View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Miami School of Law

University of Miami Law School
Institutional Repository

University of Miami Race & Social Justice Law Review

7-1-2015

Panel on Colonization, Culture, and Resistance (Transcript)

Sarah Deer

Zanita Fenton (moderator)

Val Kalei Kanuha

Eesha Pandit

Follow this and additional works at: http://repository.law.miami.edu/umrsjlr

Part of the Civil Rights and Discrimination Commons

Recommended Citation

Sarah Deer et al., *Panel on Colonization, Culture, and Resistance (Transcript)*, 5 U. Miami Race & Soc. Just. L. Rev. 325 (2015)
Available at: http://repository.law.miami.edu/umrsjlr/vol5/iss2/10

This Part I: Reimagining Gender Violence is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

TRANSCRIPT[°]

CONVERGE! REIMAGINING THE MOVEMENT TO END GENDER VIOLENCE SYMPOSIUM:

Panel on Colonization, Culture, and Resistance

UNIVERSITY OF MIAMI SCHOOL OF LAW

Zanita Fenton (moderator)[*]
Sarah Deer
Val Kalei Kanuha
Eesha Pandit[†]

FENTON: The title of our panel is Colonization, Culture & Resistance. Consider: Colonization—also understood as imperialism—where the state exercises and extends its power over other nations through force or the threat of force. It is parallel to domestic violence whereby the abuser exercises control, power, and authority over his victim through force or the threat of force. So, indeed, there are multiple

---

° This transcript has been edited from its original transcription for clarity.

* Zanita Fenton is a Professor of Law at the University of Miami School of Law. Professor Fenton's scholarly interests cover issues of subordination focusing on those of race, gender, and class. Sarah Deer is a Professor of Law at William Mitchell College of Law and is a citizen of the Muskogee Creek Nation. Professor Deer focuses on violent crime on Indian reservations. Professor Deer was named a 2014 MacArthur Fellow by the MacArthur Foundation and was named as a recipient of the MacArthur Foundation's $625,000 award known as the "genius" grant. Kalei Kanuha is a Professor of Sociology at the University of Hawaii. Kanuha is also a Project Evaluator for Ke Ala Lokahi which is the native Hawaiian batterer intervention program. Kanuha's research focuses on the intersections of ethnicity, gender and sexuality and violence against women of color. Eesha Pandit is a writer and activist who believes in social justice movements, the power of intersectionality, feminism, sisterhood, and the power of art.

† Original remarks from the CONVERGE! conference omitted. Eesha Pandit's remarks were redacted as she contributed the following essay: Eesha Pandit, *On the Same Bodies: Exploring the Shared Historical Legacy of Violence Against Women and Reproductive Injustice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 549 (2015).

Recommended Citation: Sarah Deer et al., *Panel on Colonization, Culture, and Resistance*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 325 (2015).

layers to the consideration of colonization. Culture—what world culture does not devalue women? I am not aware of any. When we discuss culture, we necessarily are also talking about subculture and counter-culture. Counter-culture is a nice segue into the discussion of resistance—resistance by finding modes of survival. Attempting to find, do or be something other than that which is promoted by general society (that is, the mainstream culture), attempting to survive the abuse and control that diminishes self. Resistance also means the manner in which marginalized and abused peoples manage to survive subordination and oppression. This brings us full circle to the first part of our title—colonization. These connections serve as a framework for listening to the panelists and forming your questions.

KANUHA: Beth Richie reminded us today that violence against women and children is set in a context of violence in our society. For Native Hawaiians as a colonized people, violence in our families and in our communities is an extension of the violence that has been wielded against us as native people by foreigners and now by the state.

I want to start with a brief history of Hawaii as I think a lot of people do not really understand the history of colonization in Hawaii. The first important context is that we see ourselves as island people, rooted in the entirety of what it means to be an island nation of Oceania, the largest continent on the globe. When James Cook arrived in 1778 to "discover" Hawaii he described Hawaiians as the most robust, healthy, and friendly peoples he had ever met.[1] At the time of Cook's first arrival estimates of the indigenous inhabitants were 400,000 to a million people; but in less than a hundred years, there were only 40,000 Hawaiians remaining.[2] Part of the rapid decimation of our people was due literally to Hawaii's geographic isolation and the pristine nature of our environment due to that isolation.[3] So we were very vulnerable to diseases and other forms of colonization that foreigners brought. A second important context is that Hawaii was an independent, sovereign nation—part of the United Nations—before we were illegally occupied and overthrown by the United States in 1893.[4] The illegal overthrow of the Hawaiian nation was based in land ownership, control of commerce, and racist imperialism by white, American capitalists who decades earlier established Christianity

---

1 MARSHALL SAHLINS, ISLANDS OF HISTORY 6 (1985).

2 DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT 32–37 (1989).

3 *Id.*

4 THE TREE OF LIBERTY: A DOCUMENTARY HISTORY OF REBELLION AND POLITICAL CRIME IN AMERICA 741–43 (Nicholas N. Kittrie & Eldon D. Wedlock eds., Johns Hopkins University Press rev. ed. 1998).

as their pathway to power over the indigenous peoples.[5] Fast forward over a century, and Hawaii is today still a colonized state and a militarized state under control of the United States of America. In November 1993, Clinton signed the Public Apology Law (103-150).[6] The law basically said, "We're sorry that over one hundred years ago the United States did illegally occupy and assume control over you as an independent, sovereign nation and we shouldn't have done it." The reason this socio-political-historical context is significant is that it explains why our understanding of gender violence and violence in all forms is situated first in the loss of power and self-determination of our people due to colonization by the United States, a nation in which we are now deeply embedded.

In pre-contact Hawaii, there is evidence of intimate and family violence. However, it was considered deviant and therefore accompanied by clearly delineated familial, communal and social consequences. The important aspect of these strategies is that justice for social violations was not relegated to one institution or person, but was viewed by the entire community as their shared responsibility. We cared for and protected each other, as well as each other's families, children and relationships. So when Beth Richie and others at this meeting recommend prison abolition as our aspiration, I would say returning to caring for and being responsible to/for each other is my aspiration for ending violence against women and children. That means we do not necessarily as a first measure call 911 or the police or Child Protective Services but that we think, strategize and intervene first as people, neighbors, friends and those "in community" to end gender violence. Every community prior to the formal establishment of state-sponsored institutions such as child welfare and courts had found ways to serve these functions. But now we have not only forgotten how to do this, but we automatically rely on the state as the arbiter and enforcer of conflicts in our families and relationships. Our aspiration is to abolish prisons and replace it with communities taking more responsibility for ourselves by intervening in the degradation or the harm caused by some to others. The norms, values and beliefs that underlie these interventions are imbedded in harmonious social relations characterized by peace and justice.

So my call and my aspiration is that we—all of us, not only indigenous peoples—get back to the roots of our cultural traditions, values, beliefs, and strategies to reclaim health, wellness, and justice, and

---

5 *See, e.g.*, Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995).

6 Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510.

to say we do not need to use the State to intervene in this most significant aspect of our lives. We affirm the insidious and historical damage of colonization that has resulted cultural loss, trauma and stress at the individual and collective levels. We state clearly that colonization was a strategy of white people, foreigners and Christian missionaries to domesticate and control the family life of a vibrant, independent, sovereign nation.

I believe the colonial project of domesticating our families is in large part responsible for family violence in indigenous communities because the state took away the gaze and oversight of our grandparents, our uncles and aunts, and our neighbors upon our families by codifying "the family" as one man, one woman and *their* children; anything that happened in that family was a private matter, it was no longer anyone else's business in the communal context of everyday life.

Finally, we focus on the possibilities, the aspirations, and what you can and should be as a member of society—not what you were and what you are and what you did. We dream that those who cause harm and violence should not think they are responsible or accountable to the state, but that they are accountable to their families, ancestors, and elders. You do not batter, rape, or abuse your children because it would bring shame to your ancestors who are watching over you each and every day and because it would harm the next generation who see you in their dreams as they succeed you.

This idea of not care but control is really what constitutes colonization. So our goal is to de-colonize our minds and hearts because we know colonization is as bad on the colonizer as it is on those who are colonized. We aspire to a community of justice in which we create change not for the state or to avoid punishment by the State, but because our first responsibility is to other humans, our families and all of our peoples who came before us and who will come after us.

DEER: Thank you for this opportunity. My remarks will be focused on four aspects of the Violence Against Women Act (VAWA) from an indigenous perspective. The first is to provide an overview of the changes in the 2013 Violence Against Women Act that deal with tribal sovereignty.[7] The second regards strategic alliances and whether or not it is counterintuitive to engage the federal government on addressing gender violence in tribal communities. Third, I would like to say a few words about tribal justice systems themselves as tools of addressing gender violence. I will close my discussion by being candid about some of my concerns about complete prison abolition.

---

7 42 U.S.C. §13925 (2012) (current version at 42 U.S.C. §13925 (2013)).

I will start by providing a brief overview of one major new change in the 2013 reauthorization of the Violence Against Women Act. To back up a few years, tribal nations have struggled to provide a comprehensive response to violence because of limitations imposed by the federal government. In 1978, the United States Supreme Court issued a decision called *Oliphant v. Suquamish Indian Tribe* in which it ruled that tribal governments had lost certain attributes of sovereignty because they are dependent on the federal government.[8] The facts of the case are actually not particularly interesting, although the result of the case has been devastating. In *Oliphant v. Suquamish*, two non-native men who lived on the reservation o committed acts of violence on the Suquamish Indian Reservation One of the men, Mr. Oliphant, was arrested by tribal police during an incident at the Suquamish Chief Seattle Days. He was charged with assaulting a tribal police officer and resisting arrest. The other man led the tribal police officers on a long high speed chase that ended when he collided into a tribal police vehicle. He was charged with reckless endangerment and damaging tribal property. The Suquamish Indian government arrested them, charged them and prosecuted them for the acts of violence that they committed. Governments do this every day. But Mr. Oliphant raised a different kind of defense than "I didn't do it." He argued that the tribe should not be able to prosecute him because he was not a member of the tribe. That would seem an absurd argument in other contexts. As a citizen of the state of Minnesota, if I were to commit a crime here in Florida, the state of Florida would be able to exercise jurisdiction over me—no question. This suggestion that tribes lacked jurisdiction over two men, who lived on the reservation, that they should escape tribal sanction because of their race seemed logically unsound for similar reasons. But they won their case in the United States Supreme Court.

The decision contains some baffling language about why the tribe should not be able to prosecute these men even though tribal governments never surrendered their authority. The Court ruled that the jurisdiction had somehow been lost (or maybe never existed) because of the relationship between the United States and tribal nations. The decision itself cites to nineteenth century cases that contain really racist language—suggesting that in some way white people would not be able to understand tribal laws, and that there were these unique aspects of tribal law which would be unintelligible for someone from the outside. In the context of this case, such a perspective was again absurd because there are probably very few cultures in which it is okay to hit a police officer or ram a police car. However, Mr. Oliphant won the case—it and

[8] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

ever since then, tribal governments have not been allowed to prosecute people who are not members of the tribe, and more specifically those who are non-Indians. Interestingly, the statistics today tell us that the vast majority of people who harm native women are non-Natives.[9] The decision remained the law until March 2013 when President Obama signed the reauthorization of the Violence Against Women Act which restored part of what the *Oliphant* case stripped away.[10] It was a victory in the sense that Congress was recognizing that tribes have the inherent right to protect their community from anyone who commits violence. Congress was not ready to address the full scope of tribal criminal jurisdiction though, and the law only covers acts of domestic violence. Still, it was a victory from my perspective.

We have a certain amount of celebration for that reform, but I do not believe that celebration and critique are mutually exclusive. I do think that we have room to critique the law even though it is too soon to be able to adequately assess its success.

The challenge that we have in tribal communities is whether we must now replicate the system of the state governments in response to domestic violence. The focus of VAWA has almost always been on the criminal justice system. Tribes were stripped of this criminal jurisdiction unilaterally. We fought to get it back and now that we have it back; we must be very thoughtful and careful about what we do with that power. We may now begin to focus more on arrest, incarceration, and lifetime stigmatization for perpetrators; I think whether to do that is an important discussion that each tribal community needs to have. But what is effective and useful for my tribe might be very different than what is true for another tribe might see. We have to keep in mind that culture in the context of Native communities includes over 560 separate tribal sovereigns. There will be hundreds of these conversations.

We also need to continually ask ourselves whether it is counterproductive or counterintuitive to engage the federal government on justice for Native women. The federal government is largely the origin of violence in our communities, so why would we go to them to resolve this crisis?

I certainly do not think that the federal government holds the ultimate solutions for tribal nations. But some of our tribal justice systems have been nearly completely assimilated—and perhaps have

---

[9] STEVEN W. PERRY, U.S. DOJ, BUREAU OF JUSTICE STATISTICS, A BJS STATISTICAL PROFILE 1992-2002: AMERICAN INDIANS AND CRIME iii (Dec. 2004), *available at* http://www.bjs.gov/content/pub/pdf/aic02.pdf.

[10] *See* LISA N. SACCO, CONGRESSIONAL RESEARCH SERVICE, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (March 6, 2014), *available at* https://fas.org/sgp/crs/misc/R42499.pdf.

begun to internalize some of the anti-sovereignty sentiment that has flowed from the federal government. The sovereignty issue then becomes an excuse, a barrier. When tribes say, "That power has been stripped away from us and so we have to throw up our hands because only the state or federal government has the authority, and therefore we cannot do anything." It becomes a way for male leaders to excuse their inaction on gender violence. Now VAWA confirms tribal responsibility. Jurisdiction has been restored and now tribal governments have no excuses. They have the responsibility of engaging and making decisions about what that response will look like.

The other challenge that we have had in this dialogue is the argument that we may have inadvertently let Native men off the hook because we have focused almost exclusively on this reform having to do with non-Native perpetrators. It is true that most of the perpetrators are non-Native—statistically—but that does not get us to a discussion about what we do with Native men who commit acts of violence. Now that we have this restored jurisdiction, I think it is going to be very important to turn our focus inward.

Many contemporary tribal legal systems are largely copies of state systems. We have tribal courts, we have tribal judges, we have tribal probation officers, tribal prosecutors and all of those things are foreign. All of those concepts are largely foreign and we have had them for a while now. So, what do we do with that? We have focused so much on sovereignty and the right to have a tribal prosecutor. Now, do we want to critique that? One of the things that I have done in my work is research on what tribal laws are. What tribal laws are on the books? What do we use as tools to address violence? The laws are even more colonized, at some level, than are our courts systems. For instance, many tribes still have laws that were copied from state law in the 1930s and 1940s—and contain some of the flaws that second-wave feminism had put to rest, like a marital rape exemption. Exempting husbands and partners from rape law is not a concept indigenous to North America. That is a European concept. That is a "woman is property" concept. So one of the first things we need to do as tribal nations is to take a really good, hard look at how we have defined crimes. Some tribes, for a variety of reasons, may choose not to exercise their criminal authority. Still, I think for victims (and as a survivor myself), understanding that your experience is validated through law can be a very powerful healing tool. I am interested now that we have the Violence Against Women Act passed, in turning our look inward to take advantage of this restored jurisdiction. Reform of tribal statutory law is important. We must really rethink how we want to deal with the violence that native women experience on native women's terms.

One of the other things I am struggling with when we talk about the prison abolition movement and the challenge to structural violence as imposed by the state is what do we do with perpetrators of really serious cases of violence? Is it too late for some perpetrators? I will just give you an example and I will warn you that it is a bit graphic. I recently testified on the behalf of the state in a criminal matter and that was a difficult decision to make. The case involved a Native man who violently assaulted his girlfriend using a hammer and caused her to nearly bleed to death; she had to have emergency surgery with blood transfusions. I am not sure what we can do in terms of a restorative response to that. I am really struggling with that and I really want to talk about what we do with that level of very lethal violence. I testified to put him in prison and I am not sorry. Maybe as a feminist and as an indigenous feminist, I should have regret but I do not. That is just a final critique I wanted to offer and I hope we can talk more about those things because I am struggling as a feminist and as an indigenous feminist. Thank you for listening to my ideas and concerns.

FENTON: Kalei—could you comment further on your discussion of apology? What can we take from this issue? Was it good that an apology was made or was it patronizing? Did it benefit Hawaii (that is, the Hawaiian people) or, did it take them backwards?

KANUHA: You know, I think as with any kind of act like that of the state, it is to benefit the politicians. It is not necessarily to benefit the people. I think it was a brave move for Bill Clinton to do that but I would say the political underpinnings of it are two-fold. Native Hawaiians are not considered sovereign people legally and this has been a many decades long struggle for us to figure out what kind of relationship do we want to have to the United States of America. Opinions span and many positions include wanting to completely divest ourselves from the Unites States and become a sovereign nation once again. I think that apology was kind of to say we feel sorry for what we did and we want to embrace you back in and basically to encourage us to want to stay within the United States of America. So, I think that is part of it. I think the other part that for all the naysayers who said that colonization did not really happen, it was really was a very dramatic act to say the United States did invade the sovereign nation of Hawaii. So, I think that was symbolically a very, very important thing.

FENTON: Sarah—I am glad that you identified the wrongs from the *Oliphant* case and brought our attention to the recent restoration of justice to the tribes in VAWA. My comment regards the general nature of criminal justice on reservations currently. It seems that this restorative effect comes at a time when on most (if not on all) reservations, the tribal criminal justice system has been forced to mimic or become assimilated

to mainstream forms of American justice and now more closely resembles the operations of a state within a state, rather than as a separate culture and people.

DEER: Absolutely, and I think because we focus so much on the federal government as a source of reform, it has perhaps skewed our perspective on what criminal justice can or should look like. We have lost. Very similar to Hawaii, we have lost what we used to do to resolve gender violence. Things that would have been more protective and more restorative of a victim's life and all of the things that she would need to become whole again. We really have to have conversations about bringing that back and thinking outside the gavel, as I say—thinking outside of the courtroom.

FENTON: I have one more comment for the full panel and for the audience to consider. The cultures primarily explored here are ones that apparently do a better job of dealing with violence or would have not promoted or accepted these forms of violence in the first place. However, where all world cultures devalue women, all cultures are not identical. So, how do we deal with situations where the culture directly affirms and condones the perpetration of violence against women?