

Decolonizing Anti-Rape Law and Strategizing Accountability in Native American Communities

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ANTIVIOLENCE ADVOCATES OFTEN FIND THEMSELVES WORKING WITH THE CONTRADICTIONS of struggling for a vision of justice within the constraints of the United States criminal legal system. Perhaps the greatest contradictions are those felt by many Native advocates who understand the United States to be a settler colonial state. Sociologist Luana Ross' seminal book on Native women and prison, *Inventing the Savage* (1998), critiques uncritical approaches toward legal reform, noting that the genocide of Native peoples has never been against the law. Similarly, as Native Studies scholar Sandy Grande states:

The United States is a nation defined by its original sin: the genocide of American Indians.... American Indian tribes are viewed as an inherent threat to the nation, poised to expose the great lies of U.S. democracy: that we are a nation of laws and not random power; that we are guided by reason and not faith; that we are governed by representation and not executive order; and finally, that we stand as a self-determined citizenry and not a kingdom of blood or aristocracy.... From the perspective of American Indians, "democracy" has been wielded with impunity as the first and most virulent weapon of mass destruction (Grande, 2004: 31–32).

At the same time, the incidence of violence against Native women has reached epidemic rates. The 1999 Bureau of Justice Statistics report, *American Indians and Crime*, found that sexual assault among Native Americans is 3.5 times higher than for all other races living in the United States. Unlike other racial groupings in the United States, most sexual assaults committed against Native American women are interracial (Greenfield and Smith, 1999). In particular, people who perpetrate sexual assault against Native women are generally white. Because of the complex jurisdictional issues involving tribal lands, most sexual assaults against Native women are committed with impunity. Depending on the tribe, non-Native perpetrators of sexual assault on Indian reservations may fall outside state, federal,

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and tribal jurisdictions; often, tribes themselves have not developed effective means for addressing violence in their communities.

The intersections of gender violence and colonialism in Native women's lives force numerous contradictions upon Native antiviolence advocates. First, the federal justice system is premised on the ongoing colonization of Native nations. Second, tribal governments often engage in gender-oppressive practices. Moreover, as Native studies scholar Jennifer Denetdale (2006, 2008) argues, many tribal governments act as neocolonial formations that support tribal elites at the expense of the community. Third, advocates address women who need immediate services, even if those services come from a colonizing federal government or a neocolonial tribal government.

One lawyer who has been at the forefront of addressing these contradictions is Sarah Deer, a member of the Mvskoke Nation. Deer worked as a program officer for the Violence Against Women Office in the Department of Justice from 1999 to 2002. She later moved to the Tribal Law and Policy Institute (TLPI) in Los Angeles. Now, she is an adviser to the TLPI, but she also teaches at the William Mitchell Law School in St. Paul, Minnesota, where she began teaching in 2008. Deer is the foremost expert on sexual assault in Indian country in the United States and was one of the primary contributors to Amnesty International's *Maze of Injustice* report (2007) on sexual assault on Native reservations. Information that is not otherwise cited in this article is based on an interview I conducted with Deer in December 2010.

Deer first began this work at the Department of Justice under the Clinton administration. Working with the federal government to end violence against Native women is always rife with contradictions, but they became particularly apparent when George W. Bush took office. Deer says that many longtime career employees in the Department of Justice reassured her that the work would not shift with the change of administration, given their experience with prior Republican and Democratic administrations. However, as the new administration dramatically shifted the priorities of the Violence Against Women Office, these employees soon quit their jobs. Tribal antiviolence programs were advised that they could not use the word "colonization" in their antiviolence curricula. Longstanding programs that published materials on domestic violence rates among police officers were defunded. This experience motivated Deer to develop a framework for decolonizing anti-rape law.

Deer left the Violence Against Women Office in 2002 and began working with the Tribal Law and Policy Institute. TLPI does do advocacy work at the federal level, but it focuses mainly on assisting tribes to develop infrastructures to address sexual assault. Many tribal governments, Deer notes, were under the misperception that the Major Crimes Act (1885) gave the federal government exclusive jurisdiction over rapes committed in Indian country. In fact, tribes and the federal government exercise concurrent jurisdiction. When she began her work, only two U.S. attorneys regularly prosecuted rape cases on Indian reservations. Because many tribes lacked

rape codes, they did not prosecute these cases either. At the time, tribes could only incarcerate offenders for up to one year in tribal jails. Deer intervened with tribes to adopt legal codes that would proactively respond to sexual violence on reservations.

Deer also critiqued strategies for addressing violence. Due to federal government restrictions on the amount of prison time allowed for sexual offenders, tribes urged the federal government to expand the ability of tribes to incarcerate. As various scholars have noted, however, expanded sentencing did not lead to decreasing rates of violence (Currie, 1998; Davis, 2003; Donziger, 1996). Before colonization, when tribes did not have prisons, violence against women was virtually unheard of (Deer, 2009). Instead, tribes utilized a number of social mechanisms to ensure safety for women and children, and none of these mechanisms are prohibited by federal legislation. Thus, rather than fighting the federal government over the issue of incarceration, Deer (2009: 154–155) suggests that tribes look to pre-colonial measures, such as banishment, to address violence by adapting them to contemporary circumstances.

Although tribes are now able to divest from the U.S. colonial system, many Native women remain under violent attack. They may need to use the federal system until more advanced decolonization becomes possible. Thus, Deer advocates a two-fold strategy: (1) in the short-term, hold the federal government accountable for prosecuting rape cases; and (2) encourage tribes to hold perpetrators accountable directly, eventually eliminating the need to rely on federal interference. This approach can be misread as a simple formula for reform. However, the project of prison abolition is a positive rather than a negative one. The goal is not to tell survivors that they can never call the police or engage the criminal justice system. The question is not whether survivors should call the police, but rather why they have no other options. For Deer, it is not inconsistent to reform federal justice systems while simultaneously building tribal infrastructures for accountability that will eventually replace the federal system.

This strategy was apparent in the Amnesty International report, *Maze of Injustice*. Amnesty's work on violence against women focuses almost solely on the responsibility of states to act with "due diligence" to prosecute offenders. The problem with this approach is that conservative law-and-order advocates have co-opted it to support repressive anticrime agendas that negatively affect indigenous peoples. For instance, the heralded Violence Against Women Act was attached to the repressive Violent Crime Control and Law Enforcement Act, which increased the use of the death penalty, added over 50 federal offenses (many of which criminalized youth of color), eliminated Pell Grants for prisoners, and expanded the prison-industrial complex by 9.7 billion dollars. This expansion of federal criminalization disproportionately affects Native communities since Indian reservations are subject to federal jurisdiction.

Concurrent with the fanfare over the federal crackdown on sexual violence, federal and state officials were refusing to prosecute offenders who sexually assaulted

Native women in tribal communities. This basically subjected Native women to legal rape. In response, Deer sought to shift Amnesty's focus. Instead of demanding that the federal justice system consistently prosecute people who assault Native women, Amnesty should urge the federal government to discontinue policies that interfere with the ability of tribes to prosecute offenders themselves. In particular, the report called for the legislative repeal of *Oliphant v. Suquamish* (which prevents tribes from prosecuting non-Native offenders on Native reservations) and of Public Law 280 (which grants states criminal jurisdiction over some tribes). Due to this report, the Obama administration passed the Tribal Law and Order Act (2010). Unfortunately, some components of this act increase the federal presence in Indian country. However, it does redress some of the problems with *Oliphant* by increasing cross-deputization among state and tribal police, allowing tribal police to arrest non-Native offenders. This is important because, unlike most other ethnic groups, Native women are most likely to be raped by non-Native offenders.

These legal reforms help to relocate antiviolence action from the state to tribal communities and to create opportunities for developing effective community-based accountability strategies for people who perpetrate violence against Native women. The best-known alternative to incarceration is the "restorative justice model," which, although successful in some Native communities, has not developed sufficient safety mechanisms for survivors of domestic/sexual violence. "Restorative justice" is an umbrella term that describes a wide range of programs that attempt to address crime from a restorative and reconciliatory framework rather than a punitive one. That is, unlike the U.S. criminal justice system, which focuses solely on punishing the perpetrator and removing him (or her) from society through incarceration, restorative justice attempts to involve all parties (perpetrators, victims, and community members) in determining the appropriate response to a crime in an effort to restore the community to wholeness.

The potential of restorative justice models to deal effectively with the consequences of "crime" seems to be much greater because, if we want people who perpetuate violence to live peaceably in society, then it is sensible to develop justice models in which the community is involved in holding him or her accountable. Under the current incarceration model, perpetrators are removed from their community and are hindered from developing ethical relationships within a community context. In the restorative justice model, everyone (victim, perpetrator, family, friends, and the working team) is involved in developing the healing contract. Everyone is also assigned an advocate through the process. Each party is also responsible for holding the perpetrator accountable to his contract. According to one Tlingit man, this approach often was more difficult than going to jail:

First one must deal with the shock and then the dismay on your neighbors' faces. One must live with the daily humiliation, and at the same time seek forgiveness not just from victims, but from the community as a whole.... [A

prison sentence] removes the offender from the daily accountability, and may not do anything towards rehabilitation, and for many may actually be an easier disposition than staying in the community (Ross, R., 1997: 18).

These models have been particularly well developed by many Native communities, especially in Canada, where the sovereign status of Native nations offers them an opportunity to develop community-based justice programs. In one program, for example, when a crime is reported, the working team that deals with sexual/domestic violence talks to the perpetrator and gives him the option of participating in the program. The perpetrator must first confess his guilt and then follow a healing contract, or go to jail. The perpetrator is free to decline to participate in the program and go through normal routes in the criminal justice system.

These models only work when the community unites in holding perpetrators accountable. Yet in cases of sexual and domestic violence, the community often sides with the perpetrator rather than the victim. As Deer (2009: 156) argues, in many Native American communities, these models are often pushed on domestic violence survivors to pressure them to reconcile with their families and “restore” the community without sufficient concern for their personal safety. In addition, Native American domestic violence advocates have been critical that some restorative justice processes co-opt “traditional” forms of governance to address domestic violence. They argue that Native communities have been pressured to adopt “circle sentencing” because it is a traditional indigenous practice. Some advocates contend that no such traditional practice exists in their communities. Moreover, concerns have arisen that diverting cases outside the court system can endanger survivors. In one example, Bishop Hubert O’Connor (a white man) was found guilty of multiple cases of sexual abuse of aboriginal women. Under the restorative justice model, his punishment was to participate in a healing circle with his victims. Since his crimes were against aboriginal women, he could opt for an “aboriginal approach” that, many argue, did little to provide real healing and accountability for the survivors.

Deer contests the tendency to romanticize and homogenize “traditional” (i.e., Native) alternatives to incarceration. First, traditional approaches might be even harsher than incarceration. Many Native people presume that traditional modes of justice focus on conflict resolution. According to Deer, however, penalties for societal infractions were not lenient: they entailed banishment, shaming, reparations, and sometimes death. Attempting to revise tribal codes by reincorporating traditional practices, she notes, is not a simple process. Difficulties arise in determining what the practices were and how they could be used today. Practices such as banishment, for example, would not have the same impact. Before colonization, Native communities were so close-knit and interdependent that banishment was often the equivalent of a death sentence. Today, however, Native peoples can be banished and still join the dominant society.

The dilemma we face is that incarceration as a response to sexual/domestic violence promotes the repression of communities of color without providing genuine safety for survivors. Restorative justice models often promote community silence and denial around issues of sexual/violence. Concern for the safety of survivors of gender violence disappears under the rhetoric of community restoration. How, then, do we develop community-based models that respond to gender violence in which the community actually holds the perpetrator accountable? Unfortunately, in discussions about ending violence advocates often assume only two possibilities, traditional criminal justice *or* restorative justice. When the faults of the restorative justice model are highlighted, the back-up strategy is assumed to be the traditional criminal justice approach. Deer, however, works with the criminal justice system as necessary, while developing effective community-based strategies against sexual violence that will eventually supplant the criminal justice system.

Alternatives for accountability that are genuinely responsive to survivors of domestic and sexual violence must incorporate a larger critique of the state to avoid framing community accountability as an add-on to the criminal justice system. Because of their primary focus on advocacy, antiviolence advocates have not developed strategies for “due process,” leaving that crucial work to the state. Lacking a critique of the state, our political imaginaries can be co-opted, the state continues to administer “justice” uncontested, with communities simply supplementing this regime. This recapitulates the fundamental injustice of the settler state, which is founded on slavery, genocide, and the exploitation of immigrant labor. Relying on the state to attend to those who do harm prevents us from creating new visions for liberatory nationhood that are not structured on logics of hierarchy, violence, and domination.

These tensions often put Deer in the difficult position of mediating between sectors of Native communities that hold contradictory beliefs. For some, working with the U.S. legal system is to be complicit in colonialism; for others, *failing* to work with this system to protect survivors of violence is to be complicit in gender violence. Deer’s dual strategy attempts to surmount this dilemma: develop Native infrastructure that addresses violence while calling for stricter accountability of federal law enforcement to Native women. Of course, the trap of pursuing reforms is that they can lead to investment in the current U.S. legal system and detract from building new systems of governance that are not based on violence, domination, and control. Still, moving from current structures to revolution is a long-term process. Thus, it is important to strategize about the content of “revolutionary” reforms. For instance, many prison abolitionists have argued that only reforms that diminish the criminal justice apparatus should be supported. According to other abolitionists, this approach leaves people vulnerable to “crimes of the powerful,” such as rape and domestic violence (Ward, 1986).

We can understand Deer’s current projects in the context of trying to articulate revolutionary reforms. She has worked to build tribal infrastructure by encouraging

and assisting tribes to develop tribal civil protection orders. Such orders may not in themselves protect women, but by developing them tribes in *practice* evolve their own systems for addressing violence. Deer notes that this is an area in which the U.S. federal government is unlikely to interfere. Moreover, the approach does not invest tribes in the project of incarceration. Tribal communities are more likely to adopt this reform now, and it opens the prospect for more creative antiviolenence responses to be introduced later. The reform is needed since many tribal governments have not undertaken initiatives to address gender violence, incorrectly thinking that the federal government is adequately addressing it (Deer, 2009: 162). In Deer's view, protection orders are not a sustainable strategy for ending violence, but they do encourage us to think of short-term tactics that are not based on increased incarceration. Because this work will likely not provoke federal action, tribal communities buy time to practice new ways of supporting accountability for violence and expanding further decolonial practices.

As Deer notes, "a long-term vision for radical change requires both immediate measures to address sexual violence and a forward-looking effort to dismantle the culture of rape that has infiltrated tribal nations" (*Ibid.*). At the same time, many other Native activists are engaging community in accountability strategies that do not work with the current system at all. To preclude unwanted attention from federal authorities, their strategies are not broadly advertised. For instance, one man who assaulted a relative was banished from his community. Since he could move to the city, tribal members followed him to various workplaces, carrying signs that described him as a rapist. We may or may not support that strategy, but it is important to engage in experimental and "jazzy" approaches to developing community-based accountability strategies (Communities Against Rape and Abuse, 2006). The short-term goal, then, is to identify opportunities to enhance our skill set for implementing community-based responses to violence. That may translate into strategically engaging the state to gain time to practice this work or avoiding the state altogether through trying out, adapting, and refining community accountability approaches. Yet the long-term goal remains that of divesting from the state completely.

In *X-Marks*, Scott Lyons (2010) engages Native activists and scholars who call for decolonization as a central focus for organizing. Those promoting decolonization often lack effective short-term strategies that are viewed as reformist, even though they may save the lives of indigenous peoples who are currently under attack. As a result, people's immediate needs are often sacrificed in favor of seemingly politically pure ideals. Conversely, those who engage in short-term reforms often decry the goal of decolonization as "unrealistic." They do not critique the manner in which these strategies often retrench rather than challenge the colonial status quo. Lyons affirms the need for decolonization, but observes that the process unfolds with preexisting materials and institutions. He calls on Native peoples to think creatively about these institutions, including their deployment for short-term

gains and the long-term vision of liberation. Sarah Deer's work is an example of decolonization as it promotes a vision of decolonized indigenous nationhood, while simultaneously adapting preexisting mechanisms to save the lives of victims of sexual and domestic violence along the way.

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