

The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement

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Anti-violence advocates in the United States often find themselves working with the contradictions of struggling for a vision of justice within the constraints of the US criminal legal system. Perhaps the greatest contradictions may be felt by many Native advocates who understand the US to be a settler colonial state. This article explores these contradictions and the limitations that this framework imposes on genuine attempts to address injustice. It also proposes a possible way out of a constraining paradox.

Sociologist Luana Ross's germinal book on Native women and prison, *Inventing the Savage*, critiques uncritical approaches toward legal reform, noting that Native genocide has never been against the law.¹ 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.²

At the same time, violence against Native women is at epidemic rates. The 1999 Bureau of Justice Statistics report, *American Indians*

and Crime, finds that sexual assault among Native Americans is 3.5 times higher than for all other races living in the US. Unlike other racial groupings, the majority of sexual assaults committed against Native American women are inter-racial.³ In particular, the majority of people who perpetrate sexual assault against Native women are white. Because of the complex jurisdictional issues involving tribal lands, the majority of sexual assaults against Native women are committed with impunity. Depending on the tribe, non-Native perpetrators of sexual assault on Indian reservations may fall out of state, federal and tribal jurisdiction. And 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 Native anti-violence advocates to operate through numerous contradictions. First, they must work within a federal justice system that is premised on the continued colonisation of Native nations. Second, they must work with tribal governments that often engage in gender oppressive practices. In addition, as Native studies scholar Jennifer Denetdale argues, many tribal governments act as neo-colonial formations that support tribal elites at the expense of the community.⁴ Third, they must also address women who need immediate services, even if those services may come from a colonising federal government or a tribal government that may perpetuate gender oppression.

Given the logics of settler colonialism, it may seem to be a hopeless contradiction to work within the US legal system at all. In fact, many social justice advocates eschew engaging in legal reform for this reason. Consequently, we are often presented with two dichotomous choices: short-term legal reform that addresses immediate needs but further invests us in the current colonial system or long-term anti-colonial organising that attempts to avoid the political contradictions of short-term strategies but does not necessarily focus on immediate needs. This essay will explore possibilities for rethinking this dichotomous approach by rethinking the role of legal reform in general. The essay foregrounds alternative approaches using a Native feminist analytic towards engaging legal reform that may have a greater potential to undo the logics of settler colonialism from within.

As I have argued elsewhere, Native feminism as well as Native studies is not limited in its object of analysis.⁵ Rather, in its interest in addressing the intersecting logics of heteropatriarchy and settler colonialism, it is free to engage with diverse materials. In looking then towards alternative strategies for undoing settler colonialism through the law, I contend that it is important to engage important work that might not seem to be directly about Native peoples or settler colonialism if this work helps provide new resources for how we could strategically engage the law. Consequently, I engage the work of legal scholars and activists that address very different areas of law as a means to challenge some of the current assumptions that undergird both reformist and revolutionary approaches to the law.

DECOLONIAL REALISM

Critical race theorist Derrick Bell challenged the presupposition of much racial justice legal reform strategies when he argued that racism is a permanent feature of society. While his work is generally cited as a critical race theoretical approach, I would contend that his work implicitly suggests a settler colonial framework for understanding legal reform. That is, many of the heirs of Derrick Bell do not follow the logical consequences of his work and argue for an approach to race and the law that seeks racial representation in the law.⁶ However, Bell's analysis points to the inherent contradictions to such an approach. Rather than seeking representation, Bell calls on Black peoples to 'acknowledge the permanence of our subordinate status'.⁷ Espousing the framework of 'racial realism', Bell disavows any possibility of 'transcendent change'.⁸ To the contrary, he argues that '[i]t is time we concede that a commitment to racial equality merely perpetuates our disempowerment'.⁹ The alternative he advocates is resistance for its own sake – living 'to harass white folks' – or short-term pragmatic strategies that focus less on eliminating racism and more on simply ensuring that we do not 'worsen conditions for those we are trying to help'.¹⁰ While Bell does not elaborate on what those strategies may be, he points to a different kind of reasoning that could be utilised for legal reform. In his famous story, 'Space Traders', aliens come to planet Earth promising to solve the world's problems if world leaders will simply

give up Black people to the aliens. This story narratively illustrates how thin white liberal commitments to social justice are. First, the white people of course do give up Black people to the aliens without much thought. But what more dramatically illustrates this point is that the reader knows that, almost without a doubt, if this were to happen in real life, of course Black people would be given up.

Within this story, however, is a little-commented scene that speaks to perhaps a different way to approach legal reform within the context of white supremacy. Gleason Golightly, a conservative black economics professor who serves as an informal cabinet member for the President, becomes embroiled in a fight with the civil rights legal establishment about the best means to oppose the proposed trade. Golightly had previously pleaded with the President and his cabinet to reject it. When his pleas are not heard, he begins to reflect on how his support for conservative racial policies in the interests of attaining greater political power had been to no avail. He realises the strategy behind his appeal to the President was doomed to fail.

In retrospect, though [his] arguments were based on morality [...] [i]nstead of outsmarting them, Golightly had done what he so frequently criticised civil rights spokespersons for doing: he had tried to get whites to do right by black people because it was right that they do so. 'Crazy!' he commented when civil rights people did it. 'Crazy!' he mumbled to himself, at himself.¹¹

Realising the error of his ways, Golightly interrupts this civil rights meeting in which activists plan to organise a moral crusade to convince white Americans to reject the space traders proposal. Instead, he suggests that they should tell white people that they cannot wait to go on the ship because they have learned they are being transported to a land of milk and honey. White people, argues Golightly, so oppose policies that benefit Black people, even if they benefit white people, that they will start litigating to stop the space traders' proposed plan.¹² The civil rights establishment rejects this strategy as a moral outrage and begins a racial justice campaign, ultimately to no avail.

What this story troubles is social justice movements' investment in the morality of the law. Despite the US legal system's complicity in settler colonialism, patriarchy, capitalism and white supremacy since its inception, they advocate strategies for change that rest on the presupposition that the law can somehow be made to support the end of sexism, racism and classism. Historically, as more radical racial and social justice organisations were either crushed or co-opted by the US governments during the 1970s, these movements shifted from a focus on a radical restructuring of the political and economic system to a focus on articulating identity based claims that did not necessarily challenge the prevailing power structure.¹³ If groups were not going to directly challenge the state, they could then call on the state to recognise their claims to equality and redress from harms perpetrated by other social actors. Ironically, then, the same US government that codified slavery, segregation, anti-immigrant racism, and the genocide of indigenous peoples, now becomes the body that will protect people of colour from racism. The fact that the US itself could not exist without the past and continuing genocide of indigenous peoples in particular does not strike liberal legal reformists as a contradiction.

Bell suggests that it may be possible to engage in legal reform in the midst of these contradictions if one foregoes the fantasy that the law is morally benevolent or even neutral. In doing so, more possibilities for strategic engagement emerge. For instance, in the 'Racial Preference Licensing Act', Bell suggests that rather than criminalise racial discrimination, the government should allow discrimination, but tax it. Taxes accrued from this discrimination would then go into an 'equality' fund that would support the educational and economic interests of African-Americans.¹⁴

As I have argued elsewhere, the law enforcement approach has been similarly limited in addressing the issues of gender violence when the majority of men do, or express willingness to engage in, it.¹⁵ As a result, criminalisation has not actually led to a decrease in violence against women.¹⁶ Anti-violence activists and scholars have widely critiqued the supposed efficacy of criminalisation.¹⁷ As I will discuss later in this essay, Native women in particular have struggled with the contradictions of engaging the legal system to address the legacies of colonial gender violence.

While there is growing critique around criminalisation as the primary strategy for addressing gender violence, there has not been attention to what other frameworks could be utilised for addressing gender violence. In particular, what would happen if we pursued legal strategies based on their strategic effects rather than based on the moral statements they propose to make?

DISTRUSTING THE LAW

Aside from Derrick Bell, because racial and gender justice legal advocates are so invested in the morality of the law, there has not been sustained strategising on what other possible frameworks may be used. Bell provides some possibilities, but does not specifically engage alternative strategies in a sustained fashion. Thus, it may be helpful to look for new possibilities in an unexpected place, the work of anti-trust legal scholar Christopher Leslie. Again, the work of Leslie may seem quite remote from scholars and activists organizing against the logics of settler colonialism. But it may be the fact that Leslie is not directly engaging in social justice work that allows him to disinvest in the morality of the law in a manner which is often difficult for those who are directly engaged in social justice work to do. This disinvestment, I contend is critical for those who wish to dismantle settler colonialism to rethink their legal strategies.

In 'Trust, Distrust, and Anti-Trust', Christopher Leslie explains that while the economic impact of cartels is incalculable, cartels are also unstable.¹⁸ Because cartel members cannot develop formal relationships with each other, they must develop partnerships based on informal trust mechanisms in order to overcome the famous 'prisoners' dilemma'. The prisoner's dilemma, as described by Leslie, is one in which two prisoners are arrested and questioned separately with no opportunity for communication between them. There is enough evidence to convict both of minor crimes for a one year sentence but not enough for a more substantive sentence. The police offer both prisoners the following deal: if you confess and implicate your partner, and your partner does not confess, you will be set free and your partner will receive a ten-year sentence. If you confess, and he does as well, then you will both receive a five-year sentence. In this scenario, it becomes the rational choice for both to

confess because if the first person does not confess and the second person does, the first person will receive a ten-year sentence. Ironically, however, while both will confess, it would have been in both of their interests not to confess.

Similarly, Leslie argues, cartels face the prisoners' dilemma. If all cartel members agree to fix a price, and abide by this price fixing, then all will benefit. However, individual cartel members are faced with the dilemma of whether or not they should join the cartel and then cheat by lowering prices. They fear that if they do not cheat, someone else will and drive them out of business. At the same time, by cheating, they disrupt the cartel that would have enabled them to all profit with higher prices. In addition, they face a second dilemma when faced with anti-trust legislation. Should they confess in exchange for immunity or take the chance that no one else will confess and implicate them?

Cartel members can develop mechanisms to circumvent pressures. Such mechanisms include the development of personal relationships, frequent communication, goodwill gestures, etc. In the absence of trust, cartels may employ trust substitutes such as informal contracts and monitoring mechanisms. When these trust and trust substitute mechanisms break down, the cartel members will start to cheat, thus causing the cartel to disintegrate. Thus, Leslie proposes, anti-trust legislation should focus on laws that will strategically disrupt trust mechanisms.

Unlike racial or gender justice advocates who focus on making moral statements through the law, Leslie proposes using the law for strategic ends, even if the law makes a morally suspect statement. For instance, in his article, 'Anti-Trust Amnesty, Game Theory, and Cartel Stability', Leslie critiques the federal Anti-Trust's 1993 Corporate Lenience Policy that provided greater incentives for cartel partners to report on cartel activity. This policy provided 'automatic' amnesty for the first cartel member to confess, and decreasing leniency for subsequent confessors in the order to which they confessed. Leslie notes that this amnesty led to an increase of amnesty applications.¹⁹ However, Leslie notes that the effectiveness of this reform is hindered by the fact that the ringleader of the cartel is not eligible for amnesty. This policy seems morally sound. Why would we want the ringleader, the person who most profited from the

cartel, to be eligible for amnesty? The problem, however, with attempting to make a moral statement through the law is that it is counter-productive if the goal is to actually break up cartels. If the ringleader is never eligible for amnesty, the ringleader becomes inherently trustworthy because he has no incentive to ever report on his partners. Through his inherent trustworthiness, the cartel can build its trust mechanisms. Thus, argues Leslie, the most effective way to destroy cartels is to render *all* members untrustworthy by granting all the possibility of immunity.

While Leslie's analysis is directed towards policy, it also suggests an alternative framework for pursuing social justice through the law, to employ it for its strategic effects rather than through the moral statements it purports to make. It is ironic that an anti-trust scholar such as Leslie displays less 'trust' in the law than do many anti-racist/anti-colonial activists and scholars who work through legal reform.²⁰ It also indicates that it is possible to engage legal reform more strategically if one no longer trusts it.

As Beth Richie notes, the anti-violence movement's primary strategy for addressing gender violence was to articulate it as a crime.²¹ Because it is presumed that the best way to address a social ill is to call it a 'crime', this strategy is then deemed the correct moral strategy. When this strategy backfires and does not end violence, and in many cases increases violence against women, it becomes difficult to argue against this strategy because it has been articulated in moral terms. If, however, we were to focus on legal reforms chosen for their strategic effects, it would be easier to change the strategy should our calculus of its strategic effects suggest so. We would also be less complacent about the legal reforms we advocate as has happened with most of the laws that have been passed on gender violence. Advocates presume that because they helped pass a 'moral' law, then their job is done. If, however, the criteria for legal reforms are their strategic effects, we would then be continually monitoring the operation of these laws to see if they were having the desired effects. For instance, since the primary reason women do not leave battering relationships is because they do not have another home to go, what if our legal strategies shifted from criminalising domestic violence to advocating affordable housing? While the shift from criminalisation may seem

immoral, women are often removed from public housing under one strike laws in which they lose access to public housing if a 'crime' (including domestic violence) happens in their residence, whether or not they are the perpetrator. If our goal was actually to keep women safe, we might need to creatively rethink what legal reforms would actually increase safety.

REVOLUTIONARY REFORMS

As mentioned previously, there has been insufficient evaluation of the strategic effects of legal strategies opposing gender violence. However, the work of Native anti-violence scholar and activist, Sarah Deer, points to possible new directions in engaging legal reform for the purpose of decolonisation. Deer notes that the issues of gender violence cannot be separated from the project of decolonisation. For instance, currently, tribal governments are restricted to sentencing tribal members to three years in tribal prison for even major crimes such as rape. Much of the focus of the anti-violence movement has been on increasing the number of years tribal governments can incarcerate members. Because of this effort, the *Tribal Law and Order Act* of 2010 increased the length of sentences from one to three years.

However, Deer notes that prior to colonisation, violence against women was virtually unheard of, even though tribes did not have prisons.²² Instead, tribes utilised a number of social mechanisms to ensure safety for women and children, and none of these mechanisms are prohibited by federal legislation. Because the federal government restricts the amount of prison time allowed for sexual offenders, tribes primarily call on the federal government to expand tribes' ability to incarcerate. However, as a variety of scholars have noted, expanded sentencing has not actually led to decreased violence.²³ Thus, rather than focusing their attention simply on incarceration, Deer suggests that tribes look to pre-colonial measures for addressing violence and begin to adapt those for contemporary circumstances.²⁴ At the same time, Deer notes that it is not necessarily a simple process to adapt pre-colonial measures for addressing violence. Unfortunately, many of the alternatives to incarceration that are promoted under the 'restorative justice model'

have 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 rather than a punitive framework. As restorative justice frameworks 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, restorative justice is opposed to the US criminal justice system, which focuses solely on punishing the perpetrator and removing him (or her) from society through incarceration. These models are well developed in many Native communities, especially in Canada, where the legal status of Native nations allows 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 the criminal justice system.

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. Everyone is also responsible for holding the perpetrator accountable to his contract. One Tlingit man noted that this approach was often 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.²⁵

These models have greater potential for dealing with crime effectively because, if we want people who perpetuate violence to live in society peaceably, it makes sense to develop justice models in which the community is involved in holding him/her accountable. Under the current incarceration model, perpetrators are taken away from their community and are further hindered from developing ethical relationships within a community context.

However, the problem with these models is that they work only when the community unites in holding perpetrators accountable. In cases of sexual and domestic violence, the community often sides with the perpetrator rather than the victim. As Deer argues, in many Native communities, these models are often pushed on domestic violence survivors in order to pressure them to reconcile with their families and 'restore' the community without sufficient concern for their personal safety.²⁶ In addition, Native advocates have sometime critiqued the uncritical use of 'traditional' forms of governance for addressing domestic violence. They argue that Native communities have been pressured to adopt circle sentencing because it is supposed to be an indigenous traditional practice. However, some advocates contend that there is no such traditional practice in their communities. Moreover, they are concerned that the process of diverting cases outside the court system can be dangerous for survivors. In one example, Bishop Hubert O'Connor (a white man) was found guilty of multiple cases of sexual abuse but his punishment under the restorative justice model was to participate in a healing circle with his victims. Because his crimes were against Aboriginal women, he was able to opt for an 'Aboriginal approach' – an approach, many argue, that did little to provide real healing for the survivors and accountability for the perpetrator.

Deer complains that there is a tendency to romanticise and homogenise 'traditional' alternatives to incarceration. First, she notes traditional approaches might, in fact, be harsher than incarceration. Many Native people presume that traditional modes of justice focus on conflict resolution. In fact, Deer argues, penalties for societal infractions were not lenient – they entailed banishment, shaming, reparations, physical punishment and sometimes death. Deer notes that revising tribal codes by reincorporating traditional practices is not a simple process. It is sometimes difficult to

determine what these practices were or how they could be made useful today. For example, some practices, such as banishment, would not have the same impact today. Prior to colonisation, Native communities were so close-knit and interdependent that banishment was often the equivalent of a death sentence. Today, however, banished perpetrators could simply leave home and join the dominant society.

While tribes now have the opportunity to divest from the US colonial system, many Native women remain under violent attack. They may need to use the federal system until such time that more advanced decolonisation becomes possible. Thus Deer advocates a two-fold strategy: 1) The short-term strategy of holding the federal government accountable for prosecuting rape cases; and 2) encouraging tribes to hold perpetrators accountable directly so that they will eventually not need to rely on federal interference. This approach can be misread as a simple formula for reform. However, it is important to remember that the project of prison abolition is a positive rather than a negative project. The goal is not to tell survivors that they can never call the police or engage the criminal justice system. The question is not, should a survivor call the police? The question is: why have we given survivors no other option but to call the police? Deer is suggesting that it is not inconsistent to reform federal justice systems while at the same time building tribal infrastructures for accountability that will eventually replace the federal system.

If we focus simply on community accountability without a larger critique of the state, we often fall back on framing community accountability as simply an add-on to the criminal justice system. Because anti-violence work has focused simply on advocacy, we have not developed strategies for 'due process', leaving that to the state. When our political imaginaries are captured by the state, we can then presume that the state should be left to administer 'justice' while communities will serve simply as a supplement to this regime. To do so, however, recapitulates the fundamental injustice of a settler state that is founded on slavery, genocide and the exploitation of immigrant labour. Further, we are unable to imagine new visions for liberatory nationhood that are not structured on hierarchical logics, violence and domination.

We face a dilemma: on the one hand, the incarceration approach for addressing sexual/domestic violence promotes the repression of communities of colour without really providing safety for survivors. On the other hand, restorative justice models often promote community silence and denial under the rhetoric of community restoration without concern for the safety of survivors. Thus, our challenge is to develop community-based models that respond to gender violence in ways that hold perpetrators accountable. Unfortunately, in this discussion advocates often assume only two possibilities: the criminal justice system *or* restorative justice. When anyone finds faults with the restorative justice model, it is assumed that the traditional criminal justice approach must be the back-up strategy. Deer's approach, by contrast, is to work with the criminal justice system while continuing to develop effective strategies for addressing violence. These will eventually eliminate the need to rely on the criminal justice system.

Of course, the trap of pursuing reforms is that they can create investment in the current US legal system and detract from building new systems of governance that are not based on violence, domination and control. At the same time, we are not going to go from where we are now to revolution tomorrow. Thus, it becomes important to strategise around what may be called 'revolutionary' reforms. Other abolitionists have argued that the only reforms that should be supported are those that diminish the criminal justice apparatus. Other abolitions have argued that this approach leaves people vulnerable to the 'crimes of the powerful', such as rape and domestic violence.²⁷

It is in this context that we can understand Deer's current projects. She has worked on building tribal infrastructure by encouraging and assisting tribes to develop tribal civil protection orders. Her strategy is not so much based on the rationale that civil protection orders will in themselves provide protection for women. Rather, by developing these orders, tribes gain the practice of developing their own systems for addressing violence. Deer notes that this is one area that is not likely to be interfered with by the US federal government. At the same time, it is not an approach that is directly tied with investing tribes in the project of incarceration. Thus, it becomes a reform that tribal communities may adopt now as

they develop creative responses for addressing violence. The reason for this suggested reform is that many tribal governments incorrectly think that the federal government is already adequately addressing gender violence and do not take initiative to address it themselves.²⁸

In the end, the importance of Deer's recommendation is not so much an investment in that particular strategy, but the manner in which it encourages us to think of short-term strategies that are not simply based on increased incarceration, strategies that will more likely fall under the federal radar screen so that tribal communities have more time to practice new ways of supporting accountability for violence. This will encourage communities to develop better decolonial practices in the future. 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'.²⁹ At the same time, many other Native activists are engaging community accountability strategies that do not work with the current system at all. These strategies are not broadly advertised because these activists do not want to gain the attention of federal authorities. Yet, many communities have developed informal strategies for addressing authorities. For instance, one man who assaulted a relative was banished from his community. As he was simply able to move to the city, tribal members would follow him to various work places, carrying signs that described him as a rapist. Again, this may be a strategy that we may or may not support. But the point is that it is important to engage the experimental and 'jazzy' approaches for developing community-based accountability strategies.³⁰

In his recent book *X-Marks*, Scott Lyons engages with Native activists and scholars who call for decolonisation as a central focus for organising.³¹ Those who call for decolonisation often do not effectively engage in any short-term reformist strategy, even though they may save the lives of indigenous peoples who are currently under immediate attack. As a result, the immediate needs of people often get sacrificed in favour of articulating seemingly politically-pure ideals. Conversely, those who do engage in short-term reform strategies often decry the goal of decolonisation as 'unrealistic'. In doing so, they do not critique the manner in which these strategies often retrench rather than challenge the colonial status quo. Lyons

affirms the need for decolonisation, but notes that decolonization happens with pre-existing materials and institutions. He calls on Native peoples to think creatively about these institutions and about the ways in which they can be deployed not just for short-term gains but for a long-term vision of liberation.

BEYOND SHAMING THE SYSTEM

Legal reformists who often focus on shaping the law to reflect their moral values and those who focus on extra-legal revolutionary strategies often share the same goal. Often the presumed 'radical' strategy adopted by social justice groups is to engage in civil disobedience. While these groups ostensibly break the law, they often do so in rather ceremonial fashion; they essentially want to shame the system. People are supposed to get arrested, and those in power are supposed to be so shamed by the fact that an unjust system required people to break the law. The expectation is that they will then change the laws. Acts of civil disobedience often are not targeted toward changing a policy directly or building alternative systems to the current one.

Many Native groups in the southwest US, however, have developed an alternative framework for extra-legal social change. Rather than breaking the law to change the system, they propose to make Native communities ungovernable. For instance, during the passage of SB1070, Native groups with the Taala Hooghan Infoshop, O'odham Solidarity Across Borders, and others occupied the Border Patrol Office.³² However, rather than engaging in the occupation with the expectation of getting arrested, they chained themselves to the building so that the office could not perform its work. This approach has continued with their efforts to stop the US government's desecration of the San Francisco Peaks through the construction of a ski resort. While they have not eschewed legal strategies for stopping this desecration, they have focused on preventing tourists from visiting the area so that the ski resort will no longer be economically viable. According to their promotional material on *TrueSnow.org*:

For the last decade defenders of the peaks have used every legitimate way they could think of to try to stop the US Forest Service from allowing treated sewage effluent to be sprayed on the Peaks to make snow. More than 20,000 people took part in the Forest Service Environmental Impact Statement process with letters and appeals asking them not to spray treated sewage effluent on the peaks to make snow. Thousands of us went to Flagstaff City Council meetings to voice our opposition to the sale of treated sewer water for the project. Yet still they approved it – before even an environmental impact statement was done. They were the most clueless of all.

Currently the Hopi tribe is seeking lawsuit against the city because of this treated sewage effluent sale. A group of tribes and environmental and social justice organizations took a lawsuit all the way to the steps of the Supreme Court. The lawsuits have only called into question the legitimacy of what is loosely termed the 'justice' system. For it seems there is no justice in this system. It is just us, IN this system.

There is also yet another lawsuit in play which I have termed 'Save the Peaks Coalition vs The Snowbowl Movement' which may have the possibility of stopping this project in the long term. But if we wait for a verdict, all the trees will be cut and the pipeline installed. This has not stopped the politically connected ski area from going ahead with their project right now and they have already clear-cut 100,000 trees (or more) and have already buried a few miles of pipeline along Snowbowl road. If they lose in court they would be expected to repair the damages. How do you get back 400 year old trees? Greed and hatred seems to be Snowbowl's only motivation [...].

But isn't there some way to stop it? Well we could hit them where it hurts! In the pocketbook. If you live in the Fort Valley area of Flagstaff you must see by now how little Arizona Snowbowl really cares about the 'economic benefits' it brings our fair town. I know some of us had a good deal of trouble even going to work when the snow was good and Snowbowl was busy. The traffic jam was incredible. Stretching more than 15 miles. They took our livelihood away and hope to make that

a daily occurrence by having a 'predictable' ski season using sewer water to make snow.

This jam up gave us an idea! Why don't we do the same thing? Arizona Snowbowl does not own the mountain, and it is perfectly legal to drive up to the area for any permitted public lands use. This means hiking, camping, praying, skiing, sitting, loving, mushroom hunting, etc.

So what do I do? It is time to stop waiting for a government entity, an environmental group, or any of the people you have come to expect to save the peaks for us. The time has come to show them how much power the people have! And believe me, you are the most powerful people in all of the world! You! Yep you! You can do it!

All summer the Arizona Snowbowl is open Friday, Saturday, and Sunday for scenic skyrides, food, and alcohol. They do get a pretty good business up there and it would have an impact if the mountain was just 'too busy' with people doing all the other things our Public Forests are for. There is nothing illegal about it and it would send a clear message to the forest service that we don't need Snowbowl to 'recreate on the mountain'. Heck, we don't even need a ski area up there to ski! In essence, take a vacation. Just do it up on the peaks and don't use Snowbowl.

Our government officials are forgetting what 'all power to the people' really means. You cannot wait any longer for someone else to save the peaks for you. It will take of all us together to do this. So what are you waiting for? Pack a lunch this Saturday morning and Converge on the Peaks!³³

What these activists suggest is to divest our moral investment in the law. This will affect not only what legal reforms we may pursue, but what revolutionary strategies we might engage in. Rather than engaging in civil disobedience to force legislators to change laws to conform to our moral principles, we might be free to engage creatively in strategies that build political and economic power directly.

CONCLUSION

In the debates prevalent within Native sovereignty and racial justice movements, we are often presented with two seemingly orthogonal positions – long-term revolutionary extra-legal movements or short-term reformist legalist strategies. Short-term legal strategies are accused of investing activists within a white supremacist and settler colonial system that is incapable of significant change. Meanwhile, revolutionaries are accused of sacrificing the immediate needs of vulnerable populations for the sake of an endlessly deferred revolution. The reality of gender violence in Native communities highlights the untenability of these positions. Native women's lives are at stake now – they cannot wait for the revolution to achieve some sort of safety. At the same time, the short-term strategies often adopted to address gender violence have often increased violence in Native women's lives by buttressing the prison industrial complex and its violent logics.

While this reformist versus revolutionary dichotomy suggests two radically different positions, in reality they share a common assumption: that the only way to pursue legal reform is to fight for laws that reinforce the appropriate moral statement (for instance, that the only way to address violence against Native women is through the law and to make this violence a 'crime'). Because the US legal system is inherently immoral and colonial, however, attempts to moralise the law generally fail. It is not surprising that the response to these failures is to simply give up on pursuing legal strategies. However, the works of Derrick Bell, Christopher Leslie, and Sarah Deer, while working in completely different areas of the law, point to a different approach. We can challenge the assumption that the law will reflect our morals and instead seek to use the law for its strategic effects. In doing so, we might advocate for laws that might in fact contradict some of our morals because we recognize that the law cannot mirror our morals anyway. We might then be free to engage in a relationship with the law which would free us to change our strategies as we assess its strategic effects.

At the same time, by divesting from the morality of the law, we then will also simultaneously be free to invest in building our own forms of community accountability and justice outside the legal

system. Our extra-legal strategies would go beyond ceremonial civil disobedience tactics designed to shame a system that is not capable of shame. Rather, we might focus on actually building the political power to create an alternative system to the heteropatriarchal, white supremacist, settler colonial state.

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NOTES

¹ Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Austin: University of Texas Press, 1998).

² Sandy Grande, *Red Pedagogy* (Lanham: Rowman & Littlefield, 2004): 31-2.

³ Lawrence Greenfield, Steven Smith, *American Indians and Crime* (Washington, DC: Bureau of Justice Statistics/US Department of Justice, 1999).

⁴ Jennifer Denetdale, 'Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition', *Wicazo Sa Review*, 20 (2006): 9-28; Jennifer Denetdale, 'Carving Navajo National Boundaries: Patriotism, Tradition, and the Dine Marriage Act of 2005', *American Quarterly*, 60 (2008): 289-294.

⁵ Andrea Smith, *Native Americans and the Christian Right: The Gendered Politics of Unlikely Alliances* (Durham, NC: Duke University Press, 2008).

⁶ Kimberle Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law', in Kimberle Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas (eds), *Critical Race Theory* (New York: New Press, 1995); Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations', in Crenshaw, Gotanda, Peller, Thomas, *Critical Race Theory*.

⁷ Derrick Bell, 'Racial Realism', in Crenshaw, Gotanda, Peller, Thomas, *Critical Race Theory*: 306.

⁸ Bell, 'Racial Realism': 308.

⁹ Bell, 'Racial Realism': 307.

¹⁰ Bell, 'Racial Realism': 308.

¹¹ Derrick Bell, *Faces at the Bottom of the Well* (New York: Basic Books, 1993): 171.

¹² Bell, *Faces at the Bottom of the Well*: 175-176.

¹³ See Incite: Women of Color Against Violence (ed.), *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex* (Cambridge, MA: South End Press, 2007).

¹⁴ Bell, *Faces at the Bottom of the Well*: 55.

¹⁵ Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005).

¹⁶ Elliot Currie, *Crime and Punishment in America* (New York: Metropolitan Books, 1998), Steven Donziger, *The Real War on Crime* (New York: HarperCollins, 1996), Samuel Walker, *Sense and Nonsense about Crime* (Belmont, CA: Wadsworth Publishing Company, 1998).

¹⁷ Andrea Ritchie, 'Law Enforcement Violence Against Women of Colour', in Incite: Women of Color Against Violence (ed.), *The Colour of Violence: Violence Against*

Women of Colour (Cambridge, MA: South End Press, 2006), Natalie Sokoloff (ed.), *Domestic Violence at the Margins* (New Brunswick, NJ: Rutgers University Press, 2005), Heather Strang, John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002).

¹⁸ Christopher Leslie, 'Trust, Distrust, and Antitrust', *Texas Law Review*, 82 (2004): 515-680.

¹⁹ Christopher Leslie, 'Antritrust Amnesty, Game Theory, and Cartel Stability', *Journal of Corporation Law*, 31 (2006): 453-488.

²⁰ Matsuda, 'Looking to the Bottom'.

²¹ Beth Richie, *Arrested Justice: Black Women, Violence, and America's Prison Nation* (New York: New York University Press, 2012): especially pp. 65-98.

²² Sarah Deer, 'Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty', *Wicazo Sa Review*, 24 (2009): 149-167.

²³ Currie, *Crime and Punishment in America*, Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003), Donziger, *The Real War on Crime*.

²⁴ Deer, 'Decolonizing Rape Law': 154-155.

²⁵ Rupert Ross, *Return to the Teachings* (London: Penguin, 1997): 18.

²⁶ Deer, 'Decolonizing Rape Law': 156.

²⁷ Tony Ward, 'Symbols and Noble Lies: Abolitionism, "Just Deserts" and Crimes of the Powerful', in Herman Bianchi, Rene van Sweenigem (eds), *Abolitionism* (Amsterdam: Free University Press, 1986).

²⁸ Deer, 'Decolonizing Rape Law': 162.

²⁹ Deer, 'Decolonizing Rape Law': 162.

³⁰ Communities Against Rape and Abuse, 'Taking Risks: Implementing Grassroots Community Accountability Strategies', in Incite (ed.), *The Colour of Violence*.

³¹ Scott Lyons, *X-Marks: Native Signatures of Assent* (Minneapolis: University of Minnesota Press, 2010).

³² For more info, see: <http://bsnorrell.blogspot.com/2010/05/occupation-ofborder-patrol.html> Accessed: 19/07/12.

³³ See: <http://southwestearthfirst.wordpress.com/2011/07/27/converge-on-the-peaks/> Accessed 29/07/12