

Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

Healing as justice: the American experience

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As Navajos always do, I introduce myself by clan so you will know who I am. I am of the Folded Arm clan. I was born for the Bitter Water clan. Most people don't realize it, but when Navajos introduce themselves that way they are actually performing a *legal* ceremony that has to be with healing. You will see what I mean as I go along.

People think they know what the word "law" means. But when you speak of the Indian version of "traditional law" or "Indian common law," you lose them; people do not have the slightest idea what you mean. Two summers ago, a six-state conference of state judges asked me to speak on Navajo common law. After my talk, Jim Zion, our court solicitor, dashed outside to have a cigarette. He overheard two Wyoming judges talking about what I had to say. The first judge said, "What did you think of Chief Justice Yazzie's presentation on Navajo common law?" The second laughed and said, "He didn't mention staking people to anthills."

Definition of Law

One definition of "law" is that it is composed of three things: norms, institutions and force. A "norm" is a feeling of "ought." One "ought" to do this and ought not do that. A norm becomes a law when it is enforced by an "institution" such as a court of the police. Many definitions insist that without force, or without ability to punish, there can be no "law". The Anglo definition of "law" insists on visible institutions such as courts and punishment. This type of "law" can only hurt; it cannot heal.

When I first heard this definition, something was missing. I asked the person who gave me the definition if human emotions should be a part of the definition. Aren't emotions a part of the process? Shouldn't they be? How so?

When the Navajo courts define "law", we must consider the term "norms." They are values and shared feelings about the way to do things. Sometimes Navajo say, "Do things in a good way." As Indians, we know what it means to do things in a good way. Therefore, the People's shared feelings fill in that broad term of "law" to give it meaning. We must also consider "moral values" in the definition of "law". Too often, people reject the word "morality" because of its religious overtones. It means something more – it is shared feelings about the right path. To complete the definition of "law", the traditional Indian "institutions" must be included: family; clan; ceremonial bodies or societies; and even people dealing with each other. By way of example: An anthropologist by the name of Downs mentions the case where a man stole a woman's blanket and jewelry at a dance so he could sell them and buy wine. The woman suspected him, and confronted him the next day. He immediately admitted what he had done and gave the woman enough sheep to make up for the loss. What were those two Navajos doing? They were applying norms, values, moral principles and emotions in the institution of addressing each other in a good way. The woman asked about the loss of her blanket and jewelry. The man replied honestly and offered *nalyeeh* or compensation. The man did things in "the good way," because this is a shared value.

Is Punishment Necessary for Law?

European explorers often said that “Indians have no law.” Why? They couldn’t see police; they didn’t find courts; they didn’t see uniforms, jails and all the trappings of power. but they also couldn’t see the clan mothers, who are so important to our native legal institutions.

A clan is built on relationships. In the Navajo way, we trace our clan membership through our mothers, and we are “born for” our father’s clan. My introduction of myself by clan simply identified who I am within our traditional legal system so that you will know your relationship to me. I may be a thousand miles away from Navajo land, but I still introduce myself by clan. Why is clan relationship so important? We Navajos say of people such as yourselves – who may be strangers – “Treat strangers like they were a relative.” We deal with each other in ways to avoid confrontation and the use of force. Force, coercion and the ability to punish are not necessary to have law.

Leadership, Leaders and Judges

Another difference – for Navajos - is the way we look at judges as leaders. In the Anglo way, a judge is one with knowledge of the law and makes decisions for others. They are supposed to be wise to decide well. Indians use their judges in a different way.

In an Anglo courtroom, a judge may use his or her wisdom to announce the reasons for a decision, but the judge never speaks to or counsels the parties. In traditional Navajo way, a “judge” is one who has the problem. That is, the people involved in a dispute make the decision. I say “people involved” in a dispute, because a dispute affects everyone. If, for example, someone hurts me, my family is “involved” in the dispute because I am hurt. If I hurt someone else and I am obliged to pay compensation to make up for the injury, my family is “involved” because they owe a duty to help pay the compensation. This is one of the ways the Navajo clan as a legal system works.

Navajo wise persons are called *naat’aanii*. Others call them an elder. Those persons used their wisdom to counsel and provide guidance; they encourage parties to talk out their problems, not make decisions for others. They help plan decisions through guidance; but they don’t make the decisions.

The Healing Way

Our traditional Navajo justice ceremony is called *Hozhooji Naat’aanii*. Many Navajo words have no corresponding term in English, so I will say that it is a term which refers to talking and planning to restore damaged relationships, guided by a person with wisdom who helps plan things to regain *K’e* (respect).

Hozhooji Naat’aanii – the “Justice and Harmony Ceremony,” is a healing ceremony. How so? Its elements are: 1) prayer; 2) expression of feelings; 3) “the lecture”; 4) discussion; 5) reconciliation; 6) consensus.

1. **Prayer** – The Indian world is not solely a material world. In Indian belief, the people of the spirit world are very much a part of daily life; they actively participate in it. You can ask them for help. Prayer is the way you seek guidance and help. Put in a more material or western way, prayer helps set the tone and make people more receptive. Even Alcoholics Anonymous speaks of “the Higher Power”.

2. **Expression of emotion** – Imagine the situation of someone who has a whiplash because a drunk driver rear-ended him at a stop sign. What happens if the driver wants to tell a court about the pain and anger over being injured? Objection! Sustained. When talking about the process of the Navajo Peacemaker Court we say that the most important piece of paper in peacemaking is the Kleenex, tissue paper for drying tears.

One big stereotype about Indians is that we have no emotions; that we bear everything with a calm stoic face. That is not so. Indians emotions are very important, and we express them.

There is a place for people to express how they feel without rules of evidence. In courtrooms, how a person feels within are not allowed to be expressed. Bearing emotions is an essential part of healing. How so? In peacemaking, you must know how I feel and I must know how you feel. That is part of making or restoring a healthy relationship.

3. **“The lecture”** – Again, we use our wise people in a different way than the wise people in western courts - judges. When the prayers have been said; when emotions have been expressed; and when people have told their stories, it is time for guidance from our *naat’aanii*. He (or she) offers guidance from our stories, traditions and ceremonies which apply to the situation. They are the law. We know they are the law and they are binding through our rearing in them. Indians don’t store their law in books; they keep it in their minds and hearts. Everyone knows the law.

4. **Discussion** – Who are the participants in peacemaking? The parties themselves (the “judges”), a leader and planner (*naat’aanii*), and relatives. Having relatives participate in the process is fundamental. Consider the following example: A young Navajo woman took a man to court in a paternity action for child support. The man denied he was the father. It was his word against her word, and most Navajo’s can’t afford blood tests. The judge sent the case to the Peacemaker Court. The couple’s parents attended. The discussion was no longer about whether the man was the father, but what the families were going to do for the well-being of their child. Those grandparents knew what was going on all the time. It is hard to hide things in a small community.

Family participation is a part of the healing process because it gets at denial. Denial – the psychological barrier that underlies most cases of child abuse, alcohol-related crime, family violence, sexual abuse and driving while intoxicated – is the act of people refusing to face reality or own up to their actions.

In a recent peacemaking which took place in our Tuba City court, the male batterer’s sister came in with him. She told him he was violent and that he must do something about his emotional state and his drinking. She told him the traditional principles that he violated – that Navajos believe in the dignity of women, so you must not hurt them. She then offered to help him. She broke down his barrier of denial and used her influence as a sister to deal with the underlying problems.

The discussion phase also gets at the *causes* of problems. For example, the judge in our Ramah district learned about post traumatic stress syndrome, a psychological condition that creates fear and mistrust and resulting violent conduct. She started having her probation and parole officer check offender’s records for military service and post traumatic stress syndrome. Sure enough, most of the assault defendants in front of her were war veterans. She also found that the children of vets with the ailment were accused of delinquency. The parents were teaching learned suspicion and violent ways to their children. The judge started sending those people to traditional Navajo curing ceremonies that are designed to deal with the psychological injury which comes from military conflict.

I must add that *all* Indians suffer from a form of mass post-traumatic stress syndrome - the trauma of attempts to kill our culture and government and the stress which comes from it. One study indicates that such underlies a great deal of alcohol-related crime, violence and abuse.

5. **Reconciliation** – If you operate a “winner take all” system of justice, expect ongoing problems. If you have a system that attempts to achieve reconciliation, you may resolve the conflicts which underlie ongoing problems. For example, a couple got a divorce in the Tuba City court in 1978. For years, the woman - who had custody of the child - returned to court, month after month, to attempt to get her child support. Month after month, the man complained that his visitation with his son was too limited. The family judge got tired of that family living in his courtroom, so he sent the case to the Navajo Peacemaker Court. When the couple was able to talk about their problems - the woman’s need for child support and the man’s need to be with his son - the situation changed. Now the man pays his child support because he knows his son needs it. The man gets to see his son whenever he wants, and often stays at the woman’s house while she and her second husband are out of town.

Navajo justice is restorative justice. It restores people to good relationships with each other. That is particularly necessary in Navajo land, because people tend to live together in small communities and clan relatives have disputes with each other. Unlike the law in Florida, Navajos can’t divorce their relatives.

6. **Consensus** – What does it mean when people are equal? Consensus is what makes our justice and harmony ceremony – peacemaking – a healing process. Navajos believe in a greater degree of equality than you will find in Canadian and American law. Navajos believe that it is wrong to use coercion on

another, so the legal process requires consensus among equals. Each person enters peacemaking as an equal and participates as an equal due to consensus. Decisions in peacemaking are a product of agreement, which is sometimes urged by the *naat'aannii*.

Navajos also believe in equality in outcome. That most often means a form of sharing where people lower their demands or do what they might not otherwise do. In one peacemaking case, involving a truck killing some sheep on the road, the grandfather of the driver agreed to pay for the damage done to the pickup truck and give the herders a few rams and ewes. You would not get that result in a Canadian or American court where liability is based on fault. In our sheep case, the parties all compromised for a result which benefited everyone.

Summing Up

As I understood both the law I learned in law school and the law I learned in Navajo ceremonies I begin to see the difference between the two systems. Anglo law is built on authority, rank, obedience in the face of punishment. Navajo common law is built on relationships, traditions, emotions, and methods of dealing with each other in a good way. We have a hard time translating our legal terms into English, because there is no English words for what we are talking about. Words carry connotations and non-Navajos have a hard time understanding the connotations of what we are talking about in our legal language. I will give a few examples.

The dynamic of Navajo justice which makes the “talking out” in peacemaking work is called *k'e*. It has to do with the importance of relationships. It is a deeply-embedded feeling we have of our responsibilities to others and our duty to live in good relations with them. It produces consensus and healing. Where does it come from? By way of example, when a baby first shows signs of awareness of his or her surroundings and laughs, that is a joyful event. The person who first hears a baby laugh must sponsor a ceremony to celebrate. All the baby's relatives attend, and the baby's awareness opens to a world of relatives and relationships. That is where the baby first learns about *k'e*. Another example is the *kinaalda*, or a woman's puberty ceremony. It stresses the importance of women and teaches their dignity. It is our domestic violence law.

Sometimes the word *K's* is translated as “solidarity,” but that doesn't get at the deep connotations of the word to us as Navajos.

The word *hozho* is often translated as “harmony.” Again, it doesn't convey the deep meaning we understand. It means “the perfect state.” It means “there is a place for everything in reality, and there is hozho or harmony when everything is in its proper place, functioning well with everything else. It is the goal of peacemaking, or our justice and harmony ceremony. Our teachings and beliefs including the ones I mentioned a few moments ago, are designed to guide people to that state. Traditional Indian justice works because it is a community view of life, not an individual “win or lose” process.

Conclusion

In August 1555, Holy Roman Emperor Charles the Fifth ordered the Spanish to “honor and obey” the “laws and good customs of Indians.” The Spanish couldn't – or wouldn't – understand them, so things went down hill from there.

In 1883, the U.S. Supreme court said that traditional Indian criminal law was the binding law, not state or territorial law. Congress couldn't understand it, so it imposed a federal criminal law on Indians, to try them outside their homelands by strangers.

In 1899, the U.S. Supreme Court ruled that traditional Indian law applied in probate court. The Bureau of Indian Affairs didn't understand (or didn't *want* to understand) traditional probate, so in 1910, they gave the Secretary of the Interior the power to decided Indian estates under state law. We have only just begun.

Think of what America and Canada knows about Indian common law. It is only the tip of the proverbial iceberg. Both governments are afraid of what is underneath the water. Think of the Canadian

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icebreaker approaching; it wants to push our iceberg out into the warm waters to melt. That is assimilation. The U.S. icebreaker wants to blow up the iceberg. It's too big. It's too big to melt, and it's too big to be blown up. In fact, as Indians regain their legal traditions, it's growing.

As I showed you, our traditional Navajo way is a healing way. It gives justice by offering healing.