

## Territorial Politics

### *Mass Incarceration and the Punitive Legacies of the Indian Territory*

*We are reminded that Indian Country had no prisons.*

—LUANA ROSS, *INVENTING THE SAVAGE*

When John Grindstone was convicted of murder in a federal courtroom in Wichita, Kansas, in 1888, he was a prisoner without a prison. As part of a biannual ritual of prosecuting prisoners from the Indian Territory, the courtroom was packed with “murderers, horse thieves, and whiskey prisoners.”<sup>1</sup> The “Indian murderer,” as he was labeled in the local papers, had taken the stand in his own defense, and when it appeared he might be convicted, his mother slipped him a poisonous root. The *Wichita Star* reported that when officers confiscated the poison, the prisoner was “like a child in the powerful hands of the officers.”<sup>2</sup> When the judge handed down a ten-year sentence for murder, he lectured Grindstone with a speech reprinted in the local paper, about “a class of men” in the Indian Territory “who think that to be a man of bravado or desperate character was necessary” and stated that “this class of people have been dealt with very leniently. . . . Hereafter it will be the duty of this court to deal in a most emphatic manner with this class of criminals.”<sup>3</sup>

When the judge ordered the US marshal to “deliver or cause to be delivered the body of the said John Grindstone” into federal custody, Grindstone became part of a class of federal prisoners without federal prisons. He was routed to the Kansas State Penitentiary because of the intergovernmental structure of power that existed before Leavenworth. Although states could no longer profit from holding federal prisoners, Kansas agreed to take Grindstone into its gothic castle, where he worked in the prison’s coalmine.<sup>4</sup> He remained in state prison until 1895, when Fort Leavenworth’s military prison became the temporary home of the federal institution.<sup>5</sup> He was photographed in the military prison as Prisoner No. 12, where he was kept in a “cage,” with “iron rods and cross-pieces, with sheet steel partitions, the door of each cell having an ordinary padlock.”<sup>6</sup> When hundreds of prisoners



FIGURE 5. John Grindstone. Inmate File No. 3760, Record Group 129, Records of the Bureau of Prisons, US Penitentiary, Leavenworth, National Archives at Kansas City.

were transferred from the military reservation to the newly built federal prison, John Grindstone was catalogued as Prisoner No. 1, the nation's first prisoner.<sup>7</sup> He was released on February 6, 1896, but returned on a seven-year sentence in 1903 as Prisoner No. 3760, when "Leavenworth" was still a pile of rocks encircled by razor wire. The record of his time in the earliest rudimentary structure of the place that became Leavenworth is a forty-two-page inventory of the body that came in and the body that went out—an archive of the marks, scars, and inherited allotments of land in the Indian Territory, and of his death and burial in the prison's graveyard.<sup>8</sup>

The political significance of *United States v. John Grindstone* was that it accelerated the reach of US law into previously unreachable places and laid the groundwork for the emergence of the federal prison system. In Grindstone's trial and punishment, the United States claimed jurisdiction over a Shawnee man accused of killing a Peoria man named Joe Sky on Quapaw land. Crimes between Indians on reservations had been untriable from the 1817 General Crimes Act until 1885, when the Major Crimes Act expanded the reach of US criminal law to all Native peoples on and off the reservations. In federalizing Native crime, the government required federal prison time for "major crimes" against anyone "within or without an Indian reservation."<sup>9</sup> Grindstone's confinement marked a critical juncture in a long attempt to bring indigenous people inside US law.<sup>10</sup> As a Shawnee man from the Quapaw Agency of a place called Indian Territory, Grindstone could have arrived at Leavenworth's gates only through the very specific legal architecture that

was used to claim jurisdiction over “Indian crime” in Indian Territory. As the seat of governance for the region, Fort Leavenworth implemented a federal project of “Law for the Indian” as part of a set of disciplinary institutions that included reservations, boarding schools, “Indian asylums,” and military guardhouses.<sup>11</sup> The history of Fort Leavenworth, as part of the mass incarceration of Native people, made it a strategic site for the beginning of the nation’s first prison. The Three Prisons Act and subsequent legislation brought the prison to Kansas to borrow a military prison with an already existing relationship to the settler colonial carceral state.

Against the backdrop of legal incorporation, Grindstone was the first of a whole cohort of “criminal Indians” sent to Leavenworth from the Indian Territory. Indian Territory prisoners were convicted of a separate class of federalized crimes, including misdemeanor offenses, that could be committed only in Indian Territory. Because this history of the carceral state has largely been forgotten, photographs of Black and Native women from the Indian Territory were not discovered in Leavenworth’s papers until 1996, when the Bureau of Prisons transferred the files to the National Archives.<sup>12</sup> In the investigations that followed, their presence was explained away as though they were “just passing through.”<sup>13</sup> Nannie Perkins, the first woman ever sentenced to federal time at Fort Leavenworth, arrived on January 19, 1896, after a conviction for “manslaughter in the Indian Territory.”<sup>14</sup> Minnie Jones joined her in April of 1896 for the misdemeanor offense of “introduction [of liquor] in the Indian country.”<sup>15</sup> Eliza Grayson arrived on May 15, 1896, after a conviction for “assault with intent to kill in the Indian Territory.”<sup>16</sup> The prison’s first warden, J. W. French, wrote to the attorney general that he had these women “in a building, apart from the men . . . making convict clothing.”<sup>17</sup> The second floor of the military prison was “furnished with larger grated cells or cages, in one of which these women were placed together.”<sup>18</sup> Nellie Thomas was the last woman to spend the duration of her two-year sentence at Leavenworth; she was kept “locked in her cell” to keep her from the view of male prisoners and was later moved to the back of the prison hospital.<sup>19</sup>

When federal prisoners were transferred from the military site to the construction site beginning in 1895, women prisoners from the Indian Territory were rerouted to the Kansas State Penitentiary, beginning with twenty-one-year-old Mary Snowden, who was marked in the prison files as “Colored (partly Ind)” and was convicted of “assault with intent to kill in Muscogee, North District, Indian Territory.”<sup>20</sup> Snowden and other women prisoners from the Indian Territory have federal prison files, but they contain mostly blank intake cards and letters about the continuing coordination between federal and state prisons. Buried in one of these blank sets of files is the story of Lizzie Cardish, who was sent to Leavenworth at the age of fifteen from the Menominee Reservation after a conviction in federal court in the Eastern District of Wisconsin for setting fire to the reservation school. Her “crime” was attributed to her “Indian hatred” and a desire to escape from the reservation and the school.<sup>21</sup> Cardish was never legally transferred from federal to

state jurisdiction and was therefore “carried on [the] books as a prisoner belonging to [Leavenworth].”<sup>22</sup> As one of the youngest federal prisoners, Cardish was joined by Dan Tso-Se of the Dine (Navajo) nation, who was convicted of murder at the age of twelve.<sup>23</sup> He was described during a sensationalized trial as “nature boy” because he spoke no English. Because his story was carried in the white newspapers, he received dozens of Christmas cards in the mail. According to the warden, “I tried to explain the meaning of them to him. I also called in two Indians of the Flathead Tribe, but we have no one who can speak his language he being a Navajo. Among *all our Indians* he is the only one of that tribe here.”<sup>24</sup>

This targeted “class” from the Indian Territory soon constituted the majority of federal prisoners at Leavenworth. In 1906, when Cardish came to Leavenworth, fully 70 percent of Leavenworth’s prisoners were from the Indian Territory and Oklahoma.<sup>25</sup> In 1908, when Tso-Se went on trial, 517 of the 833 prisoners were from the Indian Territory, even though the region no longer legally existed.<sup>26</sup> This class of prisoners was continually described in prison administrative reports and other federal communications as a “very low class of Indians and negroes.”<sup>27</sup> Letters from the warden reported a “sorry lot of human beings. . . . Some could give no home and others knew nothing of their parentage. They were composed of negroes, Indians, half-breeds, white men and ‘what-nots.’”<sup>28</sup> Making up the majority of federal prisoners, their presence as a mass in the earliest formations of the federal prison system points to a much deeper historical relationship between military and domestic punishments at Fort Leavenworth. Fort Leavenworth was always an idea about punishing Indians.

This chapter historicizes the mass incarceration of prisoners from the Indian Territory by focusing on the relationship between Leavenworth and Fort Leavenworth. It begins by examining the legal history of Indian Territory as a place that was arranged like a prison in order to show that when John Grindstone arrived at Leavenworth he came from the already prisonized space of the Indian Territory. In tracking the narrative production of the “criminal Indian” in Indian Territory, the chapter works to historicize the prison of Indian Territory as a form of settler colonial justice that used space to reorganize land into structures of confinement. When the reservation system failed to “bring in” resistant Indians, federal authorities built a framework of forced legal incorporation as part of the larger project of Law for the Indian.<sup>29</sup> This political architecture produced a subject that was recognized in law only for the purpose of punishment, turning sovereign nations into prisoners said to be guilty at the level of the group.<sup>30</sup> The carceral complex that emerged in this distinction between sovereignty and jurisdiction has continuing consequences. There are currently over four thousand Native people in federal custody, mostly from Oklahoma, the Dakotas, Nebraska, Montana, and Alaska, where Native people make up one-fourth to one-third of people living in state prisons.<sup>31</sup> As a history of the present, this chapter argues that the mass incarceration of Native people is central to the history of the carceral state. The chapter

therefore maps how Fort Leavenworth and Leavenworth came into being as ideas about punishing Indians.

ESTABLISHING THE BORDERS OF INDIAN TERRITORY:  
THE JURISDICTION OF IMAGINARY RIGHTS

Indian Territory was a region that existed on the land that became Kansas between 1825 and 1854. That land is the ancestral home of the Kansa and Osage peoples, and the Arapaho, Cheyenne, Jicarilla Apache, Kiowa, Kiowa-Apache, Pawnee, and Quapaw also have relationships to the land.<sup>32</sup> In creating the Indian Territory, the US government forcibly relocated the Otoes, Missouriias, Iowas, Sacs and Foxes, Kickapoos, Delawares, Shawnees, Chipewas, Ottowas, Peorias, Weas, Kaskaskias, Piankeshaws, Potawatomis, Miamis, Cherokee, Osages, and Quapas from the places that had already become Ohio, Pennsylvania, New York, Indiana, Michigan, Illinois, Georgia, and Missouri. As a site of detention for nearly ten thousand Native people, the Territory was built around Fort Leavenworth, which served as the seat of the region's settler governance after 1827. Fort Leavenworth brought Indian Territory into being and consolidated its status as a region of punishment. It later dissolved and relocated that space to what is now Oklahoma between 1854 and 1890.

Indian Territory was arranged as an unstable and appurtenanced place with an ambiguous but strategic relationship to US law.<sup>33</sup> The idea of Indian Territory as both a jurisdiction and a border emerged as early as 1805, when the United States declared its intention to create peace through control in the region.<sup>34</sup> By 1825, US treaties referred to a "general controlling power," mapping the landscape as a bound legal space.<sup>35</sup> As part of the region's constitution, Fort Leavenworth mapped the Territory into nineteen lateral reservations that restricted movement and thereby increased the power of surveillance. The internal arrangement of the Indian Territory into a kind of panoptic spatial form meant that individuals and groups could be quickly transported to the Fort's military guardhouse for resisting the economic, sociopolitical, and spatial regulation of the region. The political geography of Indian Territory relied on a matrix of punitive institutions, including the military jailhouse, to increase the power of the reservation system. Although the territory was administered by military authorities, its power was derived from its legal position as a kind of borderlands.<sup>36</sup> Federal law, backed by the military, created this kind of appurtenanced structure by way of reference to Native sovereignty, since US law recognized Native people as having legal standing only to the extent that Indians came "by choice" to "occupy" reservations in the Indian Territory. This manipulated relationship between sovereignty as jurisdiction positioned Native people between the status of domestic prisoner and foreign detainee—as subject to the force of law in matters of punishment but as strangers to status and standing.

As a punitive architecture, the political geography of Indian Territory was also imprinted with the radial design of nineteenth-century prison architecture.

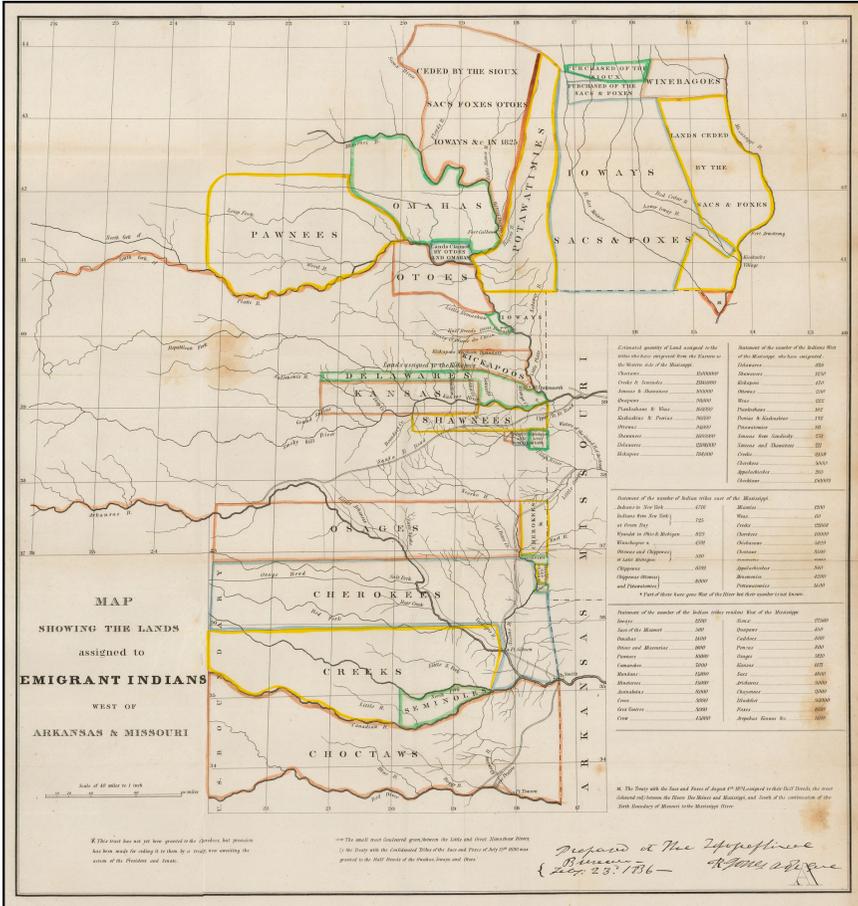


FIGURE 6. Map Showing the Lands Assigned to Emigrant Indians West of Arkansas and Missouri, 1836. Courtesy of the Library of Congress, US Topographical Bureau.

Established on the eastern edge of the Territory, Fort Leavenworth marked the radial point of all roads leading west from the center of the US border. It was the central node of the whole apparatus (the guard tower in Jeremy Bentham’s formulation) and “opened four or five great military roads, diverging from this point like the ribs of a fan, and traversing the Territory in every direction—to the Rocky Mountains, Santa Fe, Salt Lake, California and Oregon.”<sup>37</sup> Standing in the place normally reserved for the prison’s administration, Fort Leavenworth governed the region’s economic and political structure, instituting by force the separation of Indian Territory from the United States. This separation was part of an idea about an “Indian Line” that would “protect” US citizens from lawless Indians.

In debates about Fort Leavenworth's relationship to the border, military authorities wedded the idea of the Indian Line to the idea of crime. While the site was planned outside of the Territory on the eastern side of the Missouri River boundary, Colonel Henry Leavenworth ignored his orders and established the site in 1827 inside the line.<sup>38</sup> It was on the edge of the Lenape (Delaware) treaty homeland. The breaking of the river boundary prompted a set of debates about the meaning of the border, as military authorities believed that a fort inside the line would incite Native violence against whites and would "require" military intervention: "Instead of protecting our frontier inhabitants against the incursions of the Indians, these isolated garrisons must, in the event of a serious Indian War, inevitably become the first victims of its fury. At present, they only serve to invite wild and profitless adventures into the Indian Country, the usual consequences of which are personal collisions with the natives, and the government is then put to the expense of a military expedition to vindicate the rights of these straggling traders."<sup>39</sup> Suggesting that the location of the line might make US citizens into "victims" of Native aggression, military authorities considered moving the Indian Line back to St. Louis, which had served as the region's legal hub before the press west to Leavenworth. Such calls for the removal of Cantonment Leavenworth were part of an eventually abandoned strategy to "draw . . . in . . . [the] most remote garrisons, in order to form a connected line of defense, the several parts of which should mutually support each other—within which no hostile Indian would dare to venture, beyond which no white citizen, unless protected by a military escort or a proper license to trade with the Indians, should be permitted to pass."<sup>40</sup>

Conceptualized as a border, Indian Territory was a place that simultaneously assigned Native people the status of foreign nationals and domestic criminals but was always an idea about the failed reach of American law. Because Indian Territory was part of the Louisiana Purchase before its regionalization in 1825, the region's first major murder trial in 1808 was held in St. Louis, and it generated a narrative of lawless criminal Indians and the law's failure to punish them. In Louisiana Territory's courts, White Cloud and Mira Natutais (both Ioway) and Little Crow (Sac and Fox) were convicted and sentenced to death for the murder of a white man.<sup>41</sup> The Superior Court of the Louisiana Territory ruled that both Ioway men were unpunishable according to the terms of the 1802 Intercourse Act. This ruling by Judge John B. C. Lucas meant that Ioway Indians who injured whites in the Indian Territory were not subject to US jurisdiction. Acknowledging the creation of an untriable class of Indians, the court reversed the convictions of the two Ioway men but affirmed the death sentence of the Sac and Fox Little Crow on the grounds that his crime had taken place on land already ceded to the United States in 1804.<sup>42</sup> Despite the court's affirmation of Little Crow's death sentence, President Jefferson commuted his sentence.

Against the backdrop of jurisdictional ambiguity, the "Ioway Fugitives" came to symbolize the contested status of US law in the Indian Territory. Not only did the

men escape from punishment according to the terms of settler justice, but Native people had come to St. Louis in support of the prisoners. According to St. Louis newspapers, the streets of the city during the trial “teemed” with “Indian warriors who remittently beseeched and harassed Lewis and General Clark to pardon their tribesmen.”<sup>43</sup> In an open challenge to the right of US law to punish Indians and to the state’s attempt to take three Indian lives for the death of one white man, the men asserted sovereignty in the face of jurisdiction and escaped from the St. Louis jailhouse unpursued by territorial officials.<sup>44</sup> Their escape became a symbol of the law’s failure to reach an “untriable” class of “criminal Indians” just beyond the nation’s boundaries and was a catalyst for the eventual rearrangement of Indian Territory.

The legal architecture of the Indian Territory was designed to capture this unpunishable class by creating a framework of group guilt in a legal system designed to punish individuals.<sup>45</sup> Indian Territory became a punitive landscape that functioned to assign group criminality after 1828, when Fort Leavenworth enforced substitution punishments as a matter of federal policy. When an Ioway named Big Neck (also known as Great Walker and Moanahonga) could not be located by military authorities who were investigating the killing of three whites, the Ioway Chief White Cloud was arrested in his place and was taken to Fort Leavenworth with nineteen other men to await Big Neck’s capture or surrender. After his eventual surrender, Big Neck’s friend Walking Cloud or Pompakin later testified from Fort Leavenworth that he and Big Neck had in fact prevented more deaths—that he had “stayed in jail all winter” to “save my young men.”<sup>46</sup> Five years later, in 1833, when the US military punished the Ioway for retaliating against the Omaha during a period of conflict, White Cloud was again forced to submit the guilty parties, and the US military “marched eight Ioways to Fort Leavenworth.”<sup>47</sup> White Cloud was later killed by one of the men he surrendered. This practice of substitution punishment was confirmed as a matter of federal policy in President Jackson’s 1830 message: “We will march into your country . . . seize your chiefs and principal men and hold them until those who shed blood shall be surrendered to me.”<sup>48</sup> Jackson’s policy held the nation responsible for the acts of individuals, so that “criminal Indians” could no longer “hide behind the tribe.”<sup>49</sup>

The legal composition of Indian Territory was rooted in this idea of group guilt not just because of the escape of the Ioway fugitives or the use of substitution punishments in the Fort Leavenworth jailhouse. The people of the Indian Territory were also seen as criminally disloyal because of their status as “enemy nations” during the US War of 1812. These nations were considered enemies because the Sac, Delaware, Otoe, Omaha, Shawnee, and Kickapoo fought the United States in alliance with the British, who partially destroyed the US Capitol and White House. Because the nations of the Indian Territory were configured by law as foreign prisoners of war despite declarations of peace, they were detained in the Indian Territory according to the terms of the 1825 Treaty of Prairie du Chien, which formally

ended the war in “peace and friendship” but gave the United States a “controlling power” over “disloyal” Indians.<sup>50</sup>

The power of this settler colonial regime was maintained by irons and chains. When the Sac and Fox fought in Black Hawk’s War in 1831, Black Hawk was captured and paraded in irons in front of the famed Pennsylvania prison, where he was, according to white newspapers, “shown the manner in which white men punish.”<sup>51</sup> Relying on the logic of substitution punishments, the US military marched twenty-two Missouri Sac and Fox to Fort Leavenworth in irons to punish Black Hawk’s Illinois Sac and Fox. The exchange of the “murderous savages” who fought US jurisdiction in 1831 was still being discussed in Bureau of Indian Affairs (BIA) reports as late as 1862, and the memory of punishment among Black’s Hawk’s people was such that when four Sac and Fox men were later taken to Fort Leavenworth on charges of murder they agreed to walk seventy miles with two unarmed guards in order to avoid the taint of chains.<sup>52</sup> In this economy of interchangeable Indians, the fort had become a symbol of conquest—an “unmerciful dungeon” within an already prisonized landscape.<sup>53</sup>

The idea of Leavenworth as an idea about the fungibility of criminal Indians was formalized in federal law with the 1834 Intercourse Act, which served as Indian Territory’s first governing charter and put law “in force in the Indian country.”<sup>54</sup> Establishing a form of administrative rule over ten thousand people in the Territory, the act classified the region as “part of the United States west of the Mississippi and not within the states of Missouri and Louisiana, or the territory of Arkansas.”<sup>55</sup> Carving out a landscape that was both part of and separate from the United States, the act claimed “sole and exclusive jurisdiction” over “assigned” and “occupied” lands in a moment when whiteness was being settled into law as a propertied expectation.<sup>56</sup> The act gave officers at Fort Leavenworth the power to monitor transactions at the region’s boundaries, where authorities searched steamboats for the introduction of liquor, distributed fines for trade license violations, arrested criminal Indians and white trespassers fleeing to the Indian Territory, and regulated the “character” of residents, visitors, and “persons merely traveling in the Indian country.”<sup>57</sup> This closed political economy established a system of credit and debt in order to create an incentive structure that, as Thomas Jefferson described it, produced debt “beyond what the individuals can pay” so that only “a cession of lands” could level the balance.<sup>58</sup> This “factory system” of law subverted Native sovereignty into US jurisdiction by using debt to create punishable Indians.

Mapping administrative authority onto economic regulation, the 1834 Act also assigned white “Indian agents” to the reservations, who regulated matters of justice and governed reservations like prison wardens. On the Great Nemaha Reserve, where the Ioway and Sac and Fox nations were concentrated, the agent routinely “laid on the stripes for waywardness” and threatened the use of iron chains.<sup>59</sup> When the Ioway left the reservation without permission in 1849 to join a traveling exhibition, local newspapers reported that the Ioway would be punished with

physical violence.<sup>60</sup> The act distributed among the reservation agents the power to “procure the arrest and trial of *all Indians accused of committing any crime, offence, or misdemeanor . . . either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize.*”<sup>61</sup> In the process, it distorted and destabilized Native justice traditions by giving selected “chiefs” the authority to transfer criminal Indians to US jurisdiction, even as it subordinated the power of those authorities to US law. By 1836, Indian Territory was inside US law for the purpose of punishment but according to a Senate Committee on Indian Affairs Report was “a place which will ever remain an outside.”<sup>62</sup>

In the context of this dual framework, Indian Territory emerged as an idea about a line that Indians were not permitted to cross; Fort Leavenworth was a symbol of economic and penal conquest in a region that functioned, at multiple registers, like a prison. Its founding legal narrative, however, was failure—the 1834 Intercourse Act prevented American law from reaching crimes committed by one Indian person against another Indian person. Because the punitive authority of Indian agents reached only Indians who committed crimes against whites and government agents, an unreachable class of “reservation crimes” turned unlicensed white trespassers into residents who defended themselves against “Indian occupiers” and “Indian criminals.” Throughout the 1840s, federal authorities condemned the Delaware, Ioway, Sac and Fox, Kickapoo, and Shawnee as “beggars” who “harassed” soldiers and settlers on the trails. Acts of resistance to white invasion were refashioned as apolitical and criminal acts of theft, assault, and murder. BIA reports confirm that Native people in the Indian Territory were “regarded as intruders” and “criminal Indians.”<sup>63</sup>

It was this narrative of “crime on the trails” and the fear of an “Indian crime wave” that ultimately justified the land theft of a territorialized Kansas in 1854.<sup>64</sup> The routine punishment of “property crime” on the trails was anchored in the war that ensued after the Lakota High Forehead ate an ox that was wandering on the trails. Following the established procedures of agency law, Brave Bear acted on behalf of the group to restore the value of the property to the Mormons who had reported it stolen. Lieutenant John Grattan nevertheless demanded that High Forehead be surrendered for punishment, and when Brave Bear refused to turn him over, Grattan attacked the Lakota people. When Grattan and thirty-one US soldiers died in the attack, the US military condemned Grattan’s actions but plotted revenge at Fort Leavenworth throughout the winter of 1855. When Brave Bear died of his wounds in the spring, Sinte Gleske (Spotted Tail), Red Leaf, and Long Chin retaliated by attacking a mail train and killing three whites in Nebraska. In the war that followed, the logic of group punishment led to the capture of one hundred Lakota women and children, who were held hostage at Fort Laramie, Wyoming, until Sinte Gleske, Red Leaf, and Long Chin presented their own bodies for punishment.<sup>65</sup> When the men “came in,” they were marched to Fort Leavenworth, manacled by ball-and-chains “bigger than those for the cannons on their feet, their women going sorrowfully

behind them.”<sup>66</sup> After a winter in Leavenworth’s military guardhouse, where it was rumored they would be hanged, Sinte Gleske was released by President Pierce in January of 1856 and was paraded before the prisons of Washington and New York. During this exhibition of the punishment that awaited resistant Indians, Sinte Gleske inquired whether any of the prisoners in those institutions had ever been convicted of “stealing from Indians.”<sup>67</sup> “Crime on the trails” turned the Indian Line that had brought Leavenworth into being into a border now condemned for having “shut in” white citizens, separating them from the westernmost territories.<sup>68</sup> Indian Territory was now a kind of legal island in the nation’s center, and the prison had become simultaneously a site of conquest and a site of resistance.

When Indian Territory was recast as a structure that contained whites instead of Indians, it was dissolved in the transition to Kansas Territory. Fort Leavenworth was the center of a military operation that relocated the people of the old Indian Territory to the land that would later become Oklahoma. As trespassers without rights, the nations of the old Indian Territory were caught in a “choice” that was structured to make whiteness a matter of survival—Native people could “choose” to accept citizenship and “become white” or to fight for the right to remain Indian.<sup>69</sup> Despite the threat of military detention at Fort Leavenworth, the Kickapoo, Iowa, Prairie Band Potawatomi, and Sac and Fox nations remain to this day on treaty homelands.<sup>70</sup> The Delaware people have also reclaimed land in the old Indian Territory.<sup>71</sup> In the territorialization of Kansas, one-quarter of the Indian Territory “passed by the treaty process from Indian ownership to individuals, land-speculating companies, and railroads without becoming a part of the public domain or becoming subject to congressional control.”<sup>72</sup>

Even after Kansas became a state, the federal government declared its intention to maintain jurisdiction over “Indians in Kansas.” State criminal laws focused on “murderous Indians” in *United States v. John Ward* (1863), arguing that “the general punishment of crime including murder is not of the class of subjects on which the federal government has a direct authority to legislate.”<sup>73</sup> The state argued that denying Kansas the right to punish criminal Indians deprived it of statehood and a sense of national membership. Kansas reasserted the right of criminal prosecution in *Hunt v. Kansas* (1866), which declared that Indians were “in Kansas,” even those who lived “like Indians” on reservations.<sup>74</sup> *Hunt* relied on the idea that Indians were equivalent to foreigners, an idea that emerged in *Dred Scott v. Sandford* (1857) when the court situated Native people as simultaneously foreign and domestic.<sup>75</sup> But federal courts claimed ultimate jurisdiction in *The Kansas Indians* (1867), ruling that “where Indians occupy lands *the ultimate title of which is in the federal government*, it is settled that no State which, subsequently, may be created around those lands has any right over them in the absence of express treaties or congressional legislation to that effect.”<sup>76</sup>

Targeting a subject of its own making, the federal project of Law for the Indian created separate categories of “Indian crime” that punished group guilt in a

framework built for legal individuals. This was the legal architecture of a system that expanded its reach into “intra-Indian” spaces that, despite state and federal claims to jurisdiction, remained on the edges of law. Indian Territory was a system of reservations designed to institute joint administrative and military rule. Fort Leavenworth anchored that legal regime as a carceral state framework of settler colonial justice. Because Indian Territory was a place defined by the project of legal incorporation, resistance to the prison as a form of justice threw the reservation system into crisis. The response to this crisis was the federal prison system.

#### LAW FOR THE INDIAN AND THE CRISIS OF THE RESERVATION SYSTEM

Against the backdrop of a line turned barrier and the end of an Indian Territory, Law for the Indian now recognized two classes of Indians—those who had already “come in” to the prison of the new Indian Territory and those who insisted on the right to “stay out.” Over the course of the 1850s, as Leavenworth dissolved the line it had once held in place, it used its radial reach to “bring in” those who refused the reservation system through a series of military expeditions. From Fort Leavenworth, soldiers marched against the Kiowas and Comanches in 1851, the Lakota, Brulé, and Miniconjous in 1855, and the Cheyenne in 1857.<sup>77</sup> Between 1865 and 1891, the army fought a thousand times with the Apache, Modoc, Cheyenne, Ute, Nimiipuu (Nez Perce), Comanche, Kiowa, and Kickapoo. As Law for the Indian was reoriented from the concentrated space of a territory designed like a prison to the “unwieldy” space of the “frontier,” it created communities of free and unfree people with different relationships to US law. Fort Leavenworth remained the political center of the new Indian Territory and widened its reach during the “Indian Wars” to all Indians “inside the United States.” The twin projects of legal incorporation and mass incarceration anchored the spatial arrangement of the new Indian Territory.

This meant that the struggle over the reservation system was also about the legal framework of mass capture and incarceration. This was evidenced in the Dakota Uprising of 1862, the largest mass escape from the reservation system and the largest mass execution in US history. When the Dakota left the reservation to confront whites claiming title to homelands and to insist that treaty agreements since 1805 be honored, they were punished by the assignment of “enemy” status, the confinement of nearly one thousand people, and the mass trial and conviction of 303 defendants.<sup>78</sup> On the eve of their execution, US president Lincoln divided the condemned into two classes—those who had committed “massacres” and those who had engaged in “battles.”<sup>79</sup> The thirty-eight men who had committed “massacres” were found guilty of capital murder *at the level of the group* and were executed as a mass on December 26, 1862. This was a key moment in the history of mass incarceration because it defined the line between acts of war and domestic crimes and consolidated federal power over Indian punishments.

Despite the threat of mass execution and punishment, escapes from the reservation system increased and “unreserved” Indians refused to recognize the right of the United States to establish them. These mass escapes threw the whole system of Law for the Indian into crisis. When a confederation of the Cheyenne, Arapaho, Kiowa, Comanche, and Kiowa-Apache nations refused to “come in” to reservation spaces, they were described in BIA annual reports as “wild and intractable” and “in need of severe punishment.”<sup>80</sup> Speaking of these continuing escapes, US Army Lieutenant-General Philip Sheridan insisted that “the whole reservation system of the government—which is the only true policy now left—will be endangered unless every one of these Indians are taken back and made to stay.”<sup>81</sup> In the system of legal classification in BIA Reports, the 55,000 Native people entirely “unrelated” to US law were compared to the 150,000 “disciplined” Indians already on reservations. Another 95,000 were “in relation” with an agency but opposed to relocation.<sup>82</sup> The federal government would pursue the “roamers” under the guise of President Grant’s Peace Policy, which defined peace as delayed US military attacks until treaties could be “signed” under threat of military violence. Grant’s Peace Policy instituted a form of what the BIA described as “legalized reformatory control” through which “marauding bands” would be “relentlessly crushed” by mass “arrest and return to Indian Territory.”<sup>83</sup>

The use of the new Indian Territory as a kind of prison was made explicit in the US government’s treatment of the Cheyenne nation in the late 1870s. The Cheyenne justice tradition was rooted in banishment, and only sixteen murders were committed in the history of the nation.<sup>84</sup> After an attack on a wagon train passing through Kansas in 1874, Cheyenne justice was represented as so inherently violent that it became the basis of white “captivity” narratives in American literature.<sup>85</sup> In 1990, the German family and the Cheyenne people held a peace ceremony that drew 1,200 people to acknowledge the taking of four white girls and the killing of their parents and to acknowledge the injustice of the punishments that followed.<sup>86</sup> In addition to the fifteen Cheyenne actually accused of violence, eighteen others were marched 165 miles from Fort Sill, Oklahoma, to Fort Leavenworth, Kansas.<sup>87</sup> They were loaded onto trains bound for the old colonial prison at Fort Marion, Florida.<sup>88</sup> Refusing to spend three years at the former Spanish colonial prison in Florida, Grey Beard and Heap of Birds took their own lives; Grey Beard jumped “in chains and shackles” from the moving train, only to be shot in the back by his captors.<sup>89</sup> The military subsequently sent misleading messages to the Colorado Cheyenne in Grey Beard’s voice, directing them to “avoid trouble” and “travel in the white man’s road.”<sup>90</sup> In the use of substitution punishments, the settler state came to rely on the taking of hostages.

US and Cheyenne relations were supposed to be governed by the Fort Laramie Treaty of 1851, but the Fort Wise Treaty of 1861 reduced the Cheyenne land base to a site in eastern Colorado near Sand Creek.<sup>91</sup> Although the United States had previously distinguished the northern Cheyenne from the “peaceful Southern

Cheyenne,” it made no distinction between “hostile” and “civilian” Indians in the Sand Creek Massacre, when eight hundred southern Cheyenne were offered “perfect safety” by the US military in exchange for “coming in” and then were killed in a massacre that even the US military acknowledged was a crime of “cold blood.”<sup>92</sup> Between Sand Creek in 1864 and the Battle of Washita in 1868, the US military killed every last peace chief of the Southern Cheyenne, capturing fifty-three women and children and holding them in a stockade at Fort Dodge, Kansas.<sup>93</sup> This logic of group guilt meant that by the “Great Sioux War” of 1876, 980 northern Cheyenne fought alongside the Lakota and Arapaho and were condemned for the “crime” of Custer’s death at Little Bighorn.<sup>94</sup> After the infamous arrest and murder of the Lakota Crazy Horse in September of 1877, 980 northern Cheyenne were sentenced without trial to a one-year term in the prison of Indian Territory.<sup>95</sup>

When they arrived in the region, they found that their one-year term was a ruse and that their permanent confinement was secured by cannons pointed at the lodges. In a gesture of mass defiance of the reservation-prison, 284 members of the northern Cheyenne walked away from Indian Territory, under cover of night, in the winter of 1878. They ran 1,500 miles pursued by the US military across the former Indian Territory of Kansas, where the Cheyenne were said to have “raided” and “murdered” for food and supplies.<sup>96</sup> While Dull Knife’s people “came in” to Red Cloud’s agency in South Dakota to claim a place with the Lakota, Little Wolf’s band chose to “stay out” for another winter after seeing that Dull Knife’s people were treated like prisoners on the Red Cloud reservation. Of those who stayed out, all thirty-four were captured and taken to Fort Keogh for military trial, where they negotiated the terms of a Northern Reservation in Montana.<sup>97</sup> Dull Knife’s people, who had laid down arms, were transported from the Red Cloud Agency to Fort Robinson, Nebraska, where they were held by the military in a “prison room” and were denied food and water until they agreed to return to the Indian Territory. On the fifth day of their confinement they ran from the prison, in the dead of winter, and were met by the bullets of the soldiers. The survivors reunited with Little Wolf’s people. Their survival was recognized as a crime in BIA reports that criticized a “tribe” still “in need” of punishment.<sup>98</sup>

Kansas also clamored to punish the Cheyenne for the state’s “last Indian raid,” which had resulted in a failed trial in 1879 and their photograph on the steps of the Dodge City courthouse. They were symbols of the failure of American law and evidence that Indians had “never been controlled.”<sup>99</sup> As late as 1885, the Indian agent still complained that the Cheyenne “commit crimes constantly and demand heavy tributes for the privilege of driving through their country. Many of the Indians who commit such crimes are known to me, but I have thus far been powerless to arrest or punish them. . . . A worse class of savages probably never existed . . . up to the present time. . . . They have never been controlled. . . . They complain freely, and force the remedy for their complaints at the mouths of their ‘Winchester Rifles’; and they have plenty of them.”<sup>100</sup> The prisonization of the new Indian Territory

was a process that relied on this narrative of constant crime and federal powerlessness. In the wake of mass capture and punishment, the arrangement of the second Indian Territory recalled the structure of the first but developed its own federal legal architecture.

#### MAJOR CRIMES, INDIAN JAILS, AND THE POLITICAL GEOGRAPHY OF THE QUAPAW AGENCY

The second Indian Territory was arranged, like the first, according to the terms of sovereignty and jurisdiction. While the Five Nations were sovereign powers, the rest of the Territory and the Quapaw Agency in particular were part of a jurisdictional matrix that presumed the joint presence of foreign enemies and domestic criminals. The Quapaw Agency was a reservation in the far northeast corner of the Territory that would survive the transition from Indian Territory to Oklahoma Territory to Oklahoma precisely because it came to serve as the region's site of detention. Native people confined in that space were said to have resisted US law by force. Some were considered prisoners of war. Among these were the Modoc and the Nimiipuu (Nez Perce). When John Grindstone was sent to federal prison in 1889, he came from the prison of the Quapaw Agency.

The Cherokee, Choctaw, Chickasaw, Seminole, and Muskogee nations were sovereign peoples in the Indian Territory, but their presence resulted from the Trail of Tears and the logic of dislocation. US claims to jurisdiction over sovereign nations were anchored in the terms of the Reconstruction Treaties, signed between 1865 and 1868, which condemned Five Nations "alliances" with the Confederacy during the Civil War.<sup>101</sup> Establishing the right of the federal government to build and operate courts of justice in the Indian Territory, the Reconstruction Treaties gave the Five Nations jurisdiction over matters of justice when "members of the nation, by nativity or adoption, shall be the only parties."<sup>102</sup> As part of the complicated layers of settler colonial administration, the Five Nations began operating prisons as expressions of qualified self-governance. The Cherokee National Prison at Tahlequah opened in 1875 and operated as the only penitentiary inside Indian Territory until 1901, when Congress "expired" Cherokee law and closed the prison.<sup>103</sup> The Choctaw experiment with imprisonment in 1859, the Chickasaw adaptation of death by hanging, and the Choctaw, Seminole, and Muskogee adoption of the firing squad conformed to US demands regarding the proper form of administering justice.<sup>104</sup> Despite the adoption of US justice practices in instances where Indians committed crimes against other Indians, these methods of punishment were soon condemned as barbarous punishments of "Indian law." Having naturalized the prison in Indian Territory, federal Indian law used the institution to justify a renewed push for total jurisdictional control.

The reach of US law into intra-Indian crime on the reservations in the second Indian Territory originated with federal jurisdictional claims over whites

committing crime on the reservations. In 1846, the US Supreme Court in *United States v. Rogers* had ruled that treaty homelands were merely a “domicile for the tribe. . . . They hold and occupy it with the assent of the US.” The Court gained jurisdiction over “crimes between Indians” because of the legal groundwork established in a case where a white man had “become Indian” by marriage.<sup>105</sup> In refuting William Rogers’s claim that intermarriage placed him outside the bounds of US jurisdiction (he said he was an intermarried Indian who had committed a crime against another intermarried Indian), *United States v. Rogers* (1846) confirmed the reach of US criminal law to American-born white men who had “become Indian” by marrying Cherokee women even when the crime occurred inside Cherokee lines.<sup>106</sup> In asserting that Rogers was “not an Indian” but that *it had legal access to the reservation space* he inhabited, the Court imagined the future intrusions of jurisdiction, first over whites assuming Indian identities, and then over Indians who committed crimes against other Indians. Five Nations governments retained limited control over “internal” matters of punishment, but crimes committed off the reservation were considered federal crimes.

The legal arrangement of the Indian Territory was bound by the federal court at Fort Smith, Arkansas, which regulated a region made famous in “wild west” depictions of a place without the machinery of law. Administered by the “hanging judge” Isaac Parker, the court at Fort Smith condemned more people to death in group executions than any court in US history.<sup>107</sup> Forty-one percent of prisoners executed at Fort Smith were Native American; 11 of them were Cherokee, Choctaw, and Creek.<sup>108</sup> Being “dragged to Fort Smith in irons,” as the practice was described in the *Cherokee Advocate*, was part of a powerful ritual of punishment in a region where Native, Black, and white criminals intermingled, sheltered by the absence of law.<sup>109</sup> The fugitive status of the Indian Territory was grounded not just in the mass presence of “criminal Indians” but in the complex status of Black Exodusters, who had fled the South to build new lives in all-Black towns.<sup>110</sup> There was also a class of thirty-five thousand white trespassers in the Territory, whose land claims were eventually authorized by the federal government but who remained criminalized “Sooners” in the national imaginary.<sup>111</sup> Condemned in the Cherokee press as “morally unfit to live anywhere outside of prison walls,” this class of lawless whites was sometimes celebrated in American popular culture in the songs of schoolchildren: “Oh, what was your name in the States, Was it Thompson, or Johnson, or Bates? Did you murder your wife, and fly for your life? Say, what was your name in the States?”<sup>112</sup> The inability of the federal court at Fort Smith to fully control lawlessness in the region led to its description in the *Congressional Record* as the “Botany Bay of the United States.”<sup>113</sup> In comparing the region to a penal colony, federal authorities called for new methods of containment that rearranged territorial law.

The resultant legal project of bringing Indian Territory inside law led to the formation of the Quapaw Agency as a place for the “mostly remnants” of nations that had refused to lay down arms against the United States. Unlike the other regions

of the Indian Territory, which were punished at Fort Smith, the 1,076 people of the Quapaw Agency were sent directly to Fort Leavenworth for punishment.<sup>114</sup> Named after the “least developed” and most “indolent, intemperate, and demoralized” people on the reservation, the Quapaw Agency was designed to “teach” nonresistance by mixing “wild” and “domesticated” Indians in a system of colonial administrative rule driven by violence and profit.<sup>115</sup> The Quapaw people were arranged among the 160 Peorias, Kaskaskias, Weas, and Piankeshaws, 150 Ottawas, 90 Eastern Shawnee and 75 Black Bob Shawnee, 222 Wyandottes, and 214 Senecas so that they might learn the power of American punishment.<sup>116</sup> When they were later joined by the Modoc and Nimiipuu (Nez Perce) peoples, the Quapaw served as a zone of legal ambiguity that created the conditions of Leavenworth’s future.

Formally designated as prisoners of war, the Modoc were sent first to Alcatraz and then to the Quapaw Agency in the Indian Territory in 1873 for “war crimes” against the United States. The Modoc had fought the US military in the lava beds of Northern California over treaty agreements and forced relocations. During a “peace council” to which both sides brought arms, a Modoc man named Captain Jack shot US general Canby because it was rumored that the military “had a pile of wood already built up, and were going to burn [him] there.”<sup>117</sup> In the Modoc War Crimes Trial that followed, Captain Jack was found guilty along with fifty-five other “Indian outlaws.”<sup>118</sup> After the trial, the guilt of the nation was explained in a formal statement read to the prisoners on the gallows: “The history of your tribe is filled with murders of the white race. . . . These acts have placed you and your band outside the rules of civilized warfare. In other words, you have made yourselves outlaws.”<sup>119</sup> When Captain Jack, Schonchin John, Black Jim, and Boston Charley were hanged on Alcatraz Island in 1873, army doctors beheaded the Modoc in the name of craniology, displaying their skulls for the next one hundred years at the Army Medical Museum and Smithsonian.<sup>120</sup> Barncho and Sloluck were given a last-second pardon on the gallows and were imprisoned on Alcatraz Island, where Barncho died in 1875 and Sloluck remained until 1878, when he was sent to Fort Leavenworth and then on to the prison of the Indian Territory.<sup>121</sup> Eventually, the entire Modoc nation would follow for “violation of the rules of honorable warfare.”<sup>122</sup>

Considered guilty at the level of the group, the Modoc were recognized as a sovereign nation in order to be condemned as foreign criminals of war. This was a departure from the legal status previously assigned to Modoc people, who were considered “civilian Indians” “free” to move about treaty homelands in California and Oregon with passes issued by county courts.<sup>123</sup> When Captain Jack traveled off the reservations in 1868, the court declared that he was “an independent freeman entitled to the protection of life, liberty, and the pursuit of happiness by the laws of civilization.”<sup>124</sup> Because the shift from civilian to foreign status removed the possibility of criminal punishment, it created contention over the terms of Modoc punishment. General Davis, for example, in pressing for mass execution, described “a band of Indian outlaws—murderers if you please—wards of the government who

had revolted against its authority.”<sup>125</sup> The *New York Tribune* suggested that treating “common criminals” as prisoners of war was wrong because the Modoc were “mere outlaws and marauders, no more entitled to belligerent rights than so many ruffians escaped from Sing Sing.”<sup>126</sup> When it was decided that the rest of the Modoc nation would be sent to the Quapaw Agency on a sentence of thirty-six years, they were locked in a makeshift stockade as prisoners of war, but their hair was cut like that of domestic prisoners.<sup>127</sup> The placement of the Modoc in the Indian Territory was a structure of mass incarceration defined by the space of the Quapaw Agency.

While the Modoc punishment in the Indian Territory was rooted in the legal distinction between sovereign belligerents and domestic criminals, the US military treated the Nimiipuu (Nez Perce) as “captives” entirely without status at Fort Leavenworth and later in the Indian Territory. The Nimiipuu (Nez Perce) were placed into the structure of the Quapaw Agency after refusing to abide by the terms of treaty deception in 1855; this required them to move to what they called the “dead lands” of the proposed reservation.<sup>128</sup> Chief Joseph, Looking Glass, White Bird, and Toohoolhoolzote, and Palus men named Husus Kute and Hahtalekin, were punished as leaders of the “Non-Treaty Nez Perce,” and were pursued by US forces from Oregon across Idaho and Montana to a place forty miles from the Canadian border.<sup>129</sup> General Oliver Otis Howard threatened to send Chief Joseph and his people to the prison of Indian Territory “if it takes years and years.”<sup>130</sup> In the Nez Perce “surrender,” an agreement that they could return to their homeland was broken, and William Tecumseh Sherman insisted on executions and treating “what are left” just “like the Modocs, sent to some other country.”<sup>131</sup> Sherman described their status as that of “prisoners” whose “wishes should not be consulted. When the time comes, they should be located on ground at the convenience of the Government, and not of their choice.”<sup>132</sup>

Although the US “campaign” was never formally recognized as war, General Howard directed his soldiers to “treat them as prisoners of war, and provide for them accordingly,” but neither Congress nor the military ever made a formal appropriation to support indefinite detention.<sup>133</sup> After they arrived on fourteen river flatboats and eleven old passenger cars of the Great Northern Railroad, Chief Joseph’s fame as the defeated “Red Napoleon” brought spectators and military bands to stations along the route.<sup>134</sup> The local newspaper in Leavenworth published daily reports of camp life in the center of the horse-racing track that is now Sherman Army Air Field: “Quite a large number of ladies from the garrison and citizens from ‘downtown’ were on the ground to see the new arrivals.”<sup>135</sup> While the camp was treated as a kind of museum, open latrine trenches, leaking tents, and malarial infections caused twenty-one deaths at Fort Leavenworth.<sup>136</sup> The War Department eventually confessed that Nez Perce imprisonment was “of little importance” to the military and requested that responsibility be transferred to the Office of Indian Affairs.<sup>137</sup> William Tecumseh Sherman, who had once argued for mass execution, conceded that “if the Indian Bureau cannot, or will not, provide

for these captives,” they should be released from “captivity at Fort Leavenworth, Kansas,” and be allowed to “find employment where they can. This is cruel, but it seems the law provides no remedy.”<sup>138</sup>

In the transfer of penal authority over Nimiipuu (Nez Perce) detention, they were relocated to federal jurisdiction and what elders called the Eeikish Pah (the hot place). They were located first next to the Modoc on the Quapaw Agency, but after the deaths of eighty-four people they were allowed to “choose” a less punitive reservation in Indian Territory beyond the boundaries of the Quapaw.<sup>139</sup> Joseph gave a series of published interviews that increased public pressure to send the Nimiipuu (Nez Perce) home, but continued detention in the Indian Territory was justified on the grounds that thirty-one of them had been indicted *in absentia* for the murder of settlers in the First District Court of Idaho. After seven years of confinement under joint federal-military jurisdiction, they were finally released in 1884 and sent to the Lapwai and Colville reservations in Idaho and Washington, where Chief Joseph’s people were joined to the Confederated Tribes of the Colville Reservation in Washington.<sup>140</sup> The treatment of the Nimiipuu (Nez Perce) people illustrates not only the structure of sovereignty and jurisdiction that anchored the Quapaw’s relationship to Indian Territory and to Leavenworth but also how this legal ambiguity enabled forms of erasure that came to define Law for the Indian. Recognized only for the purpose of punishment, the nations of the Indian Territory were located in a carceral state that came to define the course of the federal prison system.

This creation of separate federal crimes for Indians accelerated in the early 1880s, when the secretary of the interior established the Courts of Indian Offenses (1883) and Congress passed the Major Crimes Act (1885) in response to the Supreme Court’s decision in *Ex Parte Crow Dog*. As building blocks in the architecture that became Leavenworth, these legal arrangements sought to bring Native people inside US law and therefore inside US prisons. The Courts of Indian Offenses were designed to increase the power of reservation agents over the prosecution of crime. They were panels of state-appointed “mixed-blood” peoples who had the power to withhold rations and to impose fines and sentences of hard labor and incarceration at local agency prisons.<sup>141</sup> They often focused on the punishment of indigenous political and spiritual practices, including the Sun Dance movement. According to the 1891 Board of Indian Commissioners Report, the “so-called courts of Indian offenses” were “more in the nature of courts martial than civil courts, and practically registered the decrees of the Indian agent.”<sup>142</sup> They were an alibi for the expansion of federal power onto the reservations and over “criminal Indians” who remained “at large upon the reservation unpunished.”<sup>143</sup> The perceived failure of these specialized courts led to the legal reconstruction of Law for the Indian and a BIA test case that validated the architecture that became Leavenworth.

To establish the legality of Law for the Indian, the BIA selected an “unpunished” crime that had occurred on Lakota land and argued that the federal government

could prosecute all Indians for all crimes regardless of location. The BIA chose to use Crow Dog's killing of Spotted Tail (Sinte Gleske) on August 5, 1881, which had resulted from conflict over the legal authority of the US-backed "Indian Police." Spotted Tail had been appointed as the head of the Indian Police after he "came in" to the Spotted Tail Agency. Finding none of the food he was promised, he threatened to "burn and destroy every building" on the reservation.<sup>144</sup> Spotted Tail used the violence of this incentive structure to turn US justice back on itself by reinstating Lakota justice practices. Because his status as Indian police chief allowed him to appoint members to the force, he selected only policemen who were not "full-blooded" members of the nation, since, according to Lakota tradition, "full-blooded" people could never be subject to the authority of "mixed-bloods."<sup>145</sup> Against this backdrop, when the Indian policeman Crow Dog refused Spotted Tail's orders to make a particular arrest he was dismissed from the Indian Police. Crow Dog later killed Spotted Tail just outside Dakota Territory. Because Crow Dog practiced Lakota justice, he saw that his actions would burden his family for four generations, and he "purifi[ed] himself in a sweat lodge, shooting his rifle into sacred rocks four times to assuage the spirit of Spotted Tail."<sup>146</sup> Despite Crow Dog's reparation, he was detained at Fort Niobrara, Nebraska, convicted of murder by the territorial court in Deadwood, Dakota Territory, and was sentenced to execution by hanging.

When the BIA brought *Ex Parte Crow Dog* in 1883 to confirm the legality of Law for the Indian, the Supreme Court ruled on the question of whether Congress had repealed a certain section of the Revised Statutes that excluded from jurisdiction all crimes "committed in the Indian country by one Indian against the person or property of another Indian."<sup>147</sup> The ruling in *Ex Parte Crow Dog* referred to Indians as "aliens and strangers" who were foreign to US law because of an "inability to understand" the laws of a "superior" race. The Court maintained that Native justice was rooted in revenge and suggested that to apply US justice to the Lakota would be to "measure the red man's revenge by the maxims of the white man's morality." Using the narrative of Indian difference, the Court ruled against the BIA and reversed Crow Dog's conviction.

Congress responded to the perceived failure of US jurisdiction in *Ex Parte Crow Dog* with the Major Crimes Act of 1885, which federalized Native punishment and relied on the very logic that had constituted the Indian Territory as a *prisonscape*. The act made federal crimes of murder, manslaughter, rape, assault, arson, burglary, and larceny when committed by Native people. Excepting the Five Nations, the legislation brought criminalized Indians inside US law to punish crimes against "another Indian or other person" whether "within or without an Indian reservation."<sup>148</sup> The Major Crimes Act therefore reached the remaining site of Native jurisdiction—the regulation of justice on the reservations in instances where Native people committed crimes against other Native people. The law claimed to equalize criminal Indians and domestic criminals, subjecting both to

“the same courts and in the same manner . . . to the same penalties as . . . all other persons charged with the commission of said crimes.”<sup>149</sup> But the legislation drew on a long history of legal colonialism to disguise “equality before the law” with the continuation of specialized crimes that only Indians in Indian Territory could commit. These two legal structures—the federalization of all Native crime and the distinction of special Indian Territory crimes—created a mass of federal prisoners in a nation without federal prisons.

As part of the history of the carceral state, the creation of specialized courts and specialized crimes led gradually to the removal of “Indian punishment” from legal regulation. Alongside the trend toward federalization, the Supreme Court decision in *United States v. Clapox* removed reservation jails from the realm of penal institutions altogether. In the legal ratification of the reservation jailhouse as an extralegal institution, the Court created a form of unregulated punishment through the Umatilla Reservation in Oregon, where the Indian agent had jailed a woman named Minnie for adultery. Because adultery was not a crime in the Umatilla nation or according to US law as it applied on the reservation, Minnie was imprisoned for violating an administrative “rule” established by the local agent. When a group of Umatillas, including Clapox, “broke open the jail” to free her, they argued in the federal case that followed that the whole legal apparatus of “Indian Offenses” was unconstitutional on the grounds that courts could be established only by acts of Congress. Because the Courts of Indian Offenses were created by the Department of the Interior to govern local reservation spaces, they were not authentic sources of justice according to the terms of American law. The federal courts in Oregon responded by referring to the Indian Courts as *educational* rather than punitive institutions, as “mere educational and disciplinary instrumentalities by which the government of the US endeavor[s] to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.”<sup>150</sup> This legal reclassification of the Indian Courts from sites of punishment to institutions of education was affirmed by the US Supreme Court in 1888, which ruled in *United States v. Clapox* that the reservation jail was “analogous to a school” where Native people received training in the force of law and in the “habits, ideas, and aspirations that distinguish the civilized.”<sup>151</sup> In removing Indian punishments from the possibility of legal scrutiny, US law concealed Native punishment within the rubric of education, embedding and then disappearing its violence in a structure of mass incarceration.

The joint localization and federalization of Indian punishment in the 1880s created a carceral matrix. The federal government divided the region into districts, with crimes in the central district punished at Fort Smith, Arkansas, and crimes in the southern region prosecuted in the District Court of Northern Texas. The provisional territorial government of Oklahoma later “placed all the reservations occupied by the so-called ‘non-Civilized’ Indians, except the Quapaw Agency, within its boundaries and therefore under the jurisdiction of the newly established

Territorial and US district courts for Oklahoma.”<sup>152</sup> Quapaw Agency prisoners remained subject to federal jurisdiction and were prosecuted in the federal court at Wichita, Kansas. It was because of this legal arrangement that John Grindstone ended up under federal jurisdiction in a state-level prison for a crime in the Quapaw Agency.

Those outside the Quapaw Agency and in an Indian Territory that no longer legally existed were now subject to a new regime of federal jails. The government built and rented a total of eleven jails in a region with only 120,000 people. These institutions were almost immediately condemned as antiquated institutions not worthy of the federal government. By 1897, the attorney general reported that he was still trying to establish “at least one good jail in each of the three . . . districts” of McAlester, Ardmore, and Muskogee.<sup>153</sup> The Muskogee jail on the corner of Denison and Third Street consisted of a “number of wooden buildings surrounded by a twelve-foot stockade” that held as many as 350 prisoners at a time.<sup>154</sup> During an investigation, authorities found two hundred Black, white, Cherokee, and Creek prisoners in the space of forty square feet and declared the “character of the buildings” a “disgrace to the Government” and “destructive of morals, minds, and bodies.”<sup>155</sup> To develop standards for jailhouse construction in the old Indian Territory, the US government hired Eames and Young, the architects who were already building Leavenworth, to design four new federal jails in Vinita, Muskogee, South McAlester and Ardmore, Oklahoma.<sup>156</sup> Prisoners in these jails were routed into a federal prison system without prisons and then into a military prison that was already a long-standing symbol of the carceral state.

Mass incarceration was an idea built into the space of the Indian Territory as a joint federal-military enterprise and was organized according to a regime of administrative law that functioned like a prison. In this way, the nation’s first prisoner came from a space already designed radially to make “Indian criminals” subject to federal punishment. Fort Leavenworth’s place in the history of the settler colonial state is important because it served as the military arm of a carceral matrix that stretched to the federal courts in Wichita, Kansas, and Fort Smith, Arkansas, and to the Quapaw Agency as a different kind of prison. This entire matrix had been developed to make Indians subject to law, but this form of legal recognition was refused and always in crisis.<sup>157</sup> In the reservation escapes, jailhouse breaks, and the poisonous roots almost in John Grindstone’s hand, the history of the federal prison system is anchored in resistance. Lizzie Cardish may have been sent up to Leavenworth, but she also burned down the reservation school house, creating a crisis for “Indian Affairs.” The commissioner worried in 1906 that “despite the fact that this office has emphasized the necessity of . . . watchfulness at various Indian schools, fires still occur. Most of these are due to incendiary origin . . . so that stern measures became imperative, and however distasteful such action may have been it was found necessary to make an example of those concerned.”<sup>158</sup> Leavenworth was mapped into the larger structure of Native punishment that emerged in the

nineteenth century and created forms of mass punishment that remain central to the history of mass incarceration. The federal prison system was an idea about the mass incarceration of Native people.

Because the carceral state is a settler colonial state, the origins of the federal prison system are connected to the project of an Indian Territory that was designed radially as though it were a nineteenth-century prison. Fort Leavenworth's selection as the site of the nation's first prison was part of a longer history of legal colonialism that was mapped onto the formation of Kansas Territory and entrenched into a carceral Kansas state. In the context of this multilayered legal architecture and the transition to the legal time of Bleeding Kansas, the idea of mass incarceration that began in the Indian Territory took on new life in the mass punishments of slavery's borderlands.