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Self Determination of Identity:
Two-Spirit Natives and Federal Indian Law

Tara Wilson*

INTRODUCTION

Two-Spirit persons self-determine their gender and sexual identities because these identities necessarily and intentionally center Native experiences. In doing so, Two-Spirit Natives reject Euro-centric notions of gender and sexuality and decolonize their sexual and gender identities. However, in rejecting Euro-centric concepts of gender and sexual identity, Two-Spirit persons’ self-determination of their identities are diminished by institutional constructs that the United States government has created.

Three cultural components of Native American culture allowed Two-Spirit identity to exist before the colonial imposition of Euro-centric gender norms by allowing for fluidity in gender and sexual orientation: (1) child autonomy, (2) equality between masculinity and femininity, and (3) tribal collectivism. Native American communities allowed for child autonomy by valuing self-determination in children’s identities and valuing or accommodating differences in development. This practice included valuing the roles children chose and refraining from assigning characteristics, traits or roles based on the sex of the child. Additionally, gender equality allowed for greater sex and gender autonomy because there was little cost to the individual or to the tribe for rejecting

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* Tara Wilson is a third-year law student at Georgetown University Law Center, graduating in May 2019. She also served as the Senior Articles Editor for Georgetown Journal of Gender and Law. Tara would like to thank Professor Reid Chambers for his guidance on this paper. She would also like to thank the editors of the Indiana Journal of Law and Social Equality for their work on this note.
1 See Qwo Li Driskill, Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies, 16 GLQ: J. LESBIAN & GAY STUD. 69, 72–73 (2010).
2 See id. at 72.
4 See id. at 243.
5 See id. at 243–44.
masculine or feminine expectations. Finally, tribal collectivism valued allocating responsibility based on talents and activities preferred by the individual to allow for greater tribal productivity, so assignments of activities were not restricted based on gender association with such activities.

This Article will apply this cultural framework to analyze how federal law creates impediments for two of the three cultural components, child autonomy and gender equality, and to discuss how federal constructs of identity run counter the fluidity of Two-Spirit sexual and gender identity. Part I will give a brief history of Two-Spirit identity with a focus on diminishment of said identity due to the European influences on cultural norms. Part II will address the jurisdictional layers in the enforcement of criminal law, which contribute to pervasive sexual violence and child abuse, and how this undermines both child autonomy and gender equality. Part III, rather than discussing tribal collectivism, will address the requirements to be defined as a “tribe” under federal law and how this challenges the fluidity inherent to the Two-Spirit identity. This Article will focus on federal law’s application on reservations, but will not address the role of Two-Spirit persons on reservations or the impact of tribal law on Two-Spirit people.

The term “Two Spirit,” coined at the third annual intertribal Native American First Nations gay and lesbian conference in 1990, refers to Native Americans who are transgender or queer. The term is an “indigenous-centered alternative to contemporary offshoots of Euro-American sexological categories (including ‘gay’ and

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6 See id. at 244–45.
7 See id. at 245–46.
8 Throughout this paper, the term “Two-Spirit” will be used. “Berdache” has also been used to refer to Two-Spirit Native Americans but will not be used here. The French translation of “berdache” is “male prostitute” or “kept boy,” so the term is derogatory or insulting to many Native Americans, particularly Two-Spirit Natives. In addition, the term indicates a Euro-centric concept of gender fluidity and sexuality, as well as the term was used by Western colonizers, and a romanticization of Two-Spirit identities that do not reflect the lived experiences of Two-Spirit Native Americans. See TWO SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY 3–6 (Sue-Ellen Jacobs et al. eds., 1997) (hereinafter “Two Spirit People”); see also Gabriel S. Estrada, Two-spirit Histories in Southwestern and Mesoamerican Literatures, in GENDER AND SEXUALITY IN INDIGENOUS NORTH AMERICA: 1400-1850 165, 166 (Sandra Slater et al. eds., 2011).
9 See Estrada, supra note 8, at 165–166.
‘transgender’).”

This pan-tribal term mimics indicators of gender variance or third- or fourth-gender markers (women, men, two-spirit/womanly males, two-spirit/manly females) within individual tribes; for instance, the Shoshoni have identified tainna wa’ippe, or man-woman, and the Navajo refer to two-spirit individuals as nádleehé. The term Two-Spirit, by not specifically demarcating a type of gender or sexuality, is intentionally inclusive and ambiguous.

Prior to the colonization of North America by European powers, the tribes did not apply a strict gender binary. In fact, over 100 tribes recognized more than two genders. Third-genders, for instance, were often identified when individuals showed interest in social and religious life that did not comply with traditional roles of men and women, and individuals of a third gender could marry and adopt children. However, these Native concepts of gender directly conflicted with European notions of the gender binary, which ultimately resulted in the criticizing and punishing of Two-Spirit Native Americans by European colonizers. Arriving to the New World, Europeans brought with them strong binary gender roles: women were valued for characteristics related to their domestic, pious, chaste, and obedient nature, and men, holding authority within the realms of politics and the church, were taught to exhibit “confidence, honor, physical strength, and bravery.” Additionally, European gender roles, reflected in the significant influence of both Catholic and Protestant Christianity, held up men’s authority as vital to the social order of church as society, and, particularly after the accession of Queen Elizabeth I to the British throne, these

11 See Two Spirit People, supra note 8, at 103.
12 See Driskill, supra note 1, at 72.
gender roles and marginalization of women were incorporated into ideas of “natural law,” dictated by both biology and theology. 16

The notions of masculinity, particularly confidence and bravery, motivated a sense of exploration. As Marc Lescarbot, a French author in the seventeenth century, argued:

And when all is well considered, it may truly be called pulling out thorns to take in hand such enterprises, full of toils and of continual danger, care, vexation and discomfort. But virtue and the courage which overcome all such obstacles make these thorns but to be gilly-flowers and roses to those who set themselves to these heroic deeds in order to win glory in the memory of men, closing their eyes to the pleasures of those weaklings who are good for nothing but to stay home. 17

Implicit in his statement is the masculine expectation of moving into “danger” and “discomfort” of adventure and away from the “pleasures of those weaklings” who “stay home.” Those “weaklings who are good for nothing but to stay home” exhibit feminine characteristics, which run counter to manhood and, here, is looked down upon. The idealized man, in this author’s conception, values courage, bravery and a sense of exploration at the sacrifice of comfort in the domestic realm.

This concept flowed into heavily gendered rhetoric of the colonization of the Americas. Sir Walter Raleigh, for instance, characterized Guiana with language creating a strong parallel between sexual violence of women and the conquering of the Americas. 18 He described Guiana as a “country that hath yet her maidenhead, never sacked, turned, nor wrought, the face of the earth hath not been torn, not the virtue and salt of the soil spent by manurance . . . never been entered by an army of strength, and never conquered by a Christian prince.” 19

Here, “maidenhead” refers to the virginity of the land, land which was to be “entered by an army of strength,”

16 See id. at 31.
17 Id. at 32 (internal citation omitted).
18 See id. at 34–35.
19 Slater, supra note 15, at 34–35 (quoting Sir Walter Raleigh, Discovery of Guiana, in Hakluyt: Voyages and Discoveries 408 (1972)).
without choice or consent. Guiana, in other words, was a country to be violated “by a Christian prince,” and in Sir Walter Raleigh’s conception, this “sack[ing]” of the maidenhead is part of exploration. Like the relationship between men and women, men were understood to exhibit control over the land. Thus, Sir Walter Raleigh gendered the action and the actors, and he subjugated women in this action by creating a parallel between women and land to be conquered.

The gendered conception of exploration translated to actual gendered dominance in the rape of women already living in the Americas and, in some cases, an urge to “protect” women from the gender deviance of their Native men by European colonizers of North America when they observed unfamiliar concepts of gender in their interactions and observations of Native Americans. In particular, “female power in native society as interpreted by Europeans was a reflection of the inadequacy of Native American men, who were less masculine for failing to exert authority over the women in their tribes.” Native women took multiple suitors, husbands, and lovers, and this sexual freedom offended European notions of masculinity, including assertions of control over “obedient” or “pious” women.

Two-Spirit Native Americans especially offended these gender standards by violating colonial expectations and because the more common form of Two-Spirit identity was a male Native American adopting a woman’s role. These “men,” through a Euro-centric gendered lens, demeaned themselves to adopt the role of a woman. Two-Spirit persons, rejecting “their inherent masculinity,” turned away from warfare to housework and engaged in sex with men. This “outraged European men who could not envision a masculine pursuit more splendid or noble than war.”

Translating to exploration and the conquering of the Americas, the United States government, carrying forward these notions of gender, sought to do away with “deviant” behaviors, including Two-Spirit identity, by

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20 See id. at 36–37.
21 Id. at 39.
22 Id. at 40–41.
23 See id. at 39–40.
24 Id. at 47–48.
exerting its inherent power over tribes or by allowing Christian missionaries to stamp out Two-Spirit identity. The United States exerts plenary power over tribes, and the Supreme Court in *U.S. v. Kagama* and *Lone Wolf v. Hitchcock* established a guardian-feudal relationship between the United States and Tribes. Under *Kagama*, the United States government holds plenary power over Native American tribes because tribes “are the wards of the nation” and “dependent on the United States.”

Through the late 19th century, the United States utilized this judicially-recognized, plenary authority to exert federal control over Indian behavior through forcible assimilation, breaking down Native identity by splitting up tribes through the Dawes Severalty Act (General Allotment Act of 1887) and through education. Federally sponsored boarding school systems instituted Euro-centric gender norms, undermining pre-colonial ideas of gender that allowed for the acceptance of Two-Spirit identities. This education instilled in students the norm of single family households with a division of labor between husband and wife. As Thomas J. Morgan, Commissioner of Indian Affairs from 1887 to 1892, noted, “No pains should be spared to teach them that their future must depend chiefly on their own exertions, character, and endeavors. They will be entitled to what they earn. . . . They must stand or fall as men and women, not as Indians.”

Central to assimilated identity, then, was the understanding of individuals through the lens of a gender binary, as the students will learn to “stand or fall” based on their gender identity, not based on their general identity as Indians. Additionally, assimilation included directly proscribing Two-Spirit behavior beyond education. Federal agents, for instance, forced Two-Spirit individuals in the Hidatsa tribe to conform to Eurocentric, masculine norms by cutting their hair and requiring male Two-Spirit persons to adopt men’s dress.

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27 *Kagama*, 118 U.S. at 383–84; *see* Gilden, *supra* note 3, at 249.
28 *See* Dawes Severalty Act, ch. 119, 24 Stat. 388, 1887; *see also* Rifkin, *supra* note 10, at 149.
29 *See* Rifkin, *supra* note 10, at 147.
30 *See* id.
31 *Id.* at 151 (internal citation omitted).
and Christian missionaries, through the Religious Crimes Code, would do the same and “pressure tribal communities to adopt the Euro-American ideals on family and sexuality.”

The history of colonization of gender norms for Native communities reduced the Two-Spirit population, resulting in a loss of role models for variance in sexual orientation or gender expression for the next generation of Native Americans. The Two-Spirit identity began to resurge along with Native American identity after the establishment of federal Indian policy of self-determination and the enactment of the Indian Reorganization Act of 1934, which allowed for the revitalization of tradition and adjustment to “the needs of contemporary Native American Nations” through the establishment of tribal courts.

While a resurgence of this identity occurs through recognition and self-determination of Native traditions within tribal courts, federal policy and jurisprudence on Native Americans and tribal identity continue to undermine the cultural underpinnings necessary for the growth of Two-Spirit identity. Through the lens of child sovereignty, gender equality and tribal identification as a sovereign state, federal law creates complicated layers of criminal jurisdiction that allow for the proliferation of sexual violence and child abuse. Further, the requirements to establish as a tribe run counter to the Native worldviews that underlie the fluidity inherent to Two-Spirit identity.

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32 Wilson, supra note 14, at 173; see also Gilden, supra note 3, at 249–50.
33 Two Spirit People, supra note 8, at 109.
I. JURISDICTIONAL LAYERS AND CONFUSION CONTRIBUTE TO THE PERPETUATION OF CHILD ABUSE AND SEXUAL VIOLENCE. THIS UNDERMINES TWO MAJOR FOUNDATIONS OF TWO-SPIRIT IDENTITY: CHILD SOVEREIGNTY AND GENDER EQUALITY.

The United States federal government has plenary power over tribes, which extends to criminal jurisdiction. In addition to the inherent authority the United States holds over tribal territories, the General Crimes Act (GCA) grants the federal government “sole and exclusive” jurisdiction over Native reservations except where the offense is committed by one Indian against another. For crimes occurring on reservations, the GCA primarily covers lesser offenses, and tribes have sole jurisdiction of lesser offenses if the crime does not involve an American Indian committing a crime against a non-Indian or involves no American Indians whatsoever.

While the GCA covers lesser offenses, the Major Crimes Act (MCA) confers the federal government jurisdiction over major crimes, where the defendant is an American Indian, regardless of the identity of the victim. Jurisdiction of major crimes through the MCA is concurrent with tribal criminal jurisdiction over its own members.

38 See 18 U.S.C. § 1153 (2012) (“Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States”); see also Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (upholding the Major Crimes Act); see also Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (upholding the Major Crimes Act).
39 18 U.S.C. § 1153 (2012); see also U.S. v. Lara, 541 U.S. 193, 193 (2004) (holding that trying a tribal member under tribal and federal law is not double jeopardy where both the tribe and federal government have inherent jurisdiction over the individual); Brittany Raia, Protecting Vulnerable Children in Indian Country: Why and How the Violence...
Inherent jurisdiction, as supplemented by the GCA and MCA, does not extend to the states. States do not have inherent authority over tribes, so state laws, generally, have no force on tribal territory unless prescribed by Congress or if the crime occurs between two non-Indians.\textsuperscript{40} For some states,\textsuperscript{41} Public Law 280 transfers federal jurisdiction to the states. In other words, the federal government delegates criminal jurisdiction of reservations and Native Americans to the states, but the states must bear the cost of this legislation.\textsuperscript{42} Moreover, in transferring this authority, the federal government dropped financial and technical support for tribal self-government in Public Law 280 states.\textsuperscript{43} Combined with the lack of funding for states assuming criminal jurisdiction, Public Law 280 states often have a dysfunctional criminal justice system for tribes.\textsuperscript{44}

Tribes, on the other hand, do not have inherent criminal jurisdiction to punish non-Indians. The tribes, therefore, rely on Congressional delegation to assume such jurisdiction, or tribes must rely on federal or state enforcement.\textsuperscript{45} Tribes do act as a sovereign when prosecuting their own members, and though not an

\textsuperscript{40} See Worcester v. Georgia, 31 U.S. 515, 561 (1832); United States v. McBratney, 104 U.S. 621, 621 (1881).


\textsuperscript{42} See Pecos Melton & Gardner, supra note 41, at 3.

\textsuperscript{43} See id.

\textsuperscript{44} See id.

\textsuperscript{45} See Oliphant v. Squamish Indian Tribe, et al., 435 U.S. 191 (1978) (holding that tribes acted beyond their jurisdictional authority by arresting and charging non-Indians for assaulting a tribal officer, resisting arrest and recklessly endangering another person) (“In 1891, this Court recognized that Congress’ various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts.”); \textit{In re Mayfield}, 141 U.S. 107, 116 (1891); see also Reid Chambers, Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations since the Late 1960s, 46 Ariz. St. L.J. 729, 745 (2014).
inherent power, tribes may prosecute members of other tribes.\textsuperscript{46} However, tribal authority over crimes committed by Indians is limited, and tribal courts may only impose a sentence of up to three years or fines of $15,000 for any one offense.\textsuperscript{47} Major offenses fall within federal jurisdiction under the MCA.\textsuperscript{48}

Congress did allocate criminal jurisdiction concurrent with federal criminal jurisdiction to tribes over non-Indians in some forms of sexual violence.\textsuperscript{49} The 2013 Reauthorization of the Violence Against Women Act (VAWA) extended tribes Special Domestic Violence Criminal Jurisdiction (SDVCJ) if the tribes chose to exercise the jurisdiction over non-Indian abusers involved in domestic violence, dating violence, and/or criminal violation of protection orders.\textsuperscript{50} This SDVCJ does not cover: “[c]rimes between two strangers, including sexual assault; [c]rimes committed by a person who lacks sufficient ties to the tribe, such as living or working on its reservation; and [c]hild abuse or elder abuse that does not involve violation of a protection order.”\textsuperscript{51}

The confluence of federal, state and tribal jurisdiction is complicated, and the complexity of jurisdiction and inadequate federal and state funding prevents enforcement of laws related to sexual violence and child abuse, which undermines gender equality and child autonomy. Concurrent jurisdiction creates confusion amongst victims and law enforcement officials. In some cases, law enforcement might not step in “out of fear of overstepping boundaries or simply out of confusion.”\textsuperscript{52} Per an Amnesty International report, federal authorities may not pursue cases where tribes have started an


\textsuperscript{51} Id.

investigation; federal involvement is rare and can involve lengthy delays before an investigation begins.\textsuperscript{53} Consequently, tribal law enforcement reported reluctance to take steps to preserve evidence in case federal authorities choose to investigate.\textsuperscript{54} The resulting delays may allow witnesses to disappear, evidence to go cold, victims to become intimidated or to refuse to cooperate, and perpetrators to continue to abuse children or rape and sexually assault Native persons without accountability.\textsuperscript{55}

A. Gender Equality

This maze of jurisdiction—in potentially creating failures to investigate, overarching delays, and ineffective law enforcement—contributes to failures to respond adequately or prevent sexual violence.\textsuperscript{56} In addition, the lack of tribal jurisdiction over sexual assaults between two strangers, or crimes committed by persons who lack sufficient ties to the tribe, may leave Native persons experiencing sexual violence with no recourse if the federal government fails to investigate or respond.\textsuperscript{57} The failure to respond to or prevent sexual violence contributes to a proliferation of this violence, resulting in Native American women on reservations being particularly vulnerable to sexual violence.\textsuperscript{58} In fact, according to 2009 statistics, which are likely underestimates of the scope of the problem,\textsuperscript{59} nearly one

\textsuperscript{53} See id. at 455; see also S. REP. NO. 111–93, at 3 (2009) (Committee on Indian Affairs Rep.) ("The federal response to reservation crime remains fragmented and fails to meet the justice needs of tribal communities.").

\textsuperscript{54} AMNESTY INT’L, supra note 35, at 42.

\textsuperscript{55} See Raia, supra note 39, at 320–21.

\textsuperscript{56} AMNESTY INT’L, supra note 34, at 8.

\textsuperscript{57} Id. at 9 ("[E]vidence gathered by Amnesty International suggests that in a considerable number of instances the authorities decide not to prosecute reported cases of sexual violence against Native women. When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is no further recourse for Indigenous survivors under criminal law within the USA.").

\textsuperscript{58} Id. at 8; Karen Lehavot, Karina L. Walters, and Jane M. Simoni, Abuse, Master and Health Among Lesbian, Bisexual and Two-Spirit American Indian and Alaska Native Women, 15 CULTURE, DIVERSITY & ETHNIC MINORITY PSYCHOL. 275, 277 (2009) (citing escalating violence due to under-resourcing of law enforcement, tribal, state and federal jurisdictional disputes, and steady erosion of tribal government).

\textsuperscript{59} AMNESTY INTERNATIONAL, supra note 34, at 4 (sexual violence against American Indian women is underreported due to fear of breach of
in four Native American women will be raped in their lifetime and thirty-nine percent will suffer domestic violence.\textsuperscript{60} In addition, eighty-six percent of rapes or sexual assaults committed are by non-Indian men.\textsuperscript{61} As a result, there is a sense of inevitability adopted by some Native women. Diane E. Benson, a member of the Tlingit Tribe, “heard stories of Native women murdered and dumped along the roadside with no one arrested for it” and “listened to families cry, hopeless of justice” before she herself was raped by a white man she worked for and later discovered that “this same white man had raped six other Native women under similar conditions.”\textsuperscript{62}

Sexual violence rates reflect the colonial legacy of utilizing violence as a measure to assert dominance and conformity within the gender binary and construction of gender roles. Reflecting the corrective role of violence, Two-Spirit people often experience higher rates of sexual violence because they challenge traditional roles of their gender, as exhibited by their gender expression or sexuality.\textsuperscript{63} In fact, “Two-Spirit women are more likely to be sexually and physically assaulted than heterosexual Aboriginal women and white lesbian women.”\textsuperscript{64} The proliferation of sexual violence reflects a subjugation of individuals to maintain the gender hierarchy or to punish those who challenge a hierarchy that places non-Two-Spirit men above Two-Spirit individuals and non-Two-Spirit women. Gender equality is impossible when individuals are targeted for sexual violence based on their gender and sexuality. This gender hierarchy undermines the ease in gender fluidity by increasing the cost of adopting gender noncompliant characteristics and the disadvantage to occupying a gender variant role.\textsuperscript{65} In

\textsuperscript{60} S. REP. NO. 111-93, at 2 (2009).
\textsuperscript{61} Raia, supra note 39, at 310.
\textsuperscript{62} Diane E. Benson, Violence Across the Lifecycle, in SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 131, 145 (Sarah Deer et al. eds., 2007).
\textsuperscript{64} Id. at 15.
other words, individuals who identify as Two-Spirit will be less likely to do so publicly or to accept their identity if there is a cost to do so. Here, the cost is safety.

The federal government, through its plenary power and the statutes which allow for the confusion, stalling and underfunding discussed above, creates a lack of accountability for perpetrators of sexual violence. This lack of accountability contributes to a proliferation of sexual violence, and this sexual violence functions to maintain the gender hierarchy and subjugation of women. The high rates of sexual violence against Two-Spirit persons and non-Two-Spirit women diminish the ability for individuals to express gender variance or express non-heterosexual forms of sexuality as a Two-Spirit person. Additionally, forms of sexual violence targeting Two-Spirit individuals function to enforce the colonial assimilation tactics by punishing individuals who show gender or sexual variance. Therefore, complicated criminal jurisdiction created by the federal government functions to undermine a key cultural component of Two-Spirit identity—gender equality—and the federal government places a barrier in the ability for Two-Spirit persons to self-determine their identity.

B. Child Sovereignty

As with sexual violence, state, federal, and tribal criminal jurisdiction on reservations create confusion and underfunding for law enforcement. However, unlike sexual violence, instances of child abuse by non-Indian perpetrators is completely within the purview of the federal government because the 2013 Reauthorization of VAWA does not grant SDVJ to tribes over child abuse committed by non-Indians. Though little data exists on child abuse by non-Indians, approximately 75% of residents on Indian reservations are non-Indian, and 70% of violent crime against Native children involves offenders

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67 See 25 U.S.C. § 1304(c) (2013); Dep’t of Just., supra note 50.
Therefore, at least some instances of child abuse occur at the hands of non-Indian offenders and are within federal jurisdiction. However, the federal government declines to prosecute most child abuse cases referred by tribal governments.

Consequently, like sexual violence against adults, the failure to prosecute child abuse cases contributes to the proliferation of child abuse, and as of 2009, American Indian “youth experience [fifty percent] higher rates of child abuse than non-native youth.” In 2001, the Health Director of the Oglala Sioux Tribe estimated that approximately ninety-five percent of the tribal population experienced sexual abuse as children. For Native youth, ages twelve to twenty, violence, including homicide, suicide, and intentional injuries, account for three out of every four deaths.

To facilitate the freedom to identify and live as Two-Spirit, child self-determination requires independence and to not be viewed as subordinate to adults in order for children to discover their identities. Children, rather than viewed “as property or possessions,” are valued as “individuals in a [Native American] community.” For instance, Navajo parents instill their children with significant praise to give them a sense of self-worth and freedom to determine their individual identity, rather than apply pressure on them “to conform to the expectations of the family.” However, the abuse of children necessarily subordinates the child and places the power in the hands of the adult. Like sexual violence, this

68 Raia, supra note 39, at 309-10.
69 Id. at 318 (“Between 2004–2007, the federal government decline[d] to prosecute 72% of child sex crimes cases in Indian country.”).
70 See ATTORNEY GEN.’S ADVISORY COMM., supra note 67, at 47 (“Federal reports have consistently found that the divided system of justice in place on Indian reservations lacks coordination, accountability and adequate and consistent funding. These shortfalls serve to foster violence and disrupt the peace and public safety of tribal communities.”).
71 S. REP. NO. 111-93, at 2 (2009) (Committee on Indian Affairs Rep.).
72 ATTORNEY GEN.’S ADVISORY COMM., supra note 66, at 74.
73 Id. at 38.
74 Gilden, supra note 3, at 259.
75 Id.
76 See Gilden, supra note 3, at 243; see also ATTORNEY GENERAL’S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, supra note 67, 65, 74-75 (“Traditional tribal child-rearing practices and beliefs allowed a natural system of child protection to flourish. AI/AN beliefs reinforced that all things had a spiritual nature that demanded respect, especially children.”).
creates a hierarchy of power, and children are not viewed as equals with independence and value. Rather, they are subjected to the will of their abuser. Failed to be considered individuals in their community and subordinated to their abuser, children have diminished space to determine their identities beyond the constraints of expectations set for them. Therefore, the proliferation of child abuse undermines a cultural component allowing for two-spirit identity to flourish. Federal jurisdictional complications and underfunding, which contribute to high rates of child abuse, are then partially responsible for the undermining of this cultural component.

II. **Federal Law and Regulations Impose Stricter Versions of Identity. This Undermines the Theory That Identity, Particularly Gender and Sexual Identity for Two-Spirit People, Is Fluid.**

A tribe cannot enjoy external sovereign status without recognition from the United States. To achieve federal recognition, tribes may either (1) petition Congress to pass a bill to recognize their sovereign statuses or (2) engage in the Department of Interior federal acknowledgment process. The Department of Interior has established guidelines for federal recognition, requiring external evidence of tribal identity including: identification on a “substantially continuous basis since 1900,” existence as a “distinct community,” maintenance of “political influence or authority over its members as an autonomous entity from historical times to 1900 until present,” governing documents, descendants from a historical tribe or several tribes that combined to form a single entity. In addition, members must solely identify as members of that tribe and not to another North


78 25 C.F.R. § 83.11(a) (2017) (evidence to show identification on a continuous basis may include: identification by a federal authority, relationship with state governments based on identification as a tribe, dealings with local government under said identity, identification by anthropologists, historians or other scholars, identification in newspapers or books, and identification with other Indian tribes or organizations).

79 25 C.F.R. § 83.11(a)–(e) (2017).
American tribe, and previous congressional legislation may not have terminated or forbidden the federal relationship.80 Under the Department of Interior’s definition, self-identification as a tribe by its members is only one of several components; outward identification and recognition are necessary.81 Therefore, self-identification and determination of identity are not of greater significance than identification by non-Indians or non-member Indians, and identity must be consistent and provable.

However, the construct of identity, which requires proof and consistency over time, is counter to indigenous worldviews, which “tend to embrace ambiguity, complexity[,] and non-linearity—processes that run counter to group mobilization for a singular unifying construct.”82 Two-spirit identity, in particular, embraces fluidity in the definition of the term and in the identity of individuals; the definition of two-spirit is intentionally ambiguous, and the term is intended to capture the fluidity of gender and sexuality, and “the interconnectedness and inseparability of identity with spirituality and traditional worldviews.”83 According to Janis, a Two-Spirit woman, “I’m still kind of trying to figure out um, you know, what is the term for myself.”84

Compared with the Department of Interior rules for identifying as a tribe, the guidelines for Two-Spirit identity, through the Native worldview, reflects a greater emphasis on self-identification and fluidity. The rules promulgated by the Department of Interior emphasize consistency in identity by requiring identification as a tribe for a “substantially continuous basis since 1900,” which necessitates a linearity in identity over time and largely rejects or penalizes ambiguity. This generally runs counter to a worldview that embraces ambiguity, complexity, and non-linearity. Further, the values reflected in the Department of Interior rules directly contrast with the nature of Two-Spirit identity, which is

80 25 C.F.R. § 83.11(f)–(g) (2017).
83 Id.
84 Id. at 135.
based on variance, fluidity and complexity in gender and sexuality. This is not to suggest the Department of Interior directly restricts Two-Spirit persons or that seeking status by petitioning Congress is an unavailable alternative. Rather, the bureaucratic means of establishing identity and sovereign status simply do not acknowledge or reward a worldview that allows Two-Spirit persons to thrive within the fluidity and ambiguity of identity.

CONCLUSION

From a more theoretical perspective, the construct of identity that federal law creates in tribal recognition challenges the Native worldview and the very fluidity that Two-Spirit identity is based in. In doing so, the federal government adds to a body of law that undermines major cultural components that allow Two-Spirit Natives to exist and develop in their identity from childhood. Federal law undermines Two-Spirit identity by overcomplicating criminal jurisdiction, underfunding law enforcement, and contributing to high rates of child abuse and sexual violence. Child abuse and sexual violence create hierarchies of power: adult abuser over the abused adult or child. The power dominance of the abuser over the child prevents children from being considered equal, independent individuals capable of determining their genders and sexual identities without the burden of fulfilling expectations dictated for them. As adults, sexual violence adds a burden to gender fluidity by supporting and perpetuating a gender hierarchy and using sexual violence as a tool of control. These power dynamics, allowed to continue due to jurisdictional confusion and underfunding, and the federal emphasis on linearity and consistency present a challenge to the development of Two-Spirit identity on reservations. Therefore, the federal government contributes to a society in which Two-Spirit persons are limited in self-determination of their identities by creating systems of government that undermine cultural components of this identity and fail to place value in the fluidity and non-linearity of that identity.
APPENDIX

CHART ADAPTED FROM ATTORNEY GENERAL’S ADVISORY COMMITTEE

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85 BYRON L. DORGAN, ET AL., ATTORNEY GENERAL’S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE, 48 (2014).