5 WWR 203, 28 DLR (3d) 483 (NWT CA); *Michell v Dennis and Dennis*, [1984] 2 CNLR 91, 2 WWR 449 (BC SC); *Casimel v Insurance Corp of British Columbia* (1991), 58 BCLR (2d) 316, [1992] 1 CNLR 84 (SC); *Vielle v Vielle* (1992), 93 DLR (4th) 318, [1993] 1 CNLR 165 (Alta Prov Ct (Fam Div)).

194. *Haida Nation*, *supra* note 181 at para 24.

195. The federal government has recognized that Aboriginal peoples possess unextinguished inherent rights to govern themselves. See Canada, Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Indian and Northern Affairs Canada, 1995), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>.

196. For an example of the wide scope of Aboriginal governance powers under the doctrine of continuity, see *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 at paras 65-81, 189 DLR (4th) 333.

197. *Mitchell*, *supra* note 24 at para 10.

198. Chief Justice Lamer expressed hesitation in applying the “integral to a distinctive culture” test to the claim of self-government. See *Delgamuukw*, *supra* note 24 at paras 170-71.

199. Slattery, “The Generative Structure of Aboriginal Rights,” *supra* note 26 at 20-48.

#### IV. CONCLUSION

Violence against women should not be labelled an Indigenous tradition.<sup>200</sup> It is a very complex and serious socio-legal issue that has significant implications for how jurisdiction, law, and legal traditions are taught, practiced, critiqued, and reformulated.<sup>201</sup> This article has argued that violence against Indigenous women must be confronted at all levels of society. In particular, this issue must be addressed from a jurisdictional perspective since violence is linked to the inequalities Indigenous peoples face within Indigenous communities and in Canadian society more generally. Unfortunately, at least two stereotypes stand in the way of such action. One is the misperception that Indigenous communities would be incapable of effectively addressing this issue due to the high levels of violence they encounter. The second relates to the courts' interpretive misperception that history must be the sole source of Indigenous jurisdictional claims under section 35(1) of the *Constitution*. While important truths underlie each viewpoint (violence within communities does raise distinct challenges in dealing with this issue, and attentiveness to history is crucial, though not determinative, in understanding Aboriginal and treaty rights), they do not justify the cramped and distorted approach to Indigenous jurisdiction over violence against women that characterizes contemporary constitutional jurisprudence in Canada. This article has attempted to calibrate more precisely a nuanced approach to these issues in light of broader policy and jurisprudential realities.<sup>202</sup>

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200. Andrea Smith, "Not an Indian Tradition: The Sexual Colonization of Native Peoples" (2003) 18:2 *Hypatia* 70.
201. Val Napoleon, Hadley Friedland & Emily Snyder, eds, *Thinking About and Practicing With Indigenous Legal Traditions: One Approach: A Community Handbook* [on file with author].
202. The teaching of Indigenous legal traditions in Canadian law schools must also draw on the insights developed in this article. Gender and the elimination of violence against women is a necessary site of inquiry and action for working with Indigenous peoples' own laws. Tradition, whether Aboriginal or Canadian, must not be essentialized nor regarded as being homogenous, objective, neutral, or necessarily equality-enhancing just because it is "tradition." We must constantly subject all our laws to these inquiries in order to ensure that all to whom they apply are safe from violence in any form.