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# Law, Space, and Gendered Vulnerability: A Critique of VAWA's Jurisdictional Fix in Indian Country

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LAW, SPACE, AND GENDERED VULNERABILITY:  
A CRITIQUE OF VAWA'S JURISDICTIONAL FIX IN INDIAN COUNTRY

by

ASHLEY M. RUMBLE

B.A., University of Washington, 2010

A thesis submitted to the  
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This thesis entitled:  
Law, space, and gendered vulnerability:  
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written by Ashley M. Rumble  
has been approved for the Department of Geography

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Joe Bryan

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Najeeb Jan

Date\_\_\_\_\_

The final copy of this thesis has been examined by the signatories, and we  
Find that both the content and the form meet acceptable presentation standards  
Of scholarly work in the above mentioned discipline.

## ABSTRACT

Rumble, Ashley M. (M.A., Geography)

Law, space, and gendered vulnerability: A critique of VAWA's jurisdictional fix in Indian Country

Thesis directed by Assistant Professor Joe Bryan and Assistant Professor Najeeb Jan

This thesis evaluates the jurisdictional extension included within the Violence Against Women Reauthorization Act (VAWA) of 2013, which grants tribal courts criminal jurisdiction over non-Indian perpetrators of certain domestic violence crimes. The thesis begins by examining the contemporary problem of violence against Native women within its colonial context. Drawing on feminist geography questions are asked about how particular bodies are made vulnerable in relation to their social, historical, political, and geographical condition. Looking at both the law and direct, corporeal violence as techniques for codifying Indian Country, this thesis examines how Indian Country, as a particular spatialization, renders certain bodies more exposed to violence than others. The thesis then considers the legal precedent over criminal jurisdiction to demonstrate how the law has worked historically to compound the vulnerabilities of Native women. Part III looks at VAWA as an interruption of this legal historical precedent, placing it within the popular discourse as a fix to the ostensible jurisdictional problem. Finally, the jurisdictional fix is closely scrutinized by examining it within the broader literatures of critical race theory and critical geography. Namely, in recognizing the jurisdictional extension as a liberal fix, we can understand the VAWA provision as a moralistic imperative of care. As such, VAWA is a normative legal response that seeks to respond to the crisis (of gender-violence) without significantly re-ordering the underlying structuration of Indian Country that is responsible for producing such violence in the first place. This thesis concludes that the jurisdictional fix provided by VAWA is a limited solution to the problem of gender-based violence in Indian Country.

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## ACRONYMS

DOJ	Department of Justice
ICRA	Indian Civil Rights Act
IRA	Indian Reorganization Act
ITWG	Intertribal Technical-Assistance Working Group
MCA	Major Crimes Act
SDVCJ	Special Domestic Violence Criminal Jurisdiction
TLOA	Tribal Law and Order Act
VAWA	Violence Against Women Act

## I. Introduction

Bazil: Now if the police would come. They need to get a statement. They should have been here.

Joe: Which police?

Bazil: Exactly.

Narration (Joe): The nurse didn't want us back in the room yet, and as we stood waiting the police arrived. Three men came through the emergency ward doors and stood quietly in the hall. There was a state trooper, an officer local to the town of Hoopdance, and Vince Madwesin, from the tribal police. My father insisted they each take a statement from my mother because it wasn't clear where the crime had been committed—on state or tribal land—or who had committed it—an Indian or a non-Indian. I already knew, in a rudimentary way, that these questions would swirl around the facts. I already knew, too, that these questions would not change the facts. But they would inevitably change the way we sought justice.

(Excerpt from *The Round House*, p. 12)

Geraldine: He turned me around and marched me...held my shoulder. Step over this, go that way he said. He took me somewhere.

Bazil: Where?

Geraldine: Somewhere.

Bazil: Can you say where?

Geraldine: Somewhere. That's where it happened. He kept the sack on me. And he raped me. Somewhere.

Bazil: Did you go uphill or downhill?

Geraldine: I don't know, Bazil.

Bazil: Through the woods? Did leaves brush you?

Geraldine: I don't know.

Bazil: What about the ground—gavel? brush? Was there a barbed wire fence?

Three classes of land meet there. (His voice pulled tight with fear.) Tribal trust, state, and fee. That's why I am asking.

(Excerpt from *The Round House*, p. 159-160)

In her most recent novel, *The Round House*, Louise Erdrich confronts one of the most salient and contemporary maelstroms befitting Native American space today: the problem of unprecedented domestic and sexual violence perpetrated against Native women. According to the U.S. Department of Justice, Bureau of Statistics, Native American women are subject to sexual assault 2.5 times more than any single ethnic population within the United States (2000). As the excerpts above suggest, criminal jurisdiction over sexual assault crimes is a particularly

convoluted and fraught matter. Domestic violence and sexual assault are crimes that fall under concurrent criminal jurisdiction, meaning that both tribal courts and the federal government may prosecute violent offenders on Indian territory. However, as a result of this overlapping jurisdictional configuration, as many as 65% of sexual crimes that fall under federal jurisdiction never go to federal prosecution (Williams 2012). Tribal courts serve as an alternative forum for seeking legal restitution. However, the severe sentencing limitations placed on tribal courts by the federal government further compromise the efficacy of legal justice in Indian Country (Helgesen 2011).

Of additional import in understanding the violence perpetrated against Native women is that anywhere between 50-85% percent of Native American female victims report their attackers to be white, non-Indian men (U.S. Department of Justice 2004, 9; Deer 2004; Helgesen 2011). However, prior to the reauthorization of the Violence Against Women Reauthorization Act (VAWA) of 2013, non-Indians accused of raping Native American women on tribal land could not be prosecuted by tribal courts. This historic, systemic shielding of non-Indians from the penal system is extremely problematic considering that as of 2010, 46% of people living on reservations were considered non-Indian and 49% of Indian women were married to non-Indian men (Petillo 2013). As the facts and statistics indicate, violence against Native women in Indian Country is appallingly high, and yet the legal outlets for responding to this problem have historically been negligible and ineffectual.

To respond to this social, cultural, and legal enigma, the U.S. Senate drafted a reauthorization bill of the Violence Against Women Act in 2011 that would include provisions to address the disproportionately high rates of violence against Native women. The initial authorization of VAWA in 1994 was one of the first legal recognitions of the prevalence of

gender violence within the United States. VAWA authorized federal funding for developing and improving coordinated community responses to respond to domestic and sexual assaults. Additionally, it granted extended civil and legal rights to victims of gender-based violence. Through this legislation, the U.S. Department of Justice amassed broad, unprecedented reporting on the extent, nature, and prevalence of violence against women. Resultant statistical evidence has indicated the uneven rates of sexual violence perpetrated against Native American and Alaskan Native women, as detailed above (Bubar and Thurman 2004; U.S. Department of Justice 2008). The most recent version of the Act legislates a jurisdictional fix to addresses contemporary concerns over gender-violence in Indian Country. Specifically, Title IX, Section 904 extends tribal jurisdiction over non-Indian perpetrators of certain domestic violence crimes committed in Indian Country. This new provision aims to mitigate the problems associated with the entanglement of criminal jurisdiction that is the hallmark of federal-Indian relations. The provision ostensibly recognizes the inherent right of Native Nations to prosecute criminal offenses within its territory. The highly anticipated reauthorization was widely embraced within indigenous circles, viewed as both a triumph for Native American efforts toward sovereignty and as a notable step towards minimizing gender-based violence.

Yet, in practice, the new provision is a liberal fix that operates as a normative response to gender based violence. The liberal fix emerges out of moral imperative of care that is marked not so much by unadulterated state benevolence, but rather is motivated by the modern state's anxiety over its own security. Violence against Native women serves as the contemporary crisis of the modern state—a crisis that must be dealt with in a way that maintains the sovereign legitimacy of the U.S. settler state. What emerges is a normative legal response that provides a short-term solution to this violence while simultaneously maintaining Native American existence

as exceptional. Popularly interpreted as a bestowment of tribal sovereignty, VAWA's liberal discourse obscures the perpetuation of indigenous subordination, framing the legislation as a moralistic solution endowed by Congress that ostensibly enables tribal governments to respond to the deplorable rates of gender violence in Indian Country. The liberal fix provided by VAWA is elucidated as a limited solution to the problem of gender based violence because it obscures the broader structural and historical conditions that produce a particular spatialization (Indian Country) in which women's bodies are made vulnerable and Native American existence remains subservient to U.S. sovereignty. In examining this problem through a legal geographic framework, this research scrutinizes the production of vulnerable subjects under the law and the limitations of a normative liberal fix through a close legal read of the Violence Against Women Act.

### *Theoretical Framing*

The corporeal violence experienced by Native American women is exacerbated by the structural violence enacted by the law. This research tacks back and forth between these two scales of violence to develop a nuanced account of how particular bodies are made more vulnerable to violence than others. Legal and feminist geography provides much of the theoretical scaffolding through which to examine this scalar violence.

Legal geography provides insights for critically assessing the spatialization of law, and its resulting relationships of power. Garnering its theoretical and methodological tools from critical legal studies—including critical race theory and feminist legal theory—and critical human geography, legal geography asserts that “the Law” is not natural and pre-given, but rather is a historico-political formation of power relations (Blomley 1994). In other words the law is reconceived as a site of “lived relations of power, oppression and resistance” (Blomley 2008,

162). Robert Cover (1986) urges that any critical examination of the law must move beyond reading the law as text, to consider the ways in which the law enacts a material, corporeal violence that operates as an assemblage of practices. VAWA, as an enactment of law, is hence interrogated as a power-laden structure that extends colonial power and is capable of wielding its own forms of violence onto the bodies that fall under its jurisdiction.

Legal geography also invites us to reconsider the role of space in constituting this problem of violence against Native women. For legal geographers, space is not an empty container or setting in which activities and practices take place; rather space must be thought of as something that is actively made and produced through the lived performances of the everyday (Lefebvre 1991; Delaney 2010; Goeman 2013). In this case, Indian Country is reframed and understood as a space that does not just come to exist, but as a space that is given shape through very intentional acts of power and violence. These two considerations of legal geography—law and space—come together when questions are asked about how the law sanctions such violence, how the law produces such spaces, and how such emerging spatializations fortify the law’s force. The term “spatialization” refers to spatial configurations that are given form through various social and material processes. In this sense, prevailing understandings of law as confined to the ideological and discursive, and space as confined to the material locality of action renders these concepts opposed or dichotomous to one another. Legal geography transcends these limitations to assert that law and space do not exist separately, or even alongside one another. Law and space are mutually constitutive (Delaney 2010). Law discursively defines the spatial sphere of politics where agents bound within that sphere (victims, perpetrators, judges, legislators) engage, resist, and reshape the law, thereby, reshaping political and social spatializations (Ford 2001b; Blomley 2008; Barkan 2011). In understanding the co-constitution of law and space, the

jurisdictional extension included in VAWA 2013 can be understood as a medium for refiguring the spatio-legal construction of Indian Country. In doing so, the Act effectively redefines our geographical imaginings about what Indian Country and jurisdiction is, and alters our ideological notions about who falls within those spaces, and whose law can apply over a given body. Such refiguring problematizes conventional categories such as Indian/non-Indian, victim/perpetrator, inside/outside.

The work of David Delaney and Nicholas Blomley in developing legal geography as a framework for understanding the relationships between law, space, and power make a tremendous contribution to the fields of geography and legal studies. However, the framework they provide requires a more rigorous theorization about how these spatio-legal arrangements affect the bodies that are caught within these spheres. Though Delaney is attuned to the fact that these configurations of law and space materially affect bodies, he does not go as far to develop a theoretical framework for understanding how these bodies are spatially and legally figured. In addressing this shortcoming, I engage both feminist and poststructural thought to develop a more robust framework for understanding the spatio-legal configuration of vulnerable bodies.

In thinking about how particular bodies come to be exposed to corporeal violence within certain spaces, this analysis asserts that bodies are *made* vulnerable relationally, historically and geographically. This perspective engages the work of Agamben (1998) in his adroit theorizations about spaces of exception and bare life, but it also exposes its limitations. For Agamben, it is the liminality between the law and the sovereign that enables the emergence of the sphere of exception in which certain bodies are deemed disposable and beyond the protection of the law. Yet, feminist geographers engaging Agamben's theorizations argue that the bodies caught within this sphere are not reducible to their mere corporeality or biological existence as Agamben might

have us think (Sanchez 2004; Pratt 2005; Mitchell 2006). Instead, bodies are made vulnerable (precarious) relationally, contextually, and spatially (Butler 1993; Butler 2004; Pratt 2005; Mitchell 2006). Judith Butler (2009) asserts that,

Precarity designates that *politically induced condition* in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death. Such populations are at heightened risk of disease, poverty, starvation, displacement, and of *exposure to violence without protection* (25-6, emphasis added).

The violence experienced by Native American women cannot be understood through an analysis of power as if it operates within a neutral space that Native women inhabit by happenchance. Rather, a thorough analysis must scrutinize the ways Native American women are exposed to unchecked violence as a result of a number of historical, legal, and social conditions that serve to discursively and materially produce them as vulnerable subjects. Attending to this insight, this research examines the historical and political conditions that inform the construction of Indian Country, paying particular consideration to the way gender-based violence was part and parcel of the broader colonial project. As such, Indian Country is understood as a particular spatio-legal arrangement in which Native women's bodies are made vulnerable.

In addition to thinking about the way bodies are made precarious relationally and contextually, this research interrogates the role of sovereignty and law in codifying this vulnerability. Sustaining an engagement with Agamben (1998), bodies are exposed to the unchecked violence of the state in spheres in which the sovereign suspends the law. The sovereign establishes its legitimacy by self-proclaiming its assertion over the law. Rifkin (2009) underscores the deployment of federal Indian law as a means of making Indian Country an aberrant space, effectively subordinating Native polities under the banner of U.S. sovereignty. Rifkin's analysis highlights sovereignty as a contested and contestable term—it has no singular

meaning and its assertion can be challenged by competing sovereigns. Such an understanding of sovereignty informs my own analysis. Tribal sovereignty, a concept reanimated as a result of the VAWA jurisdictional extension, exists as a claim of political authority that challenges U.S. settler sovereignty. However, a singular conception about tribal sovereignty is illusive even within indigenous circles. Within the liberal project, tribal sovereignty paradoxically exists as a remedy offered by the settler state for past injustices, yet is carefully managed to maintain a sovereign hierarchy that privileges U.S. superiority.

Rifkin and Agamben's analyses open possibilities for considering how Native bodies are figured disposable to the sovereign power. In thinking of the law's force in making exceptional spaces and figures, the law serves to spatialize by demarcating jurisdictional boundaries and by discerning which bodies are worthy of legal protection and which are not (Agamben 1998; Blomley 2008; Barkan 2011). By discursively redefining the spaces of law's force and the subject-bodies that fall within that sphere, violence and justice are materially redistributed. The history of criminal jurisdiction in Indian Country illustrates the force of the law in figuring certain bodies as unworthy of protection and justice. Engaging the legal history of criminal jurisdiction in Indian Country, this thesis questions both the "justice" and efficacy of contemporary American law as a resource for tribes to respond to gender- and race-based violence. Finally, in drawing on the spatial and legal insights of legal geography and understanding bodies as relationally figured, this research speculates on the efficacy of VAWA's jurisdictional fix based on its ability to refigure Indian Country in a way that curtails its existence as a space in which Native bodies are made vulnerable. Throughout this research, violence against Native women serves as the central trope for understanding colonial violence and law in Indian Country.

### *Situating the Research*

During my tenure at the South Lake Tahoe Women's Center (now known as Live Violence Free) I was witness to the grotesque, daily violence perpetrated against girls and women in my community. Our center provided standard domestic violence and sexual assault services including basic provisions (food, clothing, transportation), emergency lodging, short and long-term housing options, and counseling. In 2007, the agency secured a substantial grant from the Department of Justice, which allowed us to extend our services to include in-house legal advocacy, counseling, and representation. Not all domestic violence agencies are able to provide this form of support and assistance, but securing the additional funds enabled us to offer a highly sought after service for victims of domestic and sexual violence. As the agency provided these services, I was able to witness first-hand the avenues of justice provided through the law to victims of gender-based violence.

In addition to providing legal services, the agency also operated a satellite office located in Alpine County (the least populated country of California). 65% of our clients at the Alpine office self-reported as ethnically Native American. Most individuals associated with the Hung-A-Lel-Ti Community of the Washoe Tribe of Nevada and California. In working with these clients it became evident to me the unique challenges faced by Native American women in securing not only basic provisions, but also safety and personal security. The close-knit nature of the community and the cultural stigma against reporting served to deter many from seeking justice through the available formal legal channels. Those who did seek justice through the law faced a whole other set of challenges. Despite the agency's extensive experience in domestic law and the adroit legal advocacy work done on behalf of our clients, their engagement with the legal system was marked by confusion, frustration, and inaction that was largely the result of the

profuse legal entanglements that characterize criminal jurisdiction in Indian Country. These experiences have given me considerable insight into the way law operates in an exceptional manner in Indian Country and have alerted me to the grave inequalities existent in contemporary rape law.

The research presented in this thesis is by no means an attempt to speak for Native American women who have experienced domestic and sexual violence, or to speak on behalf of tribal governments as they implement and respond to their newfound legal rights under VAWA. My aim in conducting this research is to continue my work as a victim and tribal advocate.<sup>1</sup> As such, this research strives towards a number of objectives. First, this project further develops legal geography to understand the co-constructions of law and space in terms of their material outcomes. Second, the research illuminates the limitations of legal reform, underscoring the way law is deeply embedded within and maintains colonial hierarchies. Finally, this work ultimately aims to develop a more robust understanding of the structural conditions that make Native women vulnerable to domestic and sexual violence. In undertaking this work, my hope is that victim and tribal advocates may become better equipped to respond to and ultimately minimize the disproportionately high rates of sexual violence experienced by Native women.

## **II. Indian Country and the production of vulnerable bodies**

Violence does not just happen to ontologically isolated bodies. Certain bodies are made more precarious and susceptible to violence than others based on particular convergences of social, cultural, and political factors (Butler 1993; Butler 2004; Pratt 2005; Mitchell 2006; Butler

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<sup>1</sup> I utilize the term “tribal advocate” as defined by Keith Richotte, Jr. (2010). A tribal advocate, “denote[s] any person or entity that seeks to expand tribal sovereignty and benefit the lives of Native peoples. The term is not meant to exclude any person or thing on the basis of race or tribal affiliation. Rather, it is meant to be a broadly inclusive term that encompasses, but is not limited to, lawyers, legal historians, other academics, tribal nations and tribal members” (447).

2009). Building from this central antecedent, the contemporary onslaught of domestic and sexual violence experienced by Native American women is made comprehensible only in contextualizing their corporeal vulnerability against the broader colonial project. At the outset of the colonial-American project, settlers had to contend with Native Americans as a number of preexisting groups with competing claims over territory and authority. The mere existence of Native American political collectivities foundationally threatened the unity and legitimacy of U.S. settler colonial rule. To reconcile divergent claims between settlers and Native Americans, federal Indian policy had to devise solutions to the “Indian problem.” One such solution that gained considerable traction was the policy of removal. The removal policy era expelled Native Americans from their ancestral lands to carve out a settler space that would be unhampered by Native American inhabitation. Within this policy emerged the conception of Indian Country as a space on the American frontier that would be “properly” Indian.

Indian Country colloquially refers to any land or territory that is (quasi)governed by Native Americans. Critically, Indian Country exists as a spatio-legal concept that is given shape through the deployment of colonial discourses. Drawing from the work of Stoler (1995), the phrase colonial discourses refers to the way both *race* and *gender* are constituent components of a colonial logic. Expanding on Foucault’s understanding of the body as a site through which power is targeted, contested, and made, Stoler places the discourse of sexuality within a colonial context to argue that colonial power is augmented through the management of gender, sexuality, and race. Indian Country, which developed out of a specific historical, cultural, and political context, assumes a particular spatial configuration informed by racialized and gendered colonial discourses. More specifically, the exacting management of the bodies caught within this space reinforces the racialized and gendered spatialization of Indian Country.

Indian Country was also given material form by means of a corporeal force. Colonial discourses assumed a rhetorical strength in the making of Indian Country; however, gender-based violence granted material force in this space (Goeman 2013). As Stoler and Foucault suggest, the bodies caught within this spatializing project—the production of Indian Country—are the targets of intervention. In tracing the emergence of colonial discourses alongside the historical enactments of gender violence, Indian Country, as a spatio-legal construction, is understood as a space in which particular bodies are made vulnerable to both structural and corporeal violences. Though Indian Country as a concept emerged in the early moments of American colonization, the term performs much of the same functions presently as it did at the time of its inauguration—it demarcates and spatializes Native existence within the United States. A more thorough comprehension of Indian Country as a spatio-legal artifact provides insights into the way historical manifestations of racial/gendered discourses and violence operate today in making Native women the most victimized group in America.

### *Settler Legitimation*

Federal Indian law and gender-based violence are deeply implicated in legitimizing settler rule. As such, this research examines the VAWA jurisdictional extension as a potential exhibition of the ongoing project of settler legitimation. Historically, federal Indian policy has been marked by a central preoccupation with navigating competing claims to sovereignty. As mentioned earlier, the very existence of Native Americans within the same spaces that are claimed as the sovereign territory of the U.S. serves to threaten the unity and legitimacy of the U.S. nation-state (Rifkin 2009). To combat this threat, the United States has discursively and legally established itself as the rightful and superior geopolitical sovereign by systematizing a trustee-guardian relationship. But where then, do those claims leave the political collectivities of

Native Americans who existed prior to American colonization? Are tribal governments sovereign nations distinct from the United States? Which government has the authority over land and resources? Which government has authority over its citizens? How is citizenship constituted and by whom? These are but a few of the central questions that federal-Indian policy has engaged as the federal government asserts its position as supreme geopolitical authority.

Traditionally understood, sovereignty is the rule of a supreme authority over a given population within a bounded territory. This commonplace conceptualization depends upon the existence of the nation-state, which assumes a monopoly over the exercise of power. Foucault has famously complicated our understandings of state sovereignty. In considering power as the hallmark of sovereignty, he argues that power “must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate” (Foucault 1990). Foucault argues that in thinking of power as force relations, we begin to move beyond the system of “sovereignty of the state, the form of the law, or the over-all unity of domination” (Foucault 1990). Instead, the state’s power is vitalized through the enactments of a triumvirate of sovereign power, disciplined bodies, and government control (Foucault 2004). Sovereign authority is maintained through the technologies, mentalities, and rationalities that work to make society governable. In this sense, state sovereignty is not apolitical or ahistorical. State power is negotiated, contested, and carefully enacted.

Drawing from the work of Foucault, Butler (2004) urges a consideration of the ways that sovereignty is performative. She argues that if, as Foucault suggests, power is something that cannot be possessed, then the state is constantly preoccupied with authenticating its existence as the supreme authority. In other words, if sovereignty is a mode of power and not a state of existence, then the state must constantly act in the ways of a sovereign to legitimate its own self-

proclaimed status as sovereign. In this sense, sovereignty is performed through the arbitrary wielding of power that maintains the façade of legitimacy. Rifkin (2009) extends Butler's analysis to argue that sovereignty is a "restless performance" that emerges at the particular moment when the geopolitical unity of the settler state is threatened (100). Sovereignty is the tautological assertion of authority that works to legitimate the authority of he who claims it. In this sense, sovereignty legitimizes the exercise of U.S. authority by placing itself within a logical, self-assured and self-proclaimed hierarchy. The question then arises, through what legitimate means (force being an illegitimate mode) does the state establish its legitimacy?

The success of the colonial-American project hinges on the ability to assert supremacy over Native American governing arrangements. The United States' sovereign legitimacy is drawn from the existence of the nation-state. Territory and jurisdiction are geographical concepts that animate the nation-state and spatially demarcate the limits of sovereign authority (Ford 1999; Blomley 2008; Delaney 2010). However, these concepts are all geographic imaginings that are only given material force through the creation and enforcement of the law. In this sense, the law produces the conditions in which the sovereign maintains its power, and yet it is the sovereign, that provides the institutional framework to give legitimacy to the law (Agamben 2005). This conception of sovereignty confers normative notions of authority, asserting that sovereign power has the legitimate authority to declare or suspend law (Agamben 1998).

Because modern sovereignty is legitimated through the establishment and exercise of the law, the U.S. federal government has relied on federal Indian policy and the law to legitimate claims of superiority over Native American governance arrangements. Meaning, the law is utilized to structurally subordinate Native lifeways, kinship practices, indigenous legal conceptions, and political organizations to the United States. Rifkin (2009) examines the

historical role of treaty making as an example of the United States' invocation of legal sovereignty. He argues that treaty making provided the framework to delimit Native American polities as simultaneously included and excluded from the national imaginary. This inclusive-exclusion was codified through federal Indian law, making Indian Country a peculiar, aberrant, and exceptional space. The bodies caught within this exceptional sphere are equally paradoxical, existing both inside and outside the reach of the law (Agamben 1998). Such spatio-legal configuring provided the basis for validating U.S. claims as supreme geopolitical authority. But these performances of settler legitimation made Indian Country a space in which the law operated atypically and even counter productively to the aims of providing safety and security for those under the law. The exceptionality of the law enabled the profusion of corporeal violence, which acted as an additional means of garnering settler power that relied on coercion, rather than consent. Alongside the power of the law, direct force and corporeal violence have a long history in legitimating settler claims of authority. What follows is an exploration of a number of eras of federal-Indian policy. In highlighting the utilization of gender and race based violence, alongside the implementation of law—that both sanctions such violence and produces its own distinct set of violences—it becomes evident the way Indian Country is granted a particular spatio-legal configuration in which particular bodies are exposed to violence under the banner of U.S. sovereignty.

### *Dispossession by Law and Rape*

Native American and settler relations have been marked by a long, tenuous history of expansion and resistance. Operating under the doctrine of Manifest Destiny, American settlers sought to increase territorial land holdings. The phrase Indian Country was used vernacularly during this time to refer to the limits of settler expansion. Indian Country was that which lay

beyond the American frontier and was occupied by Native Americans (Deloria, Jr. and Lytle 1983). In this context, Indian Country performed both as a social mentality and a spatial materiality (Delaney 2010). The term referred very literally to the geographical territory governed by Native Americans, but it also discursively signaled colonial limits and simultaneously represented settler desires for expansion. The prevailing doctrine of progress left Indian Country exposed to the aggrandizing projects of colonial America.

As colonial expansion progressed westward, the 19th century marked the systemic diminishment and legal codification of Indian Country. Under the predominant doctrine of removal and reallocation, a number of congressional acts were installed to move Native communities off traditional and ancestral lands, either “voluntarily” or by force (Deloria, Jr. and Lytle 1983; Olund 2002). During this period from roughly 1828-1887, the United States government developed the reservation system, which provided the legal justification for Native American containment, exclusion, and segregation. According to critical legal theorist, Richard Ford, the law can be utilized as a colonial technique to spatially segregate and discriminate based on difference, such as race or gender (2001a). In this instance, the re-territorialization<sup>2</sup> of the frontier was outwardly described as a means of reducing conflict between settlers and Natives by “protecting” them from encroachment by white settlers (Olund 2002; U.S. Department of Interior 2008). Framing the prevailing reallocation and removal policies as a means of protection inscribed a discourse of paternalism within the predominant Indian policy discourse. Popular

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<sup>2</sup> In the context of this thesis I draw from Wainwright (2008) in defining and utilizing the term territorialization. Wainwright writes, “territorialization can be defined as the production of the space of the nation-state...[T]he name for the process of the working-out of the ‘spatial relations’ that make a given state-society ensemble hegemonic” (21). In the context of Native American colonization, territorialization refers to the techniques and apparatuses employed by the settler hegemon to produce a particular space that legitimates the existence of the U.S. state, while demarcating certain spaces for the Other.

attitudes understood Native Americans as the benefactors of settler state benevolence and protection. However, in considering this enactment of law through a critical legal perspective, the reservation system can alternatively be understood as a policy of separation and containment aimed to “isolate, disempower, and oppress” (Ford 2001b, 87). Not only is the reservation a racially segregated space, but by codifying the construction of the reservation through law, the reservation becomes reified as a natural, pre-given political organization (Blomley 1994; Kedar 2001). Rather than minimize conflict and “protect” Native American’s from white settlers, the reservation system legalizes, and thereby legitimates, the spatial dispossession and exploitation of Native American lands and resources (Williams 1990; Comaroff 2001; Harris 2004).

The legalization of spatial segregation through the reservation system remade and codified a particular notion of Indian Country. By relegating Native Americans onto delimited and bounded territories, the U.S. government was able to “develop a coherent national Indian policy for the first time since the United States had achieved independence” (Deloria, Jr. and Lytle 1983, 65). Such a cohesive Indian policy further influenced the sphere of law. The Supreme Court drew on these prevailing discourses in determining their rulings on cases concerning federal-Indian relations. Through a series of three landmark cases, Supreme Court Justice, John Marshall, established the foundational principles of federal Indian law that prevail today.<sup>3</sup> Though each case was significant in its own way, *Cherokee Nation v. Georgia* (1831) was a particularly salient instantiation of case law that codified a unique relationship between the

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<sup>3</sup> The three cases were *Johnson v. M’Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832). *M’Intosh* ruled that Native Americans did not own land outright, but merely occupied land at the discretion of the U.S. government. *Worcester* reinforced earlier court rulings that found that tribal nations possessed inherent sovereignty, but that affairs within Indian Country were the authority of the federal government, not the states in which the reservation resided (Getches et al. 2011).

United States and tribal nations. In ruling on the constitutionality of Georgia's imposition of state laws onto the Cherokee Nation, the court declined to rule on the basis that the Supreme Court did not have jurisdiction in the matter. The abstention was premised on the reasoning that the Cherokee Nation did not have standing because it could not rightly be considered a foreign nation. In declining to rule, the Supreme Court weakened tribal claims of sovereignty by subordinating tribal nations under the sovereignty of the United States. The Supreme Court found that the Cherokee Nation was to be considered a "domestic dependent nation" (Hart and Lowther 2008). This ruling established the enduring trustee relationship that characterizes tribal nations as wards and the U.S. federal government as guardian.

The foundational and prevailing doctrines of federal Indian law were born out of paternalistic and patriarchal discourses. Such discourses produced a particular Native subjectivity, portraying Native Americans as vulnerable (or threatening)<sup>4</sup>, backwards, and in need of U.S. intervention. Ironically, the federal response to the perceived "vulnerability" of Native Americans made them, in fact, more vulnerable. Rather than "protecting" Native American people and lifeways, federal Indian policy and law exploited the trope of the "Indian as vulnerable" in order to justify a law that was inherently racist, dehumanizing, and dispossessing. The laws of this era structurally subordinated Native American bodies and polities and established the precedent of plenary power. In doing so, Native Americans are continually exposed to the overriding power of the United States—a power that has little intention of allowing the expansion of a competing sovereign, and is arguably incapable of protecting a collective way of life particular to indigenous people.

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<sup>4</sup> There is an interesting interplay between one who is vulnerable and one who is a threat. Often those who are threatening are framed as vulnerable in order to rationalize acts of violence over the threatening population.

The prevailing popular sentiment towards Native Americans, reinforced by the dicta of the federal courts, engendered a landscape of settler aggression. While the law produced its own set of violences (legalizing dispossession and segregation), gender-based violence was frequently enacted by private individuals, reinforcing the effects of the law—subordinating Native American people and communities and forcibly dispossessing them from their lands. Rape has been cited by many scholars as a primary tool of colonization (Deer 2005; Smith 2005; Weaver 2009; Morgensen 2012). Under President Jefferson, the dilution of Indian blood seemed a surefire strategy for eliminating Native American existence altogether, and thereby eliminating their competing claims over the land (Dennison 2012). “Interbreeding” or rape, was a primary means of dissolution. Native women were frequently perceived as hyper-sexualized beings and/or as deviant. Such representations devalued and dehumanized Native women, rendering them violable, or as Smith (2005, 10) argues, “rapable.” Smith describes the power of discourse in making Native women vulnerable to sexual violence. She argues, “the rape of bodies that are considered inherently impure or dirty, *simply does not count*” as a crime (10, emphasis added). Such language echoes that of Agamben’s (1998) description of homo sacer as “bare life,” or a life that can be killed with impunity. Such discourses of Native American women as rapable make them disposable to a perpetrator who views the assault as inconsequential. The prevailing removal era discourses of conquest, seizure, and possession most explicitly associated with the colonial project of territorial expansion, permeated the broader mentality so that everything, including women’s bodies, was penetrable, subjugated and objectified.

Rather than Indian Country referring to an expanse of unsettled territory, federal Indian law inscribed particular spaces of the American landscape as “properly Indian,” displacing race onto space (Olund 2002). The various removal policies of the era served as primary modes

through which colonization and racial segregation was produced, enabling a very particular spatial codification of Indian Country (Delaney, Ford, and Blomley 2001; Ford 2001b; Blomley 2008). Indian Country was categorized and diminished through law. As if legal dispossession from one's ancestral lands was not inherently violent enough, Native American women also became a primary target for negotiating settler domination during this time.

#### *Allotment and Patriarchal Conversions*

As expansion reached its geographical limits and settlers extended as west as California, the earlier policies of containment and isolation became no longer viable. Roughly during the period from 1887-1928, the United States government shifted ideologies from one of protection-by-separation to one of civilizing assimilation. Through various tactics, including the dissolution of communal land holdings and the cultural indoctrination through the boarding school system, the U.S. government sought the incorporation of Native land, culture, and politics into the American polity (Olund 2002).

The racialized colonial discourses that operated during the removal era were re-spatialized during the assimilation era and took on a notably gender-normalizing quality as well. Under the General Allotment (Dawes) Act of 1887, Congress legislated extensive surveying of tribal lands, which enabled the allotment of communally held tribal lands into distributable individual plots (Deloria, Jr. and Lytle 1983; Dennison 2012; Helgesen 2012). It was thought that if Native Americans held private property they would be forced to learn Western ideals of business, land management, and agricultural practices. The forced allotment of tribal lands into private property would propagate Native American integration into mainstream society and force Native Americans to “move beyond the problems supposedly created by tribal structure and [to] adopt ‘civilization’” (Dennison 2012, 22). The Dawes Act is also frequently associated with

asserting heteronormative and patriarchic conceptions surrounding ideas of individuality, family, and kinship. The allotment of land into individualized plots advances the settler state framework by conferring privatization and nuclear modes of kinship as “natural conditions of human intimacy, reproduction, and resource distribution” (Rifkin 2011, 25). Subordinating tribal kinship structures to more patriarchic systems had profound implications on the role and value of Native women within their families and communities. The imposition of privatized land holdings made the household or family the primary social unit, effectively displacing the centrality of tribal communalism. Additionally, men were re-positioned as the head of the household, which disrupted the matrilocality of many Native communities. Such changes diminished the importance of women and their role in sustaining the community (Weaver 2009). The patriarchic conversions naturalized ideas of hierarchy, dominance, and power and control (Smith 2005). This effect of subordination operated on the scale of women’s individual lives and more broadly on tribal communities, as they were deemed subservient to men and the United States, respectively.

The Allotment Act was not only aimed at cultural assimilation, but the Act also legalized federal land grabbing. Any former tribal land that was deemed in excess of the individual allotments was subject to purchase by the U.S. government. Under the General Allotment Act, Indian Country was reduced from two billion acres to a mere 150 million acres (Dennison 2012). The Allotment Act codified a discursive dispossession of Native conceptions of community and the material dispossession of land by forced removal from previously held territories.

The allotment policy also operated as a technique of fragmentation (Mitchell 2002; Delaney 2010). Indian Country was even further diminished into racialized and individualized parcels of land than was experienced under the reservation system. Once fragmented and

dispossessed, Native Americans were made increasingly governable, manageable, and controllable by the Bureau of Indian Affairs (Li 2007; Delaney 2010). This re-spatialization enabled the inauguration of the boarding school system, which served as a primary tactic through which the U.S. government systematized its civilizing project (Lomawaima, Child, and Archuleta 2000). In 1879, the first off-reservation boarding school was founded which began the long history of forcibly removing children from their homes to bring them under the civilization of the white settler. The founder of these schools, Richard Pratt argued, “Transfer the savage born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit” (Adams 1995, 36). Not only did the boarding school system seek to systemically eradicate Native American culture, but Smith (2005) argues that it was also a highly gender-normalizing project. Young boys were trained as field hands, performed military drills and dressed in military-style regalia, while girls were trained extensively for domestic labor. Domestic training was “training in dispossession under the guise of domesticity, developing a habitus shaped by the messages of subservience and one’s proper place” (Lomawaima 1994, 37). Coupled by the extant evidence of sexual abuse that occurred in this setting, these efforts toward domestication<sup>5</sup> served to both reduce women’s roles within Native communities as argued by Smith (2005), but also, operated on a broader scale to produce a gendered and patriarchic hierarchy that positions U.S. ideas of civilization as superior to Native lifeways.

Similar to the Dawes Act, the Indian Reorganization Act (1934) is often cited for imposing Eurowestern lifeways onto Native American governing structures. After much of the disparaging effects of the allotment era had materialized, reservations remained a stalwart

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<sup>5</sup> I use this word for it is capable of attenuating to both the explicit task of producing domestic laborers, but also implies a certain animalism, an equivocation of Native Americans as infra-human.

organization of Native American existence. As such, the federal government identified the reservation as the primary site to continue its administration of Indian life. To this end, the Indian Reorganization Act (IRA) sought to revitalize indigenous capacities of self-governance in order to minimize tribal reliance on the United States, while ensuring an acceptable standard of living for Native American people (Getches et al. 2011). Whether it was intentional or an unforeseen consequence, the IRA is criticized for imposing Western constitutions onto tribes that were underwritten by masculinist and heteronormative ideals (Gurrereo 1997). Like the Dawes Act, many have argued that indigenous appropriations of Eurocentric sovereign arrangements under the IRA subordinated women and expelled them from traditional roles as mothers of the nation (Gurrereo 1997; Denetdale 2008; Rifkin 2011; Sunseri 2011). If such assertions are correct, then the imposition of Western lifeways onto tribes can be understood to unequally and deleteriously affect women. Displacing women from their respected roles within the community assumes its own violence. But compounding this violence, is the way that such dismantling devalues women more broadly, and thereby, exposes them to violence without political consciousness. Such insights contribute to broader understandings of the nature of the relationship between sovereignty and gender-based violence.

#### *Enrollment, Membership, and Sanctioned Gender Violence*

Under the directive of the Indian Reorganization Act, tribes began drafting their own national constitutions. In organizing themselves as separate, distinct sovereign nations, tribal communities had to determine which bodies were to be included within the tribal nation. While the delineation of the terms of citizenship is a distinct and prized right of sovereign nations, the question of tribal enrollment has historically imposed its own set of violences onto Native women. The most egregious demonstration of this is the Osage Indian murders of the early

1920's. During this period, the ensuing gender violence against Osage was largely the result of a legal arrangement that was underpinned by concerns over tribal membership.

During the period of allotment, the Osage Tribal Council negotiated an alternative allotment schedule with the federal government. The above surface lands were distributed amongst a limited number of people who were considered members of the Osage Nation as of 1906 (Dennison 2012).<sup>6</sup> This list established the membership roll, which played a central role in promulgating the violence against Osage women. The subsurface land, meanwhile, remained as a communal land holding held under the trust of the federal government. The subsurface land was a highly valuable resource for the Nation. In 1897, oil was discovered under the reservation, which led to the establishment of the Mineral Estate. The Estate coordinated the exploration and production of oil and was responsible for distributing royalties to those on the 1906 membership roll. The allotment of royalties based on the membership roll were called headrights.

The market for oil boomed in the early twenties, quickly making many of the Nation's members extremely wealthy. Outsiders began flocking to the region to capitalize on the Osage peoples' wealth. At the time, headrights could be inherited by whomever was nearest kin, regardless of status as Indian or non-Indian. As consequence of this legal arrangement, inter-racial marrying became a primary strategy for white opportunists seeking to secure personal wealth and resources. Much in the same way that rape was a tactic of colonization in the early nineteenth century, inter-racial marrying was the latest strategy in dispossessing Native people from what was rightly theirs. For some Osgae, their interlopers could not wait for a deceived partner to pass; between 1921-1925 over sixty Osage were murdered for the inheritance of their

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<sup>6</sup> This analysis relies upon the ethnography, *Colonial Entanglements* by Jean Dennison for multiple reasons. First, she is one of the few non-legal scholars to critically assess the history of the Osage Nation. Second, as a member of the Osage Nation herself, Dennison's account incorporates an indigenous knowledge alongside her anthropological training.

headright. A majority of these victims were women (McAuliffe Jr. 1994). Though the headright system didn't outwardly sanction the ensuing violence against women, the legal arrangement provided an opening for deceit, debauchery and violence—in which gender played a central role. The resultant gender-based violence was racially motivated and unevenly affected women who were targets of disingenuous marriages.

Though gender violence against the Osage occurred in the early twentieth century, tribes contemporaneously grapple with questions of enrollment as they negotiate tribal sovereignty. The case of *Martinez v. Santa Clara Pueblo*, brought to the Supreme Court in 1977, is a more recent example of the intersections between enrollment and gender violence. The petitioner, Martinez, and her child were denied membership from the tribe—despite Martinez' full-blood status—because she had married someone outside of the tribe (Curry 2001). Under tribal law, tribal membership is determined along patrilineal lines. If a woman marries outside of the tribe, she and her children are excluded from tribal membership. Male tribal members (and their children), on the other hand, who marry outside of the tribe, maintain their tribal membership. Martinez filed suit against the tribe arguing that the tribe denied her and her daughter tribal membership on the basis of gender discrimination. The plaintiff argued that the tribe had violated the Indian Civil Rights Act of 1968 by refusing equal protection under tribal law. Despite a history of federal intervention in tribal affairs, the federal court declined to hear the case on its merits, arguing that it did not have standing to rule on the validity of a tribe's membership ordinances. In this example, tribal sovereignty is a matter of political expediency, where the tribe's membership ordinance is politically advantageous by providing a certain legibility before the settler state than a more just alternative.

The case is revealing when examined from a critical feminist perspective. Swentzell (2004) argues that the Court's abstention was an important recognition of tribal sovereignty; however, the case may not be as benign. Many have argued that the Court's abstention illuminates the limited usability of law in cases (involving bodies) that fall outside the dominant, white norm (MacKinnon 1987; Curry 2001). Put another way, the law is incapable (unwilling) of securing rights for those who fall outside the normative parameters of the dominant culture, namely women and people of color (Smith 2012). In refusing to intervene, the federal government affirms the tribe's racist and gendered ordinances of membership and upholds a patriarchic construction that is redolent of the colonial project (Curry 2001).<sup>7</sup> While this is not an example of corporeal violence, per se, it nonetheless underscores the violence of the law as it narrowly constructs Native identity. Such identities, predicated on difference (race and gender), are incorporated within the law to produce embodied exclusions that leave many abandoned of foundational legal protections (Mitchell 2006). Such laws structurally victimize Native women.

From the early encounters between settlers and Native Americans to the contemporary questions of membership and enrollment, Indian Country has been fashioned as a highly racialized and gendered spatialization of colonial power. Federal-Indian law and policy has imposed an array of its own violences, refiguring Native women's subjectivities and supplanting Native lifeways to the power of the United States. Federal Indian law has rearticulated racialized discourses about what it means to be "Indian" and, in doing so, has discursively delimited the proper spaces of indigeneity. Such structural violence however, has been exacerbated by individuals who have taken it upon themselves to enact their own violence onto Native women,

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<sup>7</sup> The racist and gendered properties of contemporary, legal tribal membership are more a reflection of the legal structures that the tribe has adopted and are not necessarily characteristic of tribal life prior to Western imposition.

and, in effect, their tribal communities more broadly. The instances of targeted, corporeal violence have largely been sanctioned or ignored, even implicitly encouraged, by the law. As such, Indian Country continues to exist today, as it has in the past—as a spatio-legal construction in which racialized and gendered violence against Native women is made tolerable under U.S. efforts to establish its legitimacy.

### **III. Jurisdictional entanglements and compounded vulnerability**

Under a Western legal system, criminal prosecution is viewed as one of the most efficacious ways to remedy a wrongdoing—where justice is served when the perpetrator of a violent sexual crime is tried and prosecuted. However, tribal authority over criminal jurisdiction is profoundly complicated by the spatio-legal configuration that distinguishes Indian Country. Federal-Indian relations have been marked by an arduous contestation over the question of criminal jurisdiction. Which government—federal or tribal—has the right or authority to prosecute crime? Though the law is normatively associated with the liberal principle of equality, criminal law in Indian Country is a highly racialized subject. Not only is prosecutorial authority based on where the crime occurs, but criminal jurisdiction also depends upon the race of the involved parties. The many variables that determine and delimit criminal jurisdiction produce a jurisdictional entanglement between the U.S. and tribal courts. Many have argued that such entanglements make the successful prosecution of sexual offenders in Indian Country often untenable and vacuous (Deer 2004; Amnesty International 2007; Dennison 2012). Criminal prosecution is certainly not the only remedy to respond to gender-based violence; however, for the purposes of this discussion, it is examined as one potential remedy available to tribal communities to respond to the violence perpetrated against Native women. The limitations on tribal criminal jurisdiction are illuminated in looking at the historical contestation over

prosecutorial authority in Indian Country between tribes and the federal government. Historically, federal dicta has placed such severe limitations on tribal jurisdiction that the threat of prosecution has been largely denuded of its deterrent effect. As a consequence, the produced jurisdictional entanglement and the absence of a robust threat of prosecution compounds the vulnerability of Native women.

### *Criminal Jurisdiction in Indian Country*

Criminal jurisdiction is a central component of the modern legal system, and thereby, of modern state sovereignty. In theory, a legitimate sovereign is capable of protecting its citizens from external or internal perpetrators (Deer 2004). Ensuring the deterrent effect of law is one outlet for protecting the population. If this analysis is extended to consider the performative aspect of sovereign authenticity then the assertion over the right of criminal jurisdiction can be understood as a key expression of sovereign authority (Butler 2004; Rifkin 2009). The withholding of such a right by the federal government serves then as a tactic for retaining the United States' position as ultimate geopolitical authority. In what follows is an exploration of the limitations placed on tribal criminal jurisdiction by the federal government. In mapping this legal history of the right to prosecute violent offenders in Indian Country, criminal jurisdiction is illuminated as (a) a mode for maintaining U.S. legal superiority and (b) a limited option for tribal governments to respond to violence against Native women.

From the beginnings of federal Indian law, Congress was reluctant to relinquish criminal jurisdiction to tribal authorities within Indian Country. The 1834 Trade and Intercourse Act extends limited federal criminal jurisdiction over Indian Country; however, this extension is framed not as a matter of congressional right, but rather as a necessary service provided to tribal governments by the U.S. federal government (Deloria, Jr. and Lytle 1983). In the Report of the

Committee of Indian Affairs of the House of Representatives, which was issued alongside the authorization of the 1834 Act, Congress expressed the following:

It will be seen that we [U.S. Congress] cannot, consistently with the provisions of some of our treaties, and of the territorial act [Trade and Intercourse Act of 1834], extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather *of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens.* And this provision is retained principally on the ground that it may be *unsafe to trust to Indian law in the early stages of their government* (as quoted in Deloria, Jr. and Lytle 1983, 66; emphasis added).

Despite a legal recognition of inherent sovereignty—as conferred in *Cherokee Nation v. Georgia*, Congress asserts that Native governments are so infantile that they are incapable of properly trying non-Indians. It is debatable whether Congress thought tribal governments would ever be capable of “proper” criminal prosecution; regardless, this dictate performs a number of functions. First, it confers an implicit modernist conception of development as a matter of temporal progression only realizable through aggressive civilizing campaigns. Second, framing the capacity of prosecution in this way values non-Indian bodies over Indian bodies. Through the paradigm of citizenship, the non-Indian is afforded legal rights under the federal government by way of his designation as inside the national imaginary. Indian bodies on the other hand are an aberrant figure whose citizenship is tied to their affiliated tribe, but is also nested within the United States’ jurisdiction. As result of this inclusive-exclusion, the Native American is cast as unworthy of equal justice under the law, be it federal or tribal. A final consideration imbricated with the previous caveat is that the federal government has asserted itself as the preferred and superior arbitrator of crime committed by non-Indians.

The Major Crimes Act of 1885 served as a landmark Act that profoundly denuded tribal jurisdiction and concomitantly codified U.S. sovereign superiority. As response to the controversial outcome in *Ex Parte Crow Dog*, the Major Crimes Act (MCA) was legislated to

grant federal criminal jurisdiction over major crimes committed in Indian Country regardless of the involved parties' race (Hart and Lowther 2008). *Ex Parte Crow Dog* involved the trial of a member of the Brule Sioux tribe who murdered another member of the same tribe on the Brule Sioux reservation. The ruling held that federal jurisdiction could not be applied in instances of intra-tribal conflicts. Unsatisfied with this ruling, a number of influential settlers petitioned the Department of Justice to overturn this ruling. Asserting that reservations were lawless spaces, the Department of Justice and U.S. Congress sought to "impose law on tribes" under the guise of trusteeship (Deloria, Jr. and Lytle 1983; Hart and Lowther 2008, 202; Helgesen 2011). The result was the establishment of the Major Crimes Act, which granted federal jurisdiction over certain crimes committed on tribal reservations. The enumerated crimes under the Major Crimes Act include murder, manslaughter, *rape*, arson, burglary, larceny, and assault with the intent to commit murder. The MCA granted the federal government the sole right of criminal prosecution in Indian Country, regardless of status as Indian or non-Indian. The following year, the case of *U.S. v. Kagama* (1886) reaffirmed the constitutionality of the Major Crimes Act. The court ruled that it was constitutional for the federal Supreme Court to try a case in which both the defendant and the plaintiff were Native American. The ruling performed two important tasks. First, it secured the federal government's right over criminal jurisdiction, regardless of race or place, as established under the Major Crimes Act (1885). Second, in doing so, the ruling reaffirmed the right of "plenary power," asserting that the federal government retains the authority to act on behalf of Native American people and to intervene in tribal affairs (*United States v. Kagama* 1886). Such a ruling severely denuded tribal autonomy. The Major Crimes Act and *Kagama* centralized federal power over non-Indian prosecution. Retaining the sentiments of the 1834

Trade and Intercourse Act, non-Indian offenders remained outside the jurisdictional scope of tribal courts.

The Major Crimes Act of 1885 set a precedent that remained largely unchallenged for almost a century. That changed in 1978, when the Supreme Court ruled in *U.S. v. Wheeler* that tribes held *concurrent jurisdiction* with federal courts to prosecute crimes enumerated under the MCA (Helgesen 2011). Effectively, this meant that tribal courts could now prosecute Indian offenders of major crimes committed on Indian Country. While this case extended tribal criminal jurisdiction, the Act once again unfavorably figured Native American offenders. Under *Wheeler*, the Double Jeopardy Clause was deemed un-violated for Indian perpetrators,<sup>8</sup> meaning Native American offenders who commit crimes in Indian Country could be tried by *both* federal and tribal courts. Though the Act significantly altered criminal jurisdiction for Indian offenders, the case did not abrogate the federal government's exclusive right over non-Indian criminal prosecution. While *Wheeler* served as a partial repeal of the MCA (by granting tribes criminal jurisdiction over Indians), in the same year, the Supreme Court reaffirmed the federal government's right as sole prosecutor over non-Indians. In *Oliphant v. Squamish Indian Tribe* (1978), the U.S. Supreme Court ruled that tribes do not have inherent jurisdiction over non-Indian defendants as originally detailed under the MCA (Hegelsen 2011). Justice Rehnquist, speaking for the court, argued that tribes are to continue to be thought of as domestic dependent nations under federal jurisdiction and are therefore, to remain subject to federal criminal jurisdiction (*Oliphant v. Squamish Indian Tribe* 1978). Additionally, the court subordinated tribal authority insisting their right to criminal prosecution is subservient to the "overriding sovereignty of the United States of America" (*Oliphant v. Squamish* 1978, 210). These cases ultimately

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<sup>8</sup> This finding was reaffirmed in *U.S. v. Lara* in 2004.

affirmed that tribes do not retain criminal jurisdiction over offenders who are not formally Indian. Despite the supposed fiduciary responsibility codified by federal Indian law, federal prosecution of non-Indians who have committed a major crime on tribal reservations has historically proven extremely low (Hart and Lowther 2008). In the case of sexual assault crimes committed by non-Indians against Native Americans on tribal reservations, upwards of 65% of cases go untried (Williams 2012).

These court cases evidence the way the United States utilizes the law as a technique for sustaining juridical superiority. If in fact the right to prosecute crime is a demonstration of sovereign legitimacy, the U.S. has denuded tribal authority by restricting and controlling criminal jurisdiction in Indian Country. In doing so, the federal-Indian legal precedent has had profound consequences in circumscribing the capacities of tribal courts to respond to crime in Indian Country. If as many as 85% of criminal sex offences in Indian Country are committed by white, non-Indian men, and the federal government has been loathe to prosecute those offenders despite their sole prosecutorial authority, then the threat of criminal prosecution as a legitimate deterrence of crime becomes a vacuous threat. The legal precedent restricts tribes in their ability to fill this legal-accountability gap. Federal Indian law has created a severe jurisdictional problem that renders tribes obsolete in their ability to hold criminal offenders accountable. As such, tribes cannot meaningfully engage the legal system as an avenue for addressing gender violence in Indian Country.

Underlying these legal cases is the Indian Civil Rights Act. Legislated in 1968, the Indian Civil Rights Act (ICRA) extended a number of civil rights—as outlined in the U.S. Constitution—to American Indians. Though tribes retained the right to criminally prosecute Indian offenders (as legislated by *Wheeler*), the ICRA imposed a number of conditional

provisions that regulate the way tribes can execute criminal trials. Specifically, the ICRA requires that tribes exercising their “powers of self-government” extend civil-legal protections to those being tried under the tribal court system (Indian Civil Rights Act 1968, sec. 1302; Deloria, Jr. and Lytle 1983). For many, the ICRA seemingly promoted and enabled increased self-governance and arbitration by legitimizing tribal courts. However, it may alternatively be understood as concretizing a hierarchical juridical structure that grants “primacy to federal law over tribal law in Indian Country” (Helgesen 2011, 5).

Section 1303 of the bill contains the right to habeas corpus: “The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe” (Indian Civil Rights Act 1968). Such a provision undermines the efficacy of tribal courts by offering defendants an appeal to a supposedly higher or more legitimate court—the U.S. Supreme Court. Additionally, the ICRA severely limits the sentencing provisions of tribal courts. This can be read as a tactic for retaining U.S. judicial superiority. Tribal courts could not sentence prison terms that exceeded one year or fines that exceeded \$5,000 (Deer 2004; Helgesen 2011; Hermes 2013). Crimes considered felonies by federal standards could only be punished as misdemeanors by tribal courts (Helgesen 2011). For example, according to the 2011 Federal Sentencing Guidelines, sexual abuse, which can be tried under federal criminal court, is granted a base sentence of thirty-eight years in prison. Domestic violence has a base sentencing standard of eighteen years. Under the ICRA, tribal criminal courts could not impose a sentencing term to exceed one year for either of these crimes. Such legislation reinscribes the U.S. as the ultimate sovereign, as the most capable body of adjudicating justice, while simultaneously rendering Indian space juridically impoverished.

In 2010, the Tribal Law and Order Act (TLOA) amended the Indian Civil Rights Act by expanding the punitive capacities of tribal courts. Among many objectives, the Act contained a considerable number of provisions designed specifically to address gender-violence in Indian Country, including the following: providing an increase in the aggregate number of law enforcement improving coordinated service responses, standardizing practices for collecting sexual assault evidence, increasing domestic violence and sexual assault training for law enforcement, and developing prosecutorial accountability documentation procedures (Helgesen 2011; Gillette and Galbraith, The White House, posted March 7, 2013; Hermes 2013). Additionally, the previous sentencing limitations as outlined under the ICRA were expanded from one year to a maximum of three years of confinement and fines from \$5,000 to a maximum of \$15,000. Although the TLOA extended the prosecutorial limitations, like the ICRA and *Oliphant*, the laws discursively diminish tribal justice systems by narrowing conceptions about who is rightly a subject under tribal law and by framing tribal governments as only capable of trying lesser offenses.

Through the MCA, *Wheeler*, and *Oliphant* the right to prosecute has served as a leveraging device used by the federal government to reaffirm its position as ultimate juridical sovereign. Within these legal debates, colonial discourses permeate the rhetoric of the Supreme Court. Legislated by the Major Crimes Act of 1885 and reaffirmed by *Oliphant*, sexual offenses, including rape, perpetrated by non-Indians on tribal lands has remained the sole prosecutorial right of the federal government. By asserting that Native Americans cannot rightly prosecute their people, the United States invokes its sovereign authority by delimiting Native American polities as exceptional, as outside or unable to live under the law (Rifkin 2009). Agamben (1998) asserts that the declaration of the exception is foundational to the emergence of the modern

sovereign. If we accept this tenet, the United States is able to place indigenous peoples within the settler framework of sovereignty and structurally subordinate Native polities under U.S.

jurisdiction by discursively and materially limiting Native American governments the rights over criminal jurisdiction. In this way Native American life is excluded and simultaneously captured within the political order of American sovereignty. Not only is this precedent detrimental for Native Americans' broader efforts toward sovereignty, but it also has significant implications on the way tribes attempt to protect women from violence. Namely, the law is seen as an ineffectual system for deterring crime and securing justice.

Federal Indian law has made Indian Country an exceptional space where the law does not operate effectively or evenly. In doing so, the vulnerabilities produced by way of Indian Country existing as a racialized and gendered spatio-legal construction are exacerbated. The violence that occurs within this space is manifold. The configuration of Indian Country as an aberrant, or exceptional legal space produces an environ in which Native women are hyper exposed to the violence of non-Indian men. Because the law has failed to hold non-Indian perpetrators accountable, this spatio-legal configuration increases the likelihood of corporeal violence against women. And as if the effects of being raped, beaten, sodomized, molested, stalked, and harassed aren't harmful enough, the structural conditions that underwrite this problem wields another violence onto these victims, as victims have no practical recourse to justice. The law's incapacity to effectively try violent perpetrators serves to figure these women as unvalued and disposable—as infra-human. These enactments of violence compliment one another and grants law a force all of its own; a force that even if it were reworked to ameliorate this problem, has been legally placed beyond of the reach of tribal governments.

#### **IV. VAWA as a jurisdictional fix: Untangling the entanglement**

The Violence Against Women Reauthorization Act of 2013 provides a legalistic fix to the jurisdictional problem in Indian Country by extending tribal jurisdiction over non-Indians who commit domestic violence crimes in Indian Country. Such legislation profoundly interrupts a long precedent of federal-Indian criminal jurisdiction. On April 26, 2012, the Senate proposed a bill to Congress that would reauthorize the Violence Against Women Act (VAWA) for the third time since its inception in 1994. Recognizing the unique vulnerabilities of Native women, the proposed bill included specific provisions intended to improve protections for American Indian and Native Alaskan women (Crossband, Palmer, and Brooks 2013). Under Title IX-Safety for Native Women, the bill, S. 1925, recognized the inherent authority of tribes to prosecute certain domestic violence crimes (Gede 2012). Section 904 would grant concurrent jurisdiction to federal and tribal courts to prosecute *non-Indian* perpetrators. This proposition is significant in that it would partially overturn the precedent legislating the federal government's supremacy over the right to prosecute non-Indian criminal offenders.

The proposed jurisdictional extension was a contentious issue within Congress. The debate surrounding the bill's reauthorization highlights contemporary invocations of colonial discourses that permeate within and emanate from U.S. law. In tracing the legislative debate, many racialized and gendered discourses that prevailed during the period of settler expansion were rearticulated within Congress. Those within the Senate and the House of Representatives who rejected the S. 1925 bill often cited the inclusion of Section 904 as particularly concerning. Opponents argued that tribal courts lacked the necessary experience in providing statutory rights guaranteed to criminal defendants (despite the inclusion of extensive provisions within the bill aimed at avoiding this very hazard) (Gede 2012; U.S. Senate 2012, S1925). The rhetoric

employed to derail the jurisdictional extension is very similar to the language used by federal courts nearly 180 years ago under the 1834 Trade and Intercourse Act. Both then and now, opponents asserted that entrusting the prosecution of non-Indians to tribal governments was problematic because of their verdant governance structures and subsequent inability to “properly” try cases.

During the same period, the House of Representatives also drafted a watered down version of the Senate’s proposed bill. H.R. 4970 did not include any extension of tribal jurisdiction over non-Indians (Larkin, Jr. and Luppino-Esposito 2012; Petillo 2013). The House bill was met with broad criticism from public and private sectors and died within Congress. As the result of house disagreements, the Senate and the House of Representative failed to bring a bill before Congress before the close of the 112<sup>th</sup> congressional year, leaving the future of VAWA precariously unknown. After months of legislative dithering, Congress finally authorized the Violence Against Women Reauthorization Act of 2013.<sup>9</sup> On March 7<sup>th</sup>, 2013, President Obama signed the bill into effect, which included the jurisdictional extension largely unaltered from the original Senate draft. The bill was popularly conceived of as an important remedy to the problems associated with the “jurisdictional gap” (NCAI, posted on December 14, 2012). As such, the extension ostensibly begins untangling the jurisdictional entanglement that marks criminal law in Indian Country as dysfunctional. In doing so, the extension under VAWA supposedly improves tribal capacities to legally confront gender-based violence and, in effect, promises to minimize the prevalence of violence against women in Indian Country.

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<sup>9</sup> The Act is also known as S. 47, H.R. 11, or Pub. L. 113-4.

### *Pilot Project*

Though the Violence Against Women Reauthorization Act of 2013 was signed into force on March 7, 2013, the special provisions enabling tribal jurisdiction over non-Indians does not enter into full effect until March 2015. In the meantime, the U.S. Department of Justice (DOJ) has developed a voluntary pilot project for tribes interested in implementing special domestic violence criminal jurisdiction (SDVCJ)<sup>10</sup> earlier than the universal start date. The pilot project is comprised of two phases. Phase One occurred during the summer and fall of 2013 and consisted of developing a number of assessments and resources for tribes implementing SDVCJ. During this phase, thirty-nine tribes expressed preliminary interest in the pilot project. Each tribe that chose to participate in Phase One elected a representative to the Intertribal Technical-Assistance Working Group (ITWG). Representatives came from a number of sectors and included tribal leaders, tribal judges and attorneys, victim service providers, and law enforcement. The ITWG, in consultation with the Department of Justice and the Department of the Interior, enabled peer-to-peer intertribal exchange of ideas and experiences and granted tribes access to a number of technical assistance opportunities. Phase Two is the implementation phase of the pilot project. According to the final notice and solicitation for applicants released by the DOJ, the pilot project is distinct from other federally implemented projects, in that its aim is not to determine the efficacy of SDVCJ, but rather to provide sufficient support to tribes implementing SDVCJ and to determine “best practices” for those tribes who may elect to implement SDVCJ after March 2015 (Federal Register).

To participate in the pilot project tribes may apply through the DOJ for approval by the U.S. Attorney General. However, the provisions detailing consideration for tribal participation in

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<sup>10</sup> This is the specific language used in the legislation.

the pilot project reinforce the same juridical restrictions placed on tribal courts as before VAWA was legislated. Specifically, VAWA 2013 requires that tribal courts are able to provide defendants with the civil rights protections as outlined in the 1968 Indian Civil Rights Act and the 2010 Tribal Law and Order Act. The Application Questionnaire is comprised of a short number of questions, the majority of which pertain to tribes' ability to provide *all* defendants—regardless of status—the same rights as afforded under the federal justice system. The application requires tribes to provide sufficient evidence in the form of constitutional documents, legal procedure, or written accounts of customary practices, to demonstrate that their tribal procedures include adequate provisions to safeguard defendants' rights. Though the application is comprised of a limited number of questions, the documentation required for verification is quite cumbersome. Of the thirty-nine tribes who initially showed interest in the pilot project, only six have applied for “accelerated jurisdiction”<sup>11</sup> under Phase Two of the pilot project. While it is unclear why so few have applied to the pilot program, likely factors motivating tribes to apply include improving tribal capacities to respond to domestic and sexual violence that occurs in Indian Country, strengthening tribal legal systems, and legitimizing efforts toward self-governance.<sup>12</sup> Tribes that have applied include the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, the Penobscot Indian Nation, the Tulalip Tribes of Washington, and the Ute Indian Tribe of the Uintah and Ouray Reservation (VAWA 2013 pilot project).

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<sup>11</sup> “Accelerated jurisdiction” is the phase used by the U.S. Department of Justice to refer to the implementation of SDVCJ by tribes prior to the universal start date in March 2014.

<sup>12</sup> A number of possible reasons for *not* applying include: the application is burdensome, the necessary provisions are not in place, the implementation is too costly for tribes, tribes are waiting for the universal start date to avoid the heightened federal oversight within the pilot program, tribes are simply uninterested in SDVCJ for some other reason.

As of February 6, 2014, three tribes have successfully been granted accelerated jurisdiction: the Confederated Tribes of the Umatilla Indian Reservation (in Oregon), the Pascua Yaqui Tribe of Arizona, and the Tulalip Tribes of Washington. It is unclear why these three tribes were granted accelerated jurisdiction, while the others were not. The Department of Justice's website on the pilot project has now removed the ungranted applicants all together. While the federal government has given no clear indication about the status of the other tribes, some conjecture can be made about granteeship and legibility before the state. Popular media, espoused from both tribal advocates and federal agents, suggests a discursive association between prosecutorial authority and tribal sovereignty (Crane-Murdoch 2013; ICTMN Staff 2013; King and Clark 2013). The bestowment of accelerated jurisdiction depends upon a tribes' legibility as a sovereign—where tribal sovereignty is measured as a function of tribal bureaucracy. The letters granting accelerated jurisdiction cite robust tribal criminal justice systems as the primary reason for granting participation in the pilot program.

It cannot be immaterial that the three tribes granted accelerated jurisdiction all operate casinos. Though having a casino does not necessarily equate to increased cash flow, and thereby, improved funding for developing tribal justice systems, we may consider the normative associations between casinos, the adoption of capitalist economic structures, and the flex of tribal sovereign power. Conformity to the settler state's economic and legal governance structures provides a certain legibility before the settler state, which bolsters tribes' assertions of tribal sovereignty. Of interest in this example is the self-promulgating appropriation of the settler state systems. A widely cited report by Evans and Topoleski (2002) indicates that there is a strong correlation between the opening of casinos and an increase in violent crime on reservations. The economic conformity seen in the proliferation of the tribal gaming industry increases tribal

communities' exposure to violence. Such exposure normatively begs for increased criminalization and the expansion of a particular legal system. The indistinction between economic and legal governance systems, and the subsequent federal recognition of tribal sovereignty suggests conformity (a means of making legible) as one means of gaining and asserting some measure of political power. The three tribes granted accelerated jurisdiction are all presently able to try non-Indian offenders who commit special domestic violence crimes on their reservations. However, this newfound endowment of political power is nonetheless always qualified and always subject to the changing whim of the United States.

#### **V. The limits of VAWA as a liberal fix**

The extension of tribal criminal jurisdiction as outlined in the Violence Against Women Reauthorization Act of 2013 will not go into full effect until March 2015. As with any enactment of legal reform, it is impossible to say what the spectrum of outcomes will be until years after its implementation; however, preliminary evaluations can be made about whether or not Native women's bodies are better protected from gender and race based violence as a result of VAWA. Title IX, Section 904 emerged out of a very particular moment, in which Congress and the United States at large, recognized the abysmally high rates of gender-violence in Indian Country. Against this socio-cultural backdrop, VAWA provides a liberal fix to respond to this social ignominy. By extending the right of tribal governments to prosecute non-Indian offenders, VAWA provides a partial jurisdictional solution. However, it would be remiss to assume that this legal remedy is capable of wholly responding to the multivalent factors that have structured Indian Country in a way that produces vulnerable bodies. Though recognized as a nod to indigenous sovereignty, the Act rearticulates colonial discourses under the guise of a benevolent liberal discourse in which the extension of law is viewed as a principled response by the federal

government to respond to the high rates of gender violence in Indian Country. As a result of the VAWA legislation, longstanding debates over which sovereign authority—the U.S. federal government or Native Nations—retains the right over criminal prosecution are reinvigorated. In doing so, contemporary invocations of colonial discourses work to maintain particular racialized-gendered orderings where women are subordinate to men, and Native American lifeways are subordinate to the federal government. Embedded within broader debates of indigenous sovereignty and self-determination, the VAWA 2013 is an incomplete fix that does not necessarily refigure Indian Country in any significant way, and is therefore, limited in its capacity to substantially minimize the prevalence of gender-based violence in Indian Country.

*Understanding VAWA as a liberal fix*

For the purposes of this thesis, the phrase “liberal fix” refer to a normative legal solution borne out of a liberal will-to-care. This work engages Reid-Henry conceptualization’s of the liberal diagnostic as “an institutional site of morality that is constitutive of political liberalism and its wider paradoxes” (2). While this definition is quite useful in theorizing VAWA as a liberal, moralistic response to gender violence, I do not appropriate Reid-Henry’s usage of the term “diagnostic,” because I am not so much interested in VAWA as a means of “identifying,” or “characterizing” liberalism (Rabinow and Bennet 2007). Rather, I am interested in Reid-Henry’s conceptualization of the relationship between political rationality and a moralistic imperative of the state. In this sense, VAWA can be understood as a liberal fix in that it provides a means of intervening on behalf of strangers as a moral imperative that operates within the broader project of modern state legitimation.

Reid-Henry argues that the liberal rationality of self-interest that emerged out of the Enlightenment period does not foreclose upon a social moral imperative. Instead, a particular

moral reasoning emerged within the “political rationality of liberal society itself” (4). This political and moral imperative is both a practice of the liberal state’s anxiety over its own security and a moral reasoning that is underscored by the rationality of the state—to contain the crisis. What is produced is a liberal will-to-care that emerges as a way of responding to the crises of the modern state. As the modern state is increasingly governed through technologies,<sup>13</sup> its forms of moral response are institutionalized and systematized. Legal reform can be understood as one example of a systematized technology of the modern state that often operates as a moral response to the prevailing crisis. The federal legislation of a jurisdictional solution made to respond to and alleviate the epidemic levels of gender-based violence in Indian Country, such that we see in VAWA, conforms to this liberal model of the will-to-care.

Violence against Native women serves as the contemporary crisis (Deer 2004) that justifies federal intervention on the basis of an espoused moral imperative of care. To justify this intervention, Native women must be actively figured as victims that require saving (Fassin 2007). Such framings revitalize harmful representations of Native American women that are embedded within patriarchal and paternalistic discourses of the colonial project. The solution then for responding to the violence in Indian Country is a normative liberal fix. By normative, I am referring to a solution that is both (a) borne out of a supposed universal valuation constitutive of the hegemonic world-order, and (b) confers particular ideas as to how something should be done according to a specific value system. In both instances these values and assertions are informed by a decidedly liberal logic. In the first instance, VAWA is an enactment of legal reform that is

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<sup>13</sup> Drawing on Foucault’s conception of governmentality, “technologies” refer to the multivalent strategies employed to make a society governable. Under the modern state, these technologies may include divergent practices, from self-discipline to participation in the market, or technological apparatuses, such as the police or mapping. The term is intentionally broad and in this particular case, the law is arguably a technology of governance for the modern state.

constitutive of the broader dominant legal system. As such, the reform is incapable of transcending the limits resultant of its foundational racist structuration. Second, VAWA is a solution that asserts that the best means for responding to domestic and sexual violence is by criminalizing such behavior and expanding the spaces of legality. This is also a narrow reading of the multivalent responses that are capable of responding to gender violence. Such potential alternative solutions, however, are obscured from view because many operate outside the normative order, and are therefore, “invisible” to the state. The only solution then to the problem of violence against Native women is a liberal fix premised upon a moralistic imperative of care.

Critical race theory, however, scrutinizes legal solutions that operate within existing hegemonic structures, regardless of their espoused morality. Examining legal reform and gender violence, Andrea Smith (2012) articulates the problems of overestimating the morality of the law. In her work, she highlights a tension between short-term legal solutions that offer immediate and critical services to victims versus long-term anti-colonial strategies. Smith would likely concur that VAWA and the jurisdictional fix is needed because gender violence is real, pressing, and requires attention now. However, to assume such reform is inherently moral, and therefore, capable of systemic transformation, is to overlook the very foundational unequal and racist structuration of the law. Because legal reform does little to substantially repair the inequalities it aims to alleviate, the emphasis placed on legal reform illustrates “how thin white liberal commitments to social justice are” (72). Ultimately, Smith argues that conventional legal reform hinges on a vacant, paradoxically conceived morality of the law. VAWA, as a liberal fix borne out of the state’s supposed will-to-care, provides a normative, moralistic legal solution that does little to reconfigure racialized-gendered maldistributions of justice.

Entrusting the morality of legal reform and the ostensible promise of a resolution relies upon a liberal maneuver that frames the problem of violence against Native women as a contemporary maelstrom restricted to a particular space. VAWA is presented as an emergency fix that provides immediate relief for a short-term problem. This framing shrinks the temporal parameters of the present by obscuring the manifestation of this problem in the colonial past. Spatially, VAWA restricts tribal jurisdiction to Indian territory, which implies that this gendered and racialized violence only occurs on the reservation. The produced spatial and temporal elasticity conceals the structural and historical violence associated with this problem. This slight of hand effectively manages and manipulates the problem so that it is easily addressed through a liberal fix. As the problem of violence against Native women is addressed through a normative legal response, the liberal fix continues to make exceptional the violence (both past and present) of the modern state. Such a critical evaluation of the morality of law leaves a number of questions unanswered. Was the extension of the right to prosecute to tribal governments a benevolent jurisdictional endowment from Congress? How does VAWA maintain structural systems of power and control? How might the extension reaffirm the federal government's position as supreme geopolitical authority?

*VAWA as an incomplete fix*

Though the Violence Against Women Reauthorization Act of 2013 does begin to address the problems associated with the jurisdictional limitations placed on tribal governments, the Act reinforces the obdurate spatio-legal colonial relations that make Indian Country a space where Native American women are exposed to racialized and gendered violence. Despite associations between VAWA and tribal sovereignty, the very provisions contained within the bill serve to limit any substantial realization of self-governance. VAWA 2013 legislates extensive, ongoing

federal oversight—maintaining the historico-political relationship of trustee and guardian. The exaltation of extended criminal jurisdiction obscures the reality that the federal government has retained strict oversight over tribal justice systems by implementing detailed regulating schemes. In order to be granted accelerated jurisdiction and try non-Indian offenders, tribal courts must meet the standards outlined under the Tribal Law and Order Act (TLOA) of 2010. Specifically, tribal governments must be able to provide non-Indian defendants with effective counsel, provide indigent defendants with counsel, and retain properly licensed attorneys and judges (Hermes 2013). While these provisions are all legitimate safeguards to ensure a fair and equitable justice system, they are problematic for a number of reasons.

First, many of these “safeguards” remain cost-prohibitive despite a number of federal grants available to tribes (Hermes 2013). Many tribes interested in implementing a Western-modeled juridical system are financially constrained in doing so. As a result, criminal prosecution is relegated back to the federal system. Such a deferral discursively signals the incapacity of tribal governments to protect its people and, in effect, implies an inability of tribes to self-govern. Second, such extensive oversight constrains tribes’ ability to implement justice systems independent from U.S. influence. This is significant because it re-inscribes colonial ideas of plenary power (in which the federal government maintains its authority to intervene in tribal affairs) and hampers tribes’ efforts to define, on its own terms, its visions for justice. Violence against women, then, serves as the most salient and contemporary trope that enables the sustained and cloaked penetration of the U.S. federal system into Indian affairs.

In addition to reaffirming colonial hierarchies, the VAWA jurisdictional extension is realistically ineffectual. The final language of the bill extends “special domestic violence criminal jurisdiction” which narrowly details which crimes are allowed to be prosecuted by tribal

justice systems and the necessary relationship of the offender to the prosecuting tribe. Tribal jurisdiction over non-Indians is only permitted in such cases that the non-Indian perpetrator has significant ties to the tribal community responsible for prosecution. “Significant ties” refers to the relationship between a non-Indian perpetrator and the tribe in which the crime occurs. To be designated as maintaining significant ties, the non-Indian offender must either live on the reservation, be employed by or on the reservation, or be the spouse or intimate partner of a member of the prosecuting tribe (Gede 2012). The detailed conditions placed on SDVCJ severely limit the number of qualifying cases that tribes can prosecute. In practice, the extended criminal jurisdiction legislated by VAWA provides tribal courts with limited powers to effectively combat domestic violence in Indian Country through existing legal channels. And if, in fact, this extended right over criminal prosecution signals a recognition of tribal capacities to self-govern, then it is a very feeble recognition as such.

The reauthorization of VAWA elucidates the limits of legal reform. Namely, in examining the language and the content of the bill itself it becomes evident the ways in which VAWA exists within a pre-existing liberal framework that rearticulates racialized and colonial discourses. The constraints and conditions of the Act placed on tribal courts significantly dilute the power of this jurisdictional fix. As a final consideration, repairing the jurisdictional problem alone is not enough to effectively alleviate the conditions that render Native women vulnerable to violence in Indian Country. What is required is deeper structural reconfiguring. In expounding on the condition of precarity, Butler (2009) writes,

Precarity also characterizes the politically induced condition of maximized precariousness for populations exposed to arbitrary state violence who often have no other option than to appeal to the very state from which they need protection. In other words, they appeal to the state for protection, but the state is precisely that from which they require protection. To be protected from violence by the nation-state is to be

exposed to the violence wielded by the nation-state, so to rely on the nation-state for protection *from* violence is precisely to exchange one potential violence for another (26).

If vulnerability is induced by the unchecked violence of the state, then the state is structurally limited in its capacity to provide solutions. VAWA does little in the way to substantially restructure the spatio-legal configuration of Indian Country, which is underwritten by racialized and gendered colonial discourses. Without addressing these underlying structural problems of politically induced precarity, Indian Country will continue to exist as an aberrant space, a space where law simultaneously is hyper-applied and consistently elided, a space where federal law continues to hang over tribal sovereignty, and a space where women are effectively figured as unvalued and unworthy of protecting.

#### *VAWA and tribal sovereignty*

Though it begins to move beyond the scope of this research, I think it is worth briefly considering the effects of VAWA on tribal sovereignty as it maintains colonial hierarchies. Without having been implemented and adopted, little empirically can be said about the ways VAWA effects tribal sovereignty. However, a speculative, theoretical inquiry may nonetheless be illuminating. As such, I am interested in returning to the question of settler legitimation to consider VAWA, not only as an incomplete jurisdictional fix, but as the latest tool of U.S. self-legitimation. In doing so, the following questions may be considered: How is VAWA tied up within the project of U.S. legitimation? And what effect does this imbrication have on tribal sovereignty?

Mark Rifkin has extensively theorized forced colonial relations between North American indigenous peoples and its settlers, looking carefully at the role of sovereignty as a medium for negotiating indigenous peoples' rights/space/existence under settler rule. For Rifkin, the invocation of sovereignty is an indicator of "structural subordination" (Rifkin 2011, 19).

Meaning, sovereignty, as a performative act of state legitimacy, emerges to subordinate alternative and competing polities. In the case of colonial America, sovereignty maintains an ideological force that “legitimate[s] the unconstrained metapolitical power of the United States to invent, enforce, and alter the statuses/categories/concepts in which Native peoples are made to signify” (106). The law, then, serves as the instrument of the sovereign’s violence (Agamben 1998). The law formalizes the spaces of the sovereign’s jurisdiction, legally abandoning Native women from protection by figuring them as aberrant (Ford 1999; Pratt 2005; Rifkin 2009). VAWA 2013 is but another episode in this long and tenuous performance of U.S. legitimacy. Not only does it continue to legislate the forms of Native justice and governance, but it also squarely engages questions of tribal sovereignty and capacities of self-determination. As such, it may be a worthwhile exercise to consider the way tribal sovereignty may be appropriated as a device for reaffirming the metapolitical authority of the United States.

Within Rifkin’s framework, the notion of tribal sovereignty is inherently problematic. If the citation of sovereignty is a legitimizing performance of U.S. authority, then the United States’ supposed recognition of an internal, but opposing sovereign would be counter-productive to the state’s citation of sovereignty in the first place (Rifkin 2009). Within this conceptualization, tribal sovereignty exists as a fictive embodiment of sovereignty, obscuring the tautological basis of which U.S. claims to sovereign authority are based. Paradoxically, the U.S. cannot claim the power to regulate tribes as subordinate polities and reasonably maintain that tribes possess any real “sovereignty” of their own force and consequence. This is particularly evident in the case of tribal criminal prosecution. Under *Oliphant* (1978), the court ruled that tribes did not retain the right to criminal jurisdiction over non-Indian defendants “except *in a manner acceptable to Congress*” (*Oliphant v. Squamish Indian Tribe* 1978, Sec. 204, emphasis added). This stipulation

is evidenced by the legislation of the Violence Against Women Reauthorization Act. In reviewing the constitutionality of the extended tribal jurisdiction, legal scholars inadvertently reaffirmed the subordination of tribes under the federal government (Matthew Fletcher, Turtle Talk, posted April 23, 2012). The lawyers maintain that the Title IX, Section 904 of the VAWA legislation is a constitutional extension of tribal authority because it abrogates federal jurisdiction in a way suitable to Congress. In developing this argument the lawyers cite common law to argue that Congress (i.e. the federal government) retains the authority to delimit the powers of tribal governments. In this particular *amicus curiae*, the right of Congress to abrogate federal jurisdiction is viewed as benevolent as it confers extended privileges onto indigenous nations. Nonetheless, the logic contained within the *amicus curiae* reaffirms U.S. plenary power and evokes U.S. sovereign authority as axiomatic.

VAWA, as an extension of federal-Indian law, exists within a framework that bolsters normative ideas about U.S. sovereignty. If sovereignty is an instrument of U.S. legitimation and tribal sovereignty is antithetical to such aims, then where does that leave tribal sovereignty? More specifically, if VAWA is an instrument of U.S. legitimation, how might VAWA be detrimental to tribal sovereignty? Can VAWA offer tribal governments a way of responding to gender-based violence, without foreclosing on their own visions of justice? Without hampering their efforts of self-autonomy? And finally, if VAWA is indeed bound up in questions of sovereign legitimacy, is VAWA capable of protecting a population made vulnerable by the very state that is providing “protection”?

## **VI. Conclusion**

The Violence Against Women Reauthorization Act of 2013 improves the rights, services, and protections for survivors of gender-based violence by increasing federal funding, expanding

protection orders, and conferring additional civil rights to victims. However, the new inclusions of LGBTQ people, immigrants, and Native Americans within the bill are far from being the liberal triumph that they are so popularly embraced as. This thesis has aimed to show the limitations and contradictions inherent within a legal reform that operates through existing structures that are often the very systems responsible for producing material inequalities in the first place. An examination of the legal and spatial formation of Indian Country elucidates the way U.S. sovereignty is maintained through enduring hierarchies constituted by racial and gender differences. Such differences, accentuated through the deployment of colonial discourses, are geographically and temporally specific. Understanding Indian Country within its historical and political context underscores the way Native women's bodies are made vulnerable within particular spaces. The convoluted legal matrix of criminal jurisdiction in Indian Country compounds this vulnerability. The long-standing jurisdictional entanglement has produced a sphere of impunity. Perpetrators are legally unaccountable for their crimes and Native women are targets of violence without avenues for justice.

The jurisdictional extension provided under VAWA 2013 is thought to begin closing the jurisdictional gap by granting tribal courts the right to prosecute non-Indian offenders of domestic violence crimes (NCAI, posted on December 14, 2012; Bea Hanson, U.S. DOJ, posted March 7, 2013). Such an extension is an explicit recognition by the federal government of the disproportionate violence perpetrated against Native women in Indian Country. The extension was legislated in the name of protecting women; however, it is a legal inclusion that is incapable of addressing the underlying structural issues that make Native women vulnerable to begin with. As a liberal fix, the jurisdictional extension can be understood as a solution born out of a moral imperative to remedy the crisis of violence against women. This crisis, however, is addressed in

a way that reaffirms U.S. superiority over Native American structures of governance. VAWA 2013 may topologically refigure jurisdiction in Indian Country, but it is ultimately incapable of refiguring Indian Country as a racialized and gendered spatio-legal construction. The private, corporeal violence perpetrated against Native women will continue until these structural problems are confronted.

This research has critically assessed state legitimacy and bodily precarity to show the two as intimately intertwined. In doing so, conventional understandings of indigenous and settler sovereignty, law and space, and gender-based violence have been complicated. Legal reform is exposed as a limited means for refiguring embodied and constitutive hierarchies in space and law. The VAWA reauthorization illustrates the way a liberal legal reform bolsters racialized and gendered hierarchies, both at the scale of the body and at the scale of the polity. In understanding the jurisdictional extension as a strategy for affirming U.S. superiority over indigenous modes of governance, this research gestures at the way tribal sovereignty gets implicated in settler legitimation. In doing so, Indian Country is problematized as a pre-given, apolitical spatial and legal construction. Instead, Indian Country's existence is made legible through the co-constitutive engagements between law and space. Such insights expose Indian Country as a lived embodiment of the past and present colonial project and underscore the anxieties produced by modernity and its exceptions. The tensions inherent to liberalism and modernity characterize the very existence of Indian Country, making the liberal paradox paradigmatic of the modern Native American experience. Because Indian Country is formed out of these tensions, and such dilemmas will not be resolved anytime soon, tribal nations and people have thus had to grapple with these tensions to establish their modes of existence within this

paradoxical domain. In doing so, these defining tensions and dilemmas are productive, rather than paralyzing.

VAWA 2013 is an extension of these tensions. While on the one hand VAWA is scrutinized for reaffirming the ward-guardian relationship, on the other, VAWA is thought to provide tribes a newfound legal right to respond to domestic and sexual violence. While these two possibilities are somewhat paradoxical, held open and irresolvable to give shape and form to the other, this aporeia must also be thought of as productive. The implementation of VAWA, as tribes seek to resolve and overcome its paradoxes, provides Native people an opportunity to create a characteristically indigenous body of law that incorporates both national law and traditional law. Carpenter and Riley (2014) refer to this amalgamating process as the jurisgenerative moment for indigenous peoples—a moment that produces “interrelated and inter-reliant legal norms and structures” that are capable of attenuating to the unique and particular experiences of Native communities (176). In this sense, tribal communities are granted agency as VAWA becomes not an external imposition of federal law, but rather, a tool to be shaped, appropriated, and incorporated with customary law.

Sarah Krakoff’s (2004) research on tribal sovereignty provides a reading that enables us to imagine the negotiation and productive outcomes resultant of the tensions between external and internal notions of law and sovereignty. Her conceptualization of experiential sovereignty insists that tribal sovereignty is neither exclusively the formal legal doctrine that defines the limits of tribal governance, nor a strict adherence by tribes to cultural or internal notions of tribal sovereignty. Rather, experiential sovereignty attenuates the “on the ground” interplay between these poles. Tribes negotiate their sovereignty by actively resisting and appropriating the legal dicta issuing from the federal courts alongside their own narratives and enactments of

sovereignty. In this sense, federal Indian law gets appropriated and incorporated by tribes in very particular and intentional ways. VAWA, as a recent instantiation of federal Indian law, provides tribes with another opportunity to work through the tensions of liberalism to produce something that is both useful and beneficial to tribal communities, while also complementing and bolstering their own customary laws and lifeways. Such legal amalgamations will undoubtedly have implications on articulations of tribal sovereignty, the exercise of tribal law, and future negotiations of expanded indigenous rights.

Both Carpenter and Krakoff provide a framework for understanding federal Indian law as it constitutes and is constituted by the lived experiences of those that exist under federal Indian law. Their work returns us to a central theoretical frame of this research: law, space, and society—as always simultaneously discursive and material—are constantly in an iterative dialectic, continuously shaping and informing one another to configure unique spatio-legal arrangements. The jurisdictional fix legislated through VAWA topologically refigures Indian Country in significant ways. However, Indian Country as a spatio-legal construction is animated and given form through the particular negotiations of a people living in a space inherently and foundationally marked by the tensions of modernity. It will be the particular amalgamations of national and traditional law produced by tribes' intentional implementation of VAWA that promises to forge meaningful ways for tribes to confront and respond to violence against Native women, while forever negotiating life in this place we call Indian Country.

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