Decolonizing Rape Law

A Native Feminist Synthesis of Safety and Sovereignty

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A former secretary-treasurer of the Comanche Nation was convicted in Lawton on two counts of first-degree rape and sentenced to 20 years in prison, the prosecutor said. Melvin Ray Kerchee, 57, was found guilty Tuesday of raping two girls in 2002. They were 10 and 13 years old at the time. . . . The girls—now 13 and 15 years old—testified they were raped in the summer of 2002.[1]

Ramaris Paul Anagal, 32, of Chinle, Ariz., was sentenced here today to 25 years in prison for three counts of Aggravated Sexual Abuse and one count of Assault Resulting in Serious Bodily Injury. Anagal raped a female companion while forcing her to perform sex acts on his then girlfriend who was also traveling with them. Anagal pretended to have a gun during the ordeal. The girlfriend testified that she knew there was no gun but pretended to have one because she was afraid of Anagal. Both victims testified that Anagal told his girlfriend to shoot the friend.[2]

The above described cases are but two examples of an ever-increasing epidemic of sexual violence committed against Native women and girls. In these cases, the Native defendants were convicted and received sentences of twenty years and twenty-five years, respectively. Each was prosecuted by a foreign government (the United States, not the respective tribal nations). The question I raise is—should the tribal government itself respond to such crimes? If yes, how—and what might a Native feminist analysis have to offer in addressing this crisis?

Many people will argue that such crimes are too serious to be handled by contemporary tribal justice systems.[3] Given the numerous legal and financial limitations faced by tribal court systems, they might say, tribal governments must simply rely on the federal (or state) system to prosecute and sentence such rapists. However, this over-reliance on foreign governmental systems has often been to the detriment of Native women. Today, Native women suffer the highest per capita rates of sexual violence in the United States.[4] Conservative estimates suggest that more than one of three Native women in America will be raped during their lifetime.[5] Rape was once extremely rare in tribal communities.[6] Arguably, the imposition of colonial systems of power and control has resulted in Native women being the most victimized group of people in the United States.[7] Moreover, statistics indicate that most perpetrators of rape against Native women are white.[8] As a result of a 1978 U.S. Supreme Court decision, tribal governments have been denied their authority to criminally prosecute non-Indian perpetrators.[9]

Rape and sexual violence are deeply embedded in the colonial mindset.[10] Rape is more than a metaphor for colonization—it is part and parcel of colonization. Paula Gunn Allen notes that ". . . for many people the oppression and abuse of women is indistinguishable from fundamental Western concepts of social order."[11] Sexual assault mimics the worst traits of colonization in its attack on the body, invasion of physical boundaries, and disregard for humanity. A survivor of sexual assault may experience many of the same symptoms—self-blame, loss of identity, and long-term depression and despair—as a people surviving colonization. The perpetrators of sexual assault and colonization thrive on power and control over their victims. The U.S. government, as a perpetrator of colonization, has attempted to assert long-lasting control over land and people—usurping governments, spirituality, and identity.

Paradoxically, today authority over most sexual assaults on Indian reservations falls under the auspices of the federal government.[12] Unlike most rapes in the United States, which are prosecuted by the state court systems, rape of Native women on Indian reservations falls within the

purview of the U.S. Attorney's Offices throughout the nation. However, as noted by Indian legal scholar Kevin K. Washburn, "the system designed to address criminal justice and public safety in Indian country simply does not work."[13] Depending on an outside government, especially a government established and created by the colonizers (the historical perpetrators of rape), is not the solution to violent crimes committed upon Native women.

Washburn goes on to note that "the institutions of federal criminal justice may well feel like a vestige of a colonial power."[14] Defendants, if convicted, are held accountable by a foreign government using foreign mechanisms of justice. Moreover, federal trials rarely have Native people on the juries.[15] This creates the problem of true community accountability—something prized in tribal nations.

> If a defendant does not feel the weight of his or her own community's moral judgment, the accused may not be confronted with the truth of the wrong-fulness of his or her own actions that would bring about regret for the criminal offense. . . . When the defendant does not perceive that it is his or her own community making that judgment, the person who is found guilty may not feel the bite of the verdict in the same way. Indeed, because the federal government is sometimes viewed as a villain in Indian country, defendants may sometimes even see themselves as martyrs and may be able to evade the most difficult aspects of introspection that can be produced by a judgment of guilt.[16]

Historically, few rapes against Native women have ever been adjudicated by the colonizer's legal system.[17] This lack of response has been documented in other colonized societies, such as Australia.[18] In fact, the origins of many U.S. rape laws were racialized—that is, in the eyes of the law, only white women could be raped.[19] Moreover, Native women were not even allowed to testify in many Anglo courts until the late nineteenth century.[20]

Aside from the philosophical problem of relying on the federal government to prosecute rapists who prey on Native women, there are numerous practical problems as well. These include geographical distances and language and cultural barriers. The length of time between an assault and the sentencing, assuming a conviction is achieved, can be lengthy. For instance, the sentencing in the two example cases took place more than two years after the sexual assaults. Federal prosecutors are often very selective about the cases they pursue, leaving many victims without recourse. As Holcomb points out, "having the power to prosecute such offenses does not mean government has the obligation to do so."[21] Federal prosecutorial decision-making is "largely hidden from public

scrutiny," leaving many victims feeling abandoned.[22] Indeed, most rapes in the United States are never reported to law enforcement. Anderson writes that "women have little to no faith in the formal structures of police power to remedy violence motivated by gender animus."[23]

The current construction of the criminal justice system, as conceived by Anglo-American jurisprudence, is clearly inadequate to address sexual assault against Native women. Therefore, we must next address the question of how contemporary tribal women themselves can respond to such crimes. Even within the limitations imposed by the federal government, tribal nations in the United States retain concurrent criminal jurisdiction over sex crimes unless committed by non-Indians.[24] Can contemporary indigenous nations in the United States adequately address sexual violence? If so, what kinds of systems will address sexual violence in ways that promote safety and sovereignty for Native women? A Native feminist critique is warranted in order to address decolonization and healing, as well as self-determination.

There are numerous reasons most contemporary tribal governments have struggled to develop comprehensive mechanisms for responding to sex crimes. First and foremost, sexual assault crimes are relatively recent phenomena in tribal communities.

> According to the oral traditions within our tribal communities, it is understood that prior to mass Euro-American invasion and influence, violence was virtually nonexistent in traditional Indian families and communities. The traditional spiritual world views that organized daily tribal life prohibited harm by individuals against other beings. To harm another being was akin to committing the same violation against the spirit world.[25]

Reckoning with a new level of violence is only one part of the difficulty tribal governments face in responding to sexual assault. Tribal criminal justice systems have been severely compromised by the United States government and this has weakened tribal authority over serious crimes in Indian country. Beginning with the Major Crimes Act in 1885, numerous federal laws and U.S. Supreme Court decisions have sought to replace traditional tribal legal systems with the federal penal system.[26]

I contend that tribal nations can and should respond to sexual assault cases against their citizens by reclaiming this history of nonviolence and respect for humanity. For tribal nations, defining and adjudicating sexually motivated crimes is the purest form of sovereignty. Protecting women—the life-bearers and life-givers of nations—is central to the well-being of nations. Resisting rape means resisting colonization. Defining our own communities as havens of safety will require revolutionary social change. The challenge is in developing appropriate

responses that take into account the safety of victims and entire communities. Taking a closer look at tribal history and unique cultural attributes will aid in forming a coherent response to sexual violence in our communities.

This article will explore the strengths and weaknesses of both the adversarial (Anglo-American) model of justice and the Peacemaking model of justice as applied (and potentially applied) to rape cases. I conclude that neither paradigm is wholly appropriate for responding to the rape of Native women in Indian country. Instead, I advocate for a Native woman–centered model of adjudication—one that is feminist, and therefore decolonizing, looking to grassroots organizing as well as the "rape courts" of South Africa as a model to develop possible responses to the rape of Native women in the United States.

PROBLEMS WITH APPLYING THE ANGLO-AMERICAN MODEL IN RAPE CASES

While some tribal governments adopted Anglo-American-style governments long before the 1930s, it was the 1934 Indian Reorganization Act that formally encouraged tribal governments in the United States to develop court systems modeled after the Anglo-American judicial system.[27] Prior to this effort to assimilate tribal nations into Western-style governments, most tribal governments operated on open and accessible legal systems of oral tradition.

> For most North American Indians law was accessible to everyone since the oral tradition allowed it to be carried around as part of them rather than confined to legal institutions and inaccessible experts who largely control the language as well as the cost of using the law.[28]

The Anglo-American model of justice, on the other hand, depends on a strictly adversarial system of justice. This runs contrary to the traditional jurisprudence of most Native cultures: court rules are regimented and formal and focus heavily on defendants' rights, and procedures are based on written statutes and case law. As applied in tribal communities, the Anglo-American model rarely allows for the incorporation of tribal custom, tradition, or oral laws.[29] Moreover, the narrative and direction of a rape case in Anglo-American law are dictated by the government, not the voices of the victimized women. Koss has written of the "inherent traumatizing features of adversarial justice," noting that even women who see their rapist convicted pay a "psychic price."[30]

The adversarial Anglo-American system provides multiple rights to defendants, with little to no regard for victims' rights. The defendant, for example, has a right to "remain silent" and not testify. In most cases,

the victim is required to testify in order to obtain a conviction. This imbalance and lack of accountability on the part of defendants may be seen as contradictory to traditional indigenous perspectives on justice, in which the accused was often required to make statements regarding his behavior, whether in defense or admission of the crime. A communal system of justice favors a group or family response to violence, as opposed to an isolated, individual response. In other words, an American doctrine such as "innocent until proven guilty" is not necessarily consistent with traditional indigenous principles of justice. In early accounts of Creek culture, for instance, a defendant who became too boisterous about his rights in a criminal dispute could be punished simply for his assertions (regardless of his culpability in the alleged crime).[31] In this conception of addressing violence, the accused must answer to the larger community.

Women's truths about sexual violence are often lost in the Anglo-American model of justice. Kristin Bumiller notes that, "even as stories unfold in the courtroom, the value of the 'facts' the court will call evidence has been predetermined by the social mechanisms that privilege certain forms of communication."[32] Native women, by nature of their marginalized status in the United States, can hardly hope to find justice in a system that was developed to destroy them. Anglo-American rape law has it roots in traditional property law. In this construct, women were conceived as the "property" of men—and rape was merely a trespass to chattels. Native women will always struggle to find justice in a legal system that was designed to undermine their humanity.

The Anglo-American criminal justice system also relies heavily on incarceration as a response to violent crime. While removing a violent perpetrator from a community may be necessary to achieve immediate safety, many indigenous people are concerned that long-term incarceration with no possibility of rehabilitation is not the solution to violent crime in Indian country. It has been established that the federal courts, where a large majority of Native rapists are adjudicated, send their prisoners to a system that has no sex offender treatment program.[33] These perpetrators are then released from prison, free to return to their communities. They may have become more dangerous during their time behind bars.

The discussion around incarceration, though, must be broadened to include a more societal scope. Numerous scholars have noted that the prison–industrial complex, as run by the state and federal systems, has disproportionately incarcerated persons of color and has served to oppress tribal communities.[34] Whether or not this analysis applies in cases of Native people incarcerating their own is another question. Most historians and sociologists agree that jails did not exist in most traditional tribal societies.[35] As tribal correctional facilities developed during the last century, they mimicked the problems with contemporary non-Native prisons and jails. Certainly, there are serious concerns regarding contemporary tribal jails. A September 2004 report from the Bureau of Indian

Affairs' Office on the Inspector General found serious safety concerns, as well as human rights violations, stemming from multiple tribal jails.[36] Arguably, most of these concerns are the result of resource limitations and lack of training for tribal jail personnel.

But the broader question is whether such jails can ever be appropriate places for Native sexual assault offenders. Ideally, tribal jails could be reformed in such a way that they provide safety for communities, as well as accountability and rehabilitation for offenders. However, some believe that sex offenders cannot be rehabilitated. If this is the case, then tribal governments will have to continue to wrestle with the question of what to do once a sex offender has been identified and convicted. Many tribal cultures traditionally banished a rapist permanently from the community. In contemporary settings, however, banishment does not carry the same significance as it once did. A rapist or pedophile who is "banished" may simply move to a new community and continue to perpetrate on other victims. A Native feminist model of justice must address the long-term consequences of sexual violence, keeping in mind the nature of predatory behavior and the likelihood of recidivism.

PROBLEMS WITH THE PEACEMAKING MODEL IN RAPE CASES: LIMITS OF RESTORATIVE JUSTICE

Many scholars of indigenous law, mostly men, have suggested that one of the solutions to violent crime in Indian country is to develop "peacemaking" sessions to address criminal behavior. Most of these models purport to be more "indigenous" than the Anglo-American model because they include talking circles, family meetings, and restorative principles. A Native feminist approach necessarily perceives this construct with a skeptical lens, for it is possible that any system of jurisprudence to play unwittingly into the hands of predators, many of whom use any and all means to excuse, mitigate, or minimize their behavior.

There are a variety of models of peacemaking in the United States, the most well-known being the Navajo Nation Peacemaking Courts. Peacemaking may be an appropriate avenue for seeking resolutions to many kinds of conflicts within a tribal nation, including property disputes, probate matters, custody, and juvenile delinquency. However, the question of applying Peacemaking to felony cases such as sexual assault is much more controversial. Some have suggested that peacemaking or other restorative models are *never* appropriate in cases of sexual abuse or rape.[37] However, the recent book *Navajo Nation Peacemaking* describes the use of peacemaking in the context of sexual assault:

> An Indian Health Service (IHS) psychologist who specialized in the treatment of sex offenders called the

> Office of the Chief Justice for assistance. He explained that he operated a special program for sex offenders and that a Navajo abuser had reported himself to it. The man had dropped his denial, and the IHS official felt that peacemaking would be an effective means of dealing with *his* sexual abuse. Arrangements were made for a referral to peacemaking, with protections of confidentiality, given the likelihood that the Federal Bureau of Investigation did not know about the underlying crime.[38]

There are at least two significant problems with this account. First, there is no evidence that the man's victim or victims were willing or able to go to Peacemaking. (Note that the victims are not even mentioned in this passage.) Second, while the avoidance of the Federal Bureau of Investigation may be beneficial to the offender, the lack of accountability for perpetrating sexual abuse may endanger both the victim and the community at-large. This tendency to protect the offender from the "white man's system" without an alternative response is dangerous, as it can lead to further victimization.

The passage in *Navajo Nation Peacemaking* regarding sex offenses continues:

> This [peacemaking in sexual abuse cases] is a controversial subject that is clouded by the anger that sex offenses generate, leading to a lack of focus on solutions. While James W. Zion, one of the co-editors of this book, was teaching a Navajo common law course, a student who was a lawyer asked his opinion about a case in which the child was being sexually abused but the lawyer did not know if the abuser was the child's father or maternal grandmother. He asked how peacemaking would address such a case. Zion explained that he had seen a similar case in which the family, with the assistance of the peacemaker, had put the problem on the table in the hope that the ensuing discussion would prompt a confession. The lawyer then asked what would happen if neither admitted it. In the case that Zion was citing, the family isolated the child from both people and made sure the child was never alone with either. The lawyer expressed his amazement at the simplicity of the approach and said that he has been so focused on the notion of identifying and punishing the wrongdoer that he had not thought about simply protecting the child in the future.[39]

Again, this passage has several alarming aspects. First, the child's victimization is treated as a mere family conflict instead of a violent crime.

There is no evidence that the Peacemaking system acknowledged the psychological harm suffered by the child, and simply isolating suspected sex offenders from a child does not directly address the underlying criminal behavior. Perpetrators of sexual assault are not limited to physical abuse but often exert emotional, intellectual, and spiritual power over their victims. Therefore, the physical isolation proposed as a solution in this scenario does not address these fundamental violations. There is no enforcement mechanism in place to prevent future harm. Furthermore, because the offender is not held criminally accountable by the system, he or she is apparently free to commit offenses on other children.

Most notably, however, the author suggests that "anger" is somehow misplaced and inappropriate in regard to these cases (anger "clouds" the subject). A Native feminist analysis, in contrast, can incorporate such emotions into a legal remedy for victims. In other words, why should anger and outrage not play a critical role in responding to outrageous crimes? Consider the role of ceremony and poetry of Native rape survivors, such as Connie Fife (Cree):

i am the one who was raped by
my father then my uncle
and spent years hiding then decided
to change it all
and used all my rage to castrate my
memory of them
and healed myself with love/
I am the one who late at night screams and howls
And hears voices answer/
I am the one whose death was intended
And didn't die[40]

Some of the problems with applying a "peacemaking" model of justice to rape include safety, coercion, the excusing of criminal behavior, and recidivism. Each of these concerns merits separate and serious consideration, for they create an atmosphere that can ultimately lead to re-victimizing a survivor of sexual assault, as well as excusing the rapist's behavior, thus feeding into the vicious cycle of victimization in tribal communities. Moreover, imposing a "traditional" remedy for behavior (sexual violence) that is not "traditional" is counter-intuitive. There is a tendency to over-romanticize the peacemaking process as one that can "foster good relationships" and heal victims.[41] In fact, traditionally, many tribal cultures imposed the death penalty (as well as banishment) for sex crimes.[42]

As noted earlier, rape is intricately connected to colonization and genocide. It is doubtful that a peacemaking model would be appropriate

in cases of genocide and colonization; therefore, it is questionable whether peacemaking is culturally appropriate in cases of sexual violence. (It is somewhat akin to suggesting that the survivors of the Wounded Knee massacre sit in a circle, facing the soldiers who attacked them.) A legal mechanism designed for interpersonal quarrels and disagreements does not translate to violent crime. While additional research (designed and implemented by indigenous people) may provide data to support the effectiveness of restorative justice on recidivism, prevention, and deterrence, the existing literature suggests that Native survivors of violence are much less likely than offenders to find a restorative justice satisfying.[43]

Safety

For a victim of sexual assault, safety is paramount. A rape survivor may have well-justified fears about retaliation—many sex offenders threaten their victims with further harm, should they report the crime. Beyond efforts to provide immediate physical security, it is important to consider other forms of psychic and spiritual safety. If the peacemaking system is too informal or relaxed, it has the potential to replicate some of the troubling dynamics from the adversarial system (such as requiring the victim and perpetrator to sit in the same room). Without specific measures established to provide some degree of separation between the victim and the defendant, peacemaking risks re-victimizing the survivor by placing her in direct communication with the defendant. Requiring survivors to face their perpetrator in an informal, relaxed setting could result in re-traumatization. Resolving the violence, if that is possible, is not only a matter of stopping future occurrences but also one of victim healing. If a crime victim does not feel safe in the forum, then the forum itself runs a risk of re-victimization.

A well-known Canadian model of using restorative justice for intrafamily sexual abuse, the Hollow Water model, has been the subject of much praise in the restorative justice literature. One article indicates that Hollow Water operates on the premise that the *only* way an abused person can rebuild his or her life is to "expose his or her pain in the abuser's presence, . . . [so that] the abuser actually feels the pain that he or she created."[44] In other words, the survivor's well-being is predicated on the perpetrator's ability to empathize. This notion puts a tremendous amount of pressure on a survivor—not only must she describe the violation that happened to her but she is also, at some level, responsible for her perpetrator's response. In this regard, a survivor could experience some of the same dynamics as she would in an Anglo-American criminal trial—an exposure of the graphic, intimate details of a horrific experience without any guarantee of justice. The Hollow Water model literature does provide for extensive support for the victim(s)—before, during, and after the Healing Contract.[45] However, this ultimatum ("your

healing is dependent upon the offender's response") still presents a variety of safety issues. These concerns about safety are closely related to another aspect of re-victimization—coercion.

Coercion

Because a peacemaking court may be deemed to be more "indigenous" than an Anglo-American model, there is a risk that survivors will be coerced into participating, compounding the trauma. While the Navajo Peacemaking court claims that it provides the option of Peacemaking without requiring it, it does not account for the unofficial methods of pressuring and coercing a woman to take part in the system. Donna Coker, in her recent examination of Navajo Peacemaking as applied in domestic violence cases, writes that there are "problems of coerced participation and inadequate attention to the victim's safety."[46]

A related problem with the restorative justice literature is that the primary focus appears to be on the perpetrator(s) rather than the victim(s). In the Hollow Water model, each person (including, presumably, the victim) is required to "sign on" to the process.[47] This "Healing Contract" then binds the signers to a two- to five-year process. The literature does not indicate whether the victims have the opportunity to withdraw from the process. At the conclusion of the "Healing Contract," the "Cleansing Ceremony" is held to "honor the victimizer."[48] In my critique of this approach, I do not mean to insinuate that survivors of sexual violence can never find solace in such a process. Certainly, the individual needs of survivors vary dramatically. Instead, a Native feminist concern is that survivors may be pressured to participate in this healing process, which may put them in direct contact with the person who raped them.

Pressure to participate in the "Healing Contract" may be implicit or explicit, but the literature indicates that the "alternatives are either looking the other way on rampant sexual abuse or having their people sent off to prison, which is another form of genocide."[49] The message to survivors, then, could be construed as "either participate in this process or send dad/grandpa/uncle to prison and participate in genocide." Levis notes that "determining whether the victim is really a willing participant is more problematic than we can know."[50]

Restoration/restorative justice assumes some degree of preexisting equality between the parties—and clearly a rape survivor and her perpetrator are at unequal places. Moreover, since the goal of Navajo Peacemaking is "reconciliation of the parties in dispute," a victim of sexual assault may feel as though she has failed if she has not "made peace" with her rapist.[51] Rape and sexual violence are criminally violent acts, not mere disputes or misunderstandings. A Native feminist analysis requires accountability and responsibility rather than acquiescence and acceptance.

Some peacemaking models are predicated on the assumption that "conflict" is resolved through "compromise," but a Native woman–centered analysis does not concede that there should be compromise for rape. A compromise model assumes that both parties share the responsibility (if not for the crime, then for its resolution). Moreover, rape is much more than a mere "conflict" and should not be treated as such. Rape is a fundamental violation of the soul. This reality should not be minimized. Framing rape and sexual abuse as "interpersonal conflict" circumvents the larger issues of hierarchical power and control. Addressing rape in isolated forums does not promote social change. This is a problem for both the adversarial and the peacemaking models of justice. Treating sexual violence as a one-time mistake or misunderstanding precludes the larger issue of perpetrators using rape as a means to control and subjugate women.

However, acknowledging the larger social issues that have exacerbated the rates of sexual violence against Native women presents other problems. Most Native activists and scholars, for example, agree that sexual violence was once a rare occurrence in their communities prior to contact with Western systems. In this sense, the entire fabric of Native communities has been victimized by sexual assault. Rape and sexual abuse do not happen in a vacuum; they are individualized manifestations of a larger societal problem. The challenge, then, is to decolonize rape law by acknowledging this history without allowing perpetrators to minimize personal responsibility.

Because it tends to resemble mediation or negotiation, peacemaking has the potential to provide leniency in rape cases, providing excuses for a rapist's behavior. For example, if a rapist was mistreated as a child or has an alcohol and/or drug problem, he may be able to manipulate the peacemaking system into allowing him to excuse or mitigate his behavior. However, many people are mistreated as children but do not proceed to perpetrate sexual violence on others. Therefore, these excuses cannot and should not be tolerated in a contemporary tribal response.

Moreover, a mediation-like approach may open the door for an exploration of a particular victim's "culpability" in an assault. For example, if the victim had substance abuse problems, which the perpetrator took advantage of, a macro-level analysis runs the risk of framing the victim's "bad behavior" (alcoholism) and the perpetrator's "bad behavior" (rape) as equally bad products of colonization. In other words, we are all victims of colonization in the same way—perpetrators and victims alike. In this regard, a feminist analysis can provide some important jurisprudential distinctions that elevate sexual violence above other social ills without abandoning the historical analysis. LaRocque notes, "Political oppression does not preclude the mandate to live with personal and moral responsibility within human communities."[52]

Restorative justice models also may not address the high degree of recidivism among sex offenders and, thus, do not address the cyclical nature of sexual violence. Consider the painful experience a victim might have if her perpetrator re-offends after a peacemaking process. Her disclosure that this person has continued to violate women and children has the potential to disrupt not only her life but also the entire community that may have supported the offender's reintegration. This scenario could be exacerbated if the process were closely intertwined with spiritual or ceremonial benchmarks. Levis explains, "... [T]he problem of people not reporting non-compliance is a conspiracy of silence of a different sort."[53]

Sexual assault is more than a violent crime; its impact has been described as "soul murder." Extreme caution is warranted to ensure that a peacemaking or restorative approach does not replicate traditional Anglo-American constructs of victim-blaming, shame, and secrecy. Any model that avoids naming and establishing rape as a political (or even gendered) crime will likely fail to fully address the inequities faced by contemporary Native women.

TRANSCENDING THE EXISTING MODELS

Rape can be seen as an individualized manifestation of colonization. Perhaps we can address rape using the same tools we use to address colonization. Tribal nations have been forced, to some extent, to adopt the legal methodology and philosophy of the colonial state in responding to rape. Taiaiake Alfred and Jeff Corntassel explain:

> Colonial legacies and contemporary practices of disconnection, dependency and dispossession have effectively confined Indigenous identities to state-sanctioned legal and political definitional approaches. This political–legal compartmentalization of community values often leads Indigenous nations to mimic the practices of dominant non-Indigenous legal–political institutions and adhere to state-sanctioned definitions of Indigenous identity.[54]

Fear becomes entrenched in contemporary tribal governments, manifesting itself in assertions such as "tribal governments have no jurisdiction over rape—that's a federal issue." Alfred and Corntassel continue:

> [O]ur people must transcend the controlling power of the many and varied fears that colonial powers use to dominate and manipulate us into complacency and cooperation with its authorities. The way to do this is to confront our fears head-on through spiritually grounded action;

> contention and direct movement at the source of our fears is the only way to break the chains that bind us to our colonial existences.[55]

Instead of being trapped by a false dichotomy of choosing between the Anglo-American adversarial model and the mediation-like peacemaking model, Native women should develop alternative responses to sexual violence. Indigenous women should be at the forefront of the development of contemporary tribal remedies for rape. Incorporating a unique indigenous vision for justice, survivors of sexual violence can develop a model that transcends both the male-dominated adversarial model of justice and the male-dominated peacemaking model. 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.

I have two recommendations as starting points for tribal communities seeking ways to address rape and sexual assault in their communities. The first, a civil protection order process, allows a victim of sexual assault to obtain a protection order against her assailant.[56] The second recommendation concerns criminal courts to some extent but goes further by suggesting a re-examination of the nature of contemporary criminal jurisprudence. In short, the first recommendation can be considered part of a short-term "band-aid" plan for immediate safety. A long-term social change movement in a particular indigenous community will ultimately illuminate a variety of approaches to ending sexual violence.

The first recommendation, the "protection order" model, may not be feasible in every community, although numerous tribal courts currently issue protection orders. This civil legal remedy, a legal tool developed by mainstream feminist activists (with some basic roots in Anglo-American law), is usually confined to cases of domestic violence, wherein the victim and the perpetrator have a preexisting intimate relationship. However, contemporary tribal courts can consider expanding the protection order laws to include victims of sexual violence. A particular victim might benefit from a protection order process for at least two reasons. First, the process allows the victim to assert herself and exert some control in the legal process. The decision to file a protection order lies with the victim herself, not with a government prosecutor. Protection orders, while not a perfect solution, allow some remedy for rape by providing a public record that prohibits the respondent from having further contact with the victim. Second, as noted earlier, most sexual assaults of Native women are committed by non-Indians. Because tribal governments have been stripped of their criminal authority over such perpetrators, the only remaining remedy lies in a civil process. Once a civil order has been issued, tribal governments may choose to banish non-Indians who violate the terms of the order.

The second recommendation concerns conceptions of criminal authority. There are some potential alternatives to the existing Anglo-American model. In recent years, for example, South Africa has developed a specialized court system to deal with sexual violence. For many years, South Africa has been considered the "rape capital of the world." The rape courts there are designed to be dedicated solely to sexual assault crimes with specialized prosecutors and judges trained to provide victim-centered justice.[57] The specialized courts allow quicker responses to sexual violence, as well as higher conviction rates. One might envision a tribal "rape court" in which women elders in the community gather to respond to the report of a sexual assault. Advocates could be trained to represent the victim's perspective and wishes in the system.

Because of U.S. Supreme Court decisions and resource limitations, many tribal governments must carefully consider how to respond legally to non-Native offenders. Elected tribal leaders and court personnel, then, must consider whether or not non-Native men will be held to the same standards of behavior as Native men in their community—and if so, how that standard will be enforced. Grassroots Native women's activism, though, is not necessarily bound to this rigid interpretation of subject-matter jurisdiction.

Social change work is central to the future of tribal nations. In a society where at least one-third of Native women experience sexual violence, only committed activism and action will lead to a reversal of this devastating trend. Braveheart-Jordan and DeBruyn note:

> [H]ealing Native American Indian women must involve the incorporation and reclaiming of the communal traditional spiritual, social, and cultural power of Indian women, regardless of, and with all respect for, different individual Indian women's beliefs and religious affiliations of modern times.[58]

One of the principal sources of strength for Native women survivors of violence today is found within relationships and kinship circles. Karen Anderson writes, "Women's power [traditionally] derived in large part from the actual structure of kin relations and residence patterns."[59] Re-instilling the importance of clan and family into the legal process will empower survivors and lessen the isolation and shame that so often accompany sexual violence. Integrating family responses to rape will necessarily result in social change. It should be noted, however, that family responses must be informed by Native feminist belief systems.

Paula Gunn Allen describes one such scenario in her book *Off the Reservation:*

> Having failed to persuade the governing body to enact and enforce regulations combating violence against women,

> a number of older women banded together. When abuse of a woman occurred, the "aunties" confronted the abuser, chastised him, shamed him by making him aware that his mother, grandmother, aunts, nieces, and daughters knew about and condemned the abuse. In other words, the women of the community took total responsibility for ending the crime that they recognized was directed against them all. They held men to the standard set by women, and by making community life woman-centered, their safety and that of the entire community was ensured. I hear that violence against women doesn't occur there anymore.[60]

It becomes important, then, for tribal governments to construct rape not only as an attack on an individual woman but also an attack on the entire community. The connections to family, clan, and community also have significant relevance for sex offenders. Luana Ross notes that the offender *and his family* are responsible to the victim and must pay compensation.[61]

Native women who have survived rape and who have advocated on behalf of rape victims should be at the center of the response to sexual violence. Our voices will guide communities in developing appropriate responses that take into account both safety and dignity for survivors. Community activism, speak-outs, and public education will continue to be part of responding to sexual violence. These activities are not limited to tribal lands; indeed, the Native antirape movement in the United States includes large populations of urban women and others who live outside of federally defined "Indian country" (such as most villages in Alaska).

Kevin Washburn writes that "a community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination."[62] In keeping with that philosophy, it is critical to acknowledge that rape threatens the very existence of our nations. Responding to sexual violence is central to restoring and maintaining sovereignty as indigenous nations. Integrating ceremony, song, and stories into the legal process will encompass both safety and sovereignty, ultimately restoring the respect and dignity that sexual violence has attempted to destroy.

NOTES

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