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# "LIFE COMES FROM IT": NAVAJO JUSTICE CONCEPTS THE HONORABLE ROBERT YAZZIE\*

## INTRODUCTION

Navajo justice is unique, because it is the product of the experience of the Navajo People. Prior to contact with European cultures, Navajos developed their ways of approaching life through many centuries of dealing with obstacles to their survival. Likewise, Navajo concepts of justice are a product of the experience we have gained from dealing with problems. To fully understand these concepts, the essential character of Anglo-European law must be compared to that of Navajo law.

Law, in Anglo definitions and practice, is written rules which are enforced by authority figures. It is man-made. Its essence is power and force. The legislatures, courts, or administrative agencies who make the rules are made up of strangers to the actual problems or conflicts which prompted their development. When the rules are applied to people in conflict,<sup>1</sup> other strangers stand in judgment and police and prisons serve to enforce those judgments.<sup>2</sup> America is a secular society, where law is characterized as rules laid down by human elites for the good of society.

The Navajo word for "law" is *beehaz'aanii*. It means something fundamental, and something that is absolute and exists from the beginning of time.<sup>3</sup> Navajos believe that the Holy People<sup>4</sup> "put it there for us from the time of beginning"<sup>5</sup> for better thinking, planning, and guidance. It is the source of a healthy, meaningful life, and thus "life comes from it."<sup>6</sup> Navajos say that "life comes from *beehaz'aanii*," because it is the essence of life. The precepts of *beehaz'aanii* are stated in prayers and ceremonies which tell us of *hozho*—"the perfect state." Through these prayers and ceremonies we are taught what ought to be and what ought not to be.

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1. The conflict is most often with the "state" in criminal law, thereby losing sight of the harm done to a victim.

2. This is a criminality and police model, which has created many problems for tribal courts today. Russell Lawrence Barsh and J. Youngblood Henderson, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy*, in *AMERICAN INDIANS AND THE LAW* 25 (Lawrence Rosen ed., 1976).

3. *Bennett v. Navajo Bd. of Election Supervisors*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009, 6011 (Navajo 1990).

4. The term Holy People refers to divine personages or spirit forces which were instrumental in the creation of the world. Following creation and the exodus of the Navajo People to their present place in this world, the Holy People went into the rocks and earth, where they still help.

5. "Put there from the time of beginning" is a well-known Navajo phrase which means that the Holy People established certain fundamentals as part of creation.

6. "Life comes from it" refers to the fact that law is basic and that a meaningful life is one of its products.

Our religious leaders and elders say that man-made law is not true "law." Law comes from the Holy People who gave the Navajo people the ceremonies, songs, prayers, and teachings to know it. If we lose our prayers and ceremonies, we will lose the foundations of life. Our religious leaders also say that if we lose those teachings, we will have broken the law.

These contrasts show that while Anglo law is concerned with social control by humans, Navajo law comes from creation. It concerns life itself, and the means to live successfully. The way to a meaningful life can be learned in teachings which are fundamental and absolute.

Navajo justice is also pragmatic, and to explain how that is so, I will describe the problems Navajos address, contrast Navajo thinking with the major concepts of Anglo-European law, outline Navajo dispute resolution processes, and discuss the practical, problem solving emphasis of Navajo law.

### THE SOCIAL PROBLEMS NAVAJOS FACE

The core of Navajo justice is problem-solving. Navajo legal thinking requires a careful examination of each aspect of a given problem to reach conclusions about how best to address it.<sup>7</sup> Navajos have faced different problems as they learned the ways of survival in a sometimes hostile environment. In the times of legend, Navajos slew monsters. Today, Navajos face new monsters, including:

- Domestic violence, involving abuse to spouses, elders, and children.<sup>8</sup>
- Gang violence, where Navajo youths refuse to listen and do what they please.<sup>9</sup>
- Alcohol-related crime<sup>10</sup> such as driving while intoxicated, with resulting loss of productive lives;<sup>11</sup> and disorderly conduct and fighting among neighbors and families in communities.<sup>12</sup>

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7. I recently compared the process of justice planning to the traditional Navajo method of using a crystal ball to look into the future. Robert Yazzie, *Tribal, State, and Federal Relationships in Our Future Society*, address at Building on Common Ground: A Leadership Conference to Develop a National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts (Sept. 18, 1993). I explained that predicting the future requires a careful examination of each aspect or facet of the present as the means to see into the future.

8. While spouse abuse was present in pre-contact times, Navajos developed successful approaches to addressing it; modern social violence is an alien import. James W. Zion & Else B. Zion, *Hozho' Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407, 412, 416 (1993).

9. We, as Navajo judges, are shocked to learn of gang fights with weapons in our communities.

10. We estimate that of our current criminal caseload (cases brought forward plus new filings), approximately 90,000 matters or 70% of the offenses are related to or the product of alcohol use. This leads us to wonder whether criminal law is the best tool to address crime and alcohol. See Barsh & Henderson, *supra* note 2, at 53.

11. This is a problem all jurisdictions in the Southwest share. Alcohol-related mortality, e.g., deaths which are the product of alcohol consumption is high in New Mexico. It has the highest motor vehicle accident fatality rate in the United States. Liza D. Chavez et al., *Alcohol-Related Mortality, in RACIAL AND ETHNIC PATTERNS OF MORTALITY IN NEW MEXICO* 108, 113 (Thomas M. Becker et al. eds., 1993). Blood alcohol levels were present in 51% of auto crash deaths, 49% of homicide victims, and 42% of suicides. *Id.*

12. This is our greatest category of criminal offenses. Navajo Nation trial judges agree that disorderly conduct most often involves drinking and fighting in family and community settings.

- Child abuse and neglect.<sup>13</sup>
- The breakup of families in divorce and separation, with lasting effects upon children.<sup>14</sup>

These problems are today's monsters; they are problems which get in the way of a successful life. The element which is common to all of the stated problems, including widespread alcohol abuse, is a loss of hope. There is a disease of the spirit which infects too many Navajos and leads to rising court caseloads.<sup>15</sup> What do modern systems of justice offer to deal with these problems? Have the courts been effective in addressing them? Perhaps the very nature of these problems, grounded in a loss of self-respect and hope, gives us clues as to how they can effectively be addressed.

### THE ADVERSARIAL SYSTEM: "VERTICAL" JUSTICE

The first modern courts were introduced to the Navajo Nation in 1892.<sup>16</sup> Today's Navajo Nation courts were created in 1959<sup>17</sup> and reconstituted in 1985.<sup>18</sup> The Courts of the Navajo Nation use the state model of adjudication, i.e. the adversarial system. There are obvious conflicts between Anglo-European justice methods and those of Navajo tradition. In trying to resolve these conflicts, Navajo Nation justice planners sometimes use models to help analyze the differences between the Anglo-European and Navajo legal systems. One useful model describes the Anglo-European legal system as "vertical" and the Navajo legal system as "horizontal."<sup>19</sup>

A "vertical" system of justice is one which relies upon hierarchies and power.<sup>20</sup> That is, judges sit above the parties, lawyers, jurors and other participants in court proceedings. The Anglo-European justice system uses rank, and the coercive power which goes with rank, to address conflicts. Power is the active element in the process. Judges have the power to directly affect the lives of the disputants for better or worse. Parties to a dispute have limited power and control over the process. A decision is dictated from on high by the judge, and that decision is an order or

13. Given Navajo attitudes toward children as special treasures, this too is an imported social disease. See Elizabeth Hauswald, *Child Abuse and Child Neglect: Navajo Families in Crisis*, 1 DINE BE'IIINA': A JOURNAL OF NAVAJO LIFE 37 (1988).

14. As it is with general patterns of criminality in the United States, Navajo Nation judges can directly relate youth and adult crime to family disruption.

15. Over 85,000 pending criminal and civil cases in FY 1992, and 93,000 in FY 1993.

16. SIXTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 209 (1892); DAVID ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO 34 (1982).

17. 1958 Navajo Nation Council Res. Nos. CO-69-58 and CJA-5-59 (codified at NAVAJO TRIB. CODE tit. 7, § 101 (1978)). The courts of the Navajo Nation, as the judicial branch of the Navajo Nation, came into being on April 1, 1959.

18. 1985 Navajo Nation Council Resolution No. CD-94-85 (codified at NAVAJO TRIB. CODE tit. 7, § 101 (1978)).

19. MICHAEL BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 16-17 (1968); see also Richard A. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMPLE L. Q. 295 (1959).

20. BARKUN, *supra* note 19, at 16.

judgment which parties must obey or else face a penalty. The goal of the vertical system or adversarial law is to punish wrongdoers and teach them a lesson. For example, defendants in criminal cases are punished by jail and fines.<sup>21</sup> In civil cases, one party wins and the other party is punished with a loss.<sup>22</sup> Adversarial law offers only a win-lose solution; it is a zero-sum game. The Navajo justice system, on the other hand, prefers a win-win solution.

A fundamental aspect of the vertical justice system is the adjudicatory process. Adjudication makes one party the "bad guy" and the other "the good guy;" one of them is "wrong" and the other is "right." The vertical justice system is so concerned with winning and losing that when parties come to the end of a case, little or nothing is done to solve the underlying problems which caused the dispute in the first place.

For centuries, the focus of English and American criminal law has been punishment by the "state." The needs and feelings of the victims are ignored, and as a result no real justice is done. There are many victims of any crime. They include the direct recipients of the harm and those who depend on them, family members, relatives and the community. These are people who are affected by both the dispute and the legal decision. Often, the perpetrator is a victim as well, caught in a climate of lost hope, alcohol dependency and other means of escape.

The victims, or subjects of the adjudication, have little or no opportunity to participate in the outcome of a case. Their needs and feelings are generally not considered, and thus not addressed.<sup>23</sup> They leave the courtroom feeling ignored and empty-handed. The adversarial system is "all or nothing," where strangers with power decide the future of people who have become objects rather than participants.

Money is a driving force in modern American society. Lawyers operate the adversarial system, and money buys lawyers. The best lawyers cost the most. Legal procedures are costly, and only the most wealthy litigants can afford them. Money for justice turns it into a commodity to be bought and sold.<sup>24</sup> Many people in our wage and money-driven industrial society cannot afford redress so they sometimes turn to extralegal methods for a remedy. For instance, the verdict in the Rodney King case sparked angry outbursts in Los Angeles because the adversarial trial of police ignored systemic violence and racism.<sup>25</sup>

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21. This is punishment for the sake of punishment: "Eye for eye, tooth for tooth, hand for hand, foot for foot." *Exodus* 21:24.

22. Retired Navajo Nation Associate Justice Homer Bluehouse says that in this win-lose alternative, one party goes out of the courtroom with his tail up and the other goes out with his tail down.

23. This is especially true when outsiders intervene in a dispute, imposing the use of their own moral codes and rules.

24. People in turn become consumers and too often the subjects of law. See Edmond Cahn, *The Consumers of Injustice*, in 2 *THE WORLD OF LAW* 574 (Ephraim London ed., 1960).

25. In 1988, the President of El Salvador begged Congress to delay the return of illegal Salvadoran refugees in the United States citing systemic violence in El Salvador. Doris M. Meissner, *Don't Deport Central American Immigrants*, *THE WASH. POST*, Dec. 29, 1988, at A23. The systemic violence and deprivations he recited are strikingly similar to the systemic violence minorities face in American society today.

What do consumers of law get from the adversarial adjudication process of the vertical system? This is a difficult question to answer since its methods do not repair damaged relationships, families, communities and society; instead this process promotes further conflict and disharmony.

Another element of the vertical system is a preoccupation with "the truth." The adversarial system dictates that there must be a winner and a loser. The side that represents the truth as it is perceived by the court wins, while the other side loses. "Truth" becomes a game where people attempt to manipulate the process, or undermine it where it does not suit their advantage. Each person has a version of "the truth," which represents that individual's understanding or perception of what happened.

People have strong feelings about truth, yet the vertical system does not allow the individual an opportunity to express his or her version of the truth in court. This role is taken from the individual and given to a power figure who is a stranger, both to the participants and the situation in question. Individual perceptions of the truth are based upon ones perspective; the "rules" of the vertical system prevent the parties from presenting their perspective. As a result, the parties feel disappointed and cheated because each of them knows what they think happened and the conclusions which should be drawn from that perspective.

When there must be a winner and a loser, truth is important. However, not all situations are best resolved through the adversarial determination of winner and loser. Sometimes solving the problem presented by a situation is more important than determining right and wrong and imposing penalties. Truth is irrelevant to a method of law that emphasizes problem solving.

For example, in a divorce, husbands and wives fight over property, child custody and hurt feelings. Each party views the situation from his or her perspective of the truth. Based on that "truth," each feels that he or she should win and that the other party should lose. The adversarial system calls upon a husband and wife to make important decisions about their future—and those of their children—at a time when they are not emotionally prepared to wisely look to the future. The couple is not allowed a means to express their hurt and anger, and because there is no opportunity to deal with emotions, lawyers and judges make unpalatable decisions for the couple. In the process, children are wounded, and the separated couple often fight more after the divorce than before. This process is alien to Navajo thought. In the Navajo tradition, there is a greater concern with the well-being of children and the ability of people to go on with life without hurt feelings.

Vertical justice looks back in time, to find out what happened and assess punishment for it. We may never know what really happened.<sup>26</sup> Vertical justice does not look to the future. It does not try to find out what went wrong in order to restore the mind, physical well-being, the

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26. Perhaps that is why conspiracy theories, such as those about the Kennedy assassination, and books about horrible murders are so popular.

spirit, and emotional stability. I insist that any definition of "law" must contain an emotional element: one of spirit and feelings. Where the feelings of parties are separated from the process and the decision does not address them, dissatisfaction follows. Where the legal system ignores the emotions of the parties, there can be no restoration of relationships.

Vertical adversarial adjudication relies upon power, force and coercion. Where powerful figures abuse their authority, there is authoritarianism and tyranny.<sup>27</sup> Navajo thought recognizes the danger of hierarchial or vertical systems. There is a Navajo maxim that one must "beware of powerful beings." Likewise, coercion is so feared in Navajo ethics that the invocation of powerful beings (e.g. calling upon them to use their force against another)—a form of coercion—is considered to be witchcraft.<sup>28</sup> The inappropriateness of the vertical system, as imposed upon Indian nations in modern systems of law and courts becomes more obvious when it is compared to the "horizontal" Navajo approach.

### THE NAVAJO SYSTEM: "HORIZONTAL" JUSTICE

The "horizontal" model of justice is in clear contrast to the "vertical" system of justice.<sup>29</sup> The horizontal justice model uses a horizontal line to portray equality: no person is above another. A better description of the horizontal model, and one often used by Indians to portray their thought, is a circle. In a circle, there is no right or left, nor is there a beginning or an end; every point (or person) on the line of a circle looks to the same center as the focus. The circle is the symbol of Navajo justice because it is perfect, unbroken, and a simile of unity and oneness. It conveys the image of people gathering together for discussion.

Imagine a system of law which permits anyone to say anything during the course of a dispute. A system in which no authority figure has to determine what is "true." Think of a system with an end goal of restorative justice which uses equality and the full participation of disputants in a final decision. If we say of law that "life comes from it," then where there is hurt, there must be healing.

Navajo concepts of justice are related to healing because many of the principles are the same. When a Navajo becomes ill, he or she will consult a medicine man.<sup>30</sup> Patients consult Navajo healers to summon outside healing forces and to marshal what they have inside them for

27. "Tyranny is an abuse of hierarchy." ELI SAGAN, *AT THE DAWN OF TYRANNY: THE ORIGINS OF INDIVIDUALISM, POLITICAL OPPRESSION AND THE STATE* 277 (1985). Wherever political power (which includes law) involves hierarchies there is always a danger of abuse. Sagan also observes that: "Political oppression is easier when there is a racial or cultural distinction between the masters and the oppressed. Tyranny will be harsher in a state established through conquest of one people by another than in a state where all share the same language, culture and history." *Id.* at 278.

28. Witchcraft is a crime which carries the death penalty under Navajo common law.

29. See BARKUN, *supra* note 19; see also Falk, *supra* note 19.

30. There are also medicine women. I use the term "medicine man" because of its popularity in the English language. Classification by gender, however, perpetuates a stereotype about Indian healers that they are usually men. Having used "medicine man" to introduce healers, I will use that as a gender-neutral term in the continuation of the text to include women.

healing. A Navajo healer examines the patient to determine the illness, its cause and what ceremony matches the illness to cure it.<sup>31</sup> The cure must be related to the exact cause of the illness because Navajo healing works through two processes: first, it drives away or removes the cause of illness; and second, it restores the person to good relations in solidarity with his or her surroundings and self.

The term "solidarity" is essential to an understanding of both Navajo healing and justice.<sup>32</sup> Language is a key to law, and those who share common understandings of the values and emotions which are conveyed in words are bonded through them.<sup>33</sup> Words are signs which also convey feelings. The Navajo understanding of "solidarity" is difficult to translate into English, but it carries connotations which help the individual to reconcile self with family, community, nature, and the cosmos—all reality. The sense of oneness with one's surroundings, and the reconciliation of the individual with everyone and everything, makes an alternative to vertical justice work. Navajo justice rejects simply convicting a person and putting them in prison; instead it favors methods which use solidarity to restore good relations among people. Most importantly, it restores good relations with self.

Navajo justice is a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion. In it, humans are not in ranks or status classifications from top to bottom. Instead, all humans are equals and make decisions as a group. The process—which we call "peacemaking" in English—is a system of relationships where there is no need for force, coercion or control.<sup>34</sup> There are no plaintiffs or defendants; no "good guy" or "bad guy." These labels are irrelevant.<sup>35</sup> "Equal justice" and "equality before the law" mean precisely what they say.<sup>36</sup> As Navajos, we do not think of equality as treating people equal *before* the law; they are equal *in* it.<sup>37</sup> Again, our Navajo language points this out in practical terms.

31. In Navajo thought, like begets like.

32. Note that one dictionary definition of the word "solidarity" recognizes native thought as: "A union of interests, purposes, or sympathies among members of a group; fellowship of responsibilities and interests: *The savage depends upon the group . . . for practical cooperation and mental solidarity*" (Bronislaw Malinowski)." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1229 (William Morris ed., 1981).

33. See SAGAN, *supra* note 27, at 278. People bound by language and culture are less likely to abuse each other.

34. Again, forcing a person to do something against his or her will is a form of witchcraft; something which is considered horrible in Navajo thought.

35. Associate Navajo Nation Justice Raymond D. Austin recently told an audience of lawyers at a conference that we must not use bad words to accuse others because the Holy People gave us our language and told us we must not abuse others with it. I cannot call another a "bad guy," and when Navajos are called upon to do so in adjudication that goes against their ethical values.

36. Navajos sometimes appear to be literal because the Navajo language is very precise. The maxim is that "words are very powerful" because we use them with precision, and they mean what they say.

37. In Anglo thought everyone is equal *procedurally* within the judicial system. Yet there are still glaring inequalities among the poor, women, AIDS victims and others who are distinguished by gender, class, race or sexual orientation. In Navajo thought, all people are genuinely equal in status and outcomes; equality is not limited to an individual's involvement with the judicial process.



Under the vertical justice system, when a Navajo is charged with a crime, the judge asks (in English): "Are you guilty or not guilty?" A Navajo cannot respond because there is no precise term for "guilty" in the Navajo language.<sup>38</sup> The word "guilt" implies a moral fault which commands retribution. It is a nonsense word in Navajo law due to the focus on healing, integration with the group, and the end goal of nourishing ongoing relationships with the immediate and extended family, relatives, neighbors and community.

Clanship—*dooneeike*'—is a part of the Navajo legal system. There are approximately 210 Navajo clans.<sup>39</sup> The clan institution establishes relationships among individual Navajos by tracing them to a common mother; some clans are related to each other the same way. The clan is a method of establishing relationships, expressed by the individual calling other clan members "my relative." Within a clan, every person is equal because rank, status, and power have no place among relatives.

The clan system fosters deep, learned emotional feelings which we call "*k'e*." The term means a wide range of deeply-felt emotions which create solidarity of the individual with his or her clan.<sup>40</sup> When Navajos meet, they introduce themselves to each other by clan: "I am of the (name) clan, born for the (name) clan, and my grandparents' clans are (name)."<sup>41</sup> The Navajo encounter ritual is in fact a legal ceremony, where those who meet can establish their relationships and obligations to each other. The Navajo language reinforces those bonds by maxims which require duties and mutual (or reciprocal) relationships. Obviously, one must treat his or her relatives well, and we say: "Always treat people as if they were your relative." That is also *k'e*.

Navajo justice uses *k'e* to achieve restorative justice. When there is a dispute<sup>42</sup> the procedure, which we call "talking things out," works like this: Every person concerned with or affected by the dispute or problem receives notice<sup>43</sup> of a gathering to talk things out. At the gathering everyone has the opportunity to be heard. In the vertical legal system the "zone

38. Judges of other Indian nations point out the same conclusion for their languages. As in the state and federal courts, guilty plea rates are high in tribal courts. Is it because of the overwhelming power of the "state"? Is it because (as we believe) Indians are essentially honest and tell the truth? Is it because those who are charged in our courts have a different concept of fault? Is it because our traditional law disregards "guilt" and "innocence" in place of problem-solving?

39. There are four original clans. As Navajo women married people from other Indian nations, or women from other nations became clan mothers, the number of clans grew. However, the exact number of clans that resulted from this process is a point of some controversy among the Navajo people.

40. Again, it is difficult to translate into English because of its strong connotations.

41. A Navajo is a member of his mother's clan and "born for" his or her father's clan; the use of grandparent clans establishes even more extended relationships so that most Navajos are relatives of most others.

42. Disputes commonly involve matters such as land squabbles, divorce, probate or contract.

43. Navajo "notice" need not be in writing, and it is not concerned with a specific written statement of an accusation or proposed punishment. There is a right to participate in a gathering to solve problems because it affects everyone. Navajo Due Process requires notice to a wider circle of people than is required by general American Due Process.

of dispute"<sup>44</sup> is defined as being only between the people who are directly involved in the problem. On the other hand, as a Navajo, if my relative is hurt, that concerns me; if my relative hurts another, I am responsible to the injured person. In addition, if something happens in my community, I am also affected. I am entitled to know what happened, and I have the right to participate in discussions of what to do about it. I am within the zone of a dispute involving a relative. In the horizontal system the zone is wider because problems between people also affect their relatives.<sup>45</sup>

The parties and their relatives come together in a relaxed atmosphere to resolve the dispute.<sup>46</sup> There are no fixed rules of procedure or evidence to limit or control the process. Formal rules are unnecessary. Free communication without rules encourages people to talk with each other to reach a consensus.<sup>47</sup> Truth is largely irrelevant because the focus of the gathering is to discuss a problem. Anyone present at the gathering may speak freely about his or her feelings or offer solutions to the problem. Because of the relationship and obligation that clan members have with each other, relatives of the parties are involved in the process. They can speak for, or speak in support of, relatives who are more directly involved in the dispute.

The involvement of relatives assures that the weak will not be abused<sup>48</sup> and that silent or passive participants will be protected. An abused victim may be afraid to speak; his or her relatives will assert and protect that person's interests. The process also deals with the phenomenon of denial where people refuse to face their own behavior. For instance, a perpetrator may feel shame for an act done, and therefore hesitant to speak. Relatives may speak to show mitigation for the act and to try to make the situation right. For example, Judge Irene Toledo of the Navajo Nation Ramah Judicial District has recounted a story in which the family helped a man confront the results of his actions.

The actions of this particular man commenced as an adversarial paternity proceeding familiar to today's child support enforcement efforts. The alleged father denied paternity while the mother asserted it. Judge Toledo sent the case to the district's Navajo Peacemaker Court<sup>49</sup> for resolution. The parents of the couple were present for talking things out in peacemaking. It is difficult for a man and a woman to have a relationship in a small community without people knowing what is going on. The couple's family and everyone else who was present at the

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44. A "zone of interests to be protected or regulated by the statute or constitutional guarantee in question" operates as a rule of standing. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

45. Law is feelings. We share the feelings poets express—as John Donne put it, "I am involved in Mankind; And therefore never send to know for whom the bell tolls; it tolls for thee." JOHN DONNE, *DEVOTION NO. XVII, reprinted in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE & THE COMPLETE POETRY OF WILLIAM BLAKE*, at 332 (1941).

46. Often prompted by a meal and always commenced with a prayer.

47. There are some unspoken limitations, of course, such as the prohibition against abusing each other with words.

48. For example, this is apparent in situations involving domestic violence.

49. See *infra* text accompanying note 57.

peacemaking were well aware of the activities of the couple. In light of the presence of family, the man admitted that he was the father of the child, and the parties negotiated paternity and child support as a group.<sup>50</sup> The participation of a wider circle of relations is an effective means to address denial and get directly to a resolution of a problem rather than get sidetracked in a search for "the truth."<sup>51</sup>

The absence of coercion or punishment is an important Navajo justice concept because there are differences in the way people are treated when force is a consideration. If, as in the vertical system, a decision will lead to coercion or punishment, there are procedural controls to prevent unfair decisions and state power. These safeguards include burdens of proof on the state, a high degree of certainty (e.g. "proof beyond a reasonable doubt"), the right of the accused to remain silent, and many other procedural limitations. If, however, the focus of a decision is problem-solving and not punishment, then parties are free to discuss problems.

Thus, another dynamic which we may see in Judge Toledo's example is that if we choose to deal with a dispute as a problem to be solved through discussion, rather than an act which deserves punishment, the parties are more likely to openly address their dispute.

Traditional Navajo civil procedure uses language and ceremony to promote the process of talking things out. Navajo values are expressed in prayers and teachings—using the powerful connotative force of our language—to bring people back to community in solidarity. Navajo values convey the positive forces of *hozhooji*, which aims toward a perfect state. The focus is on doing things in a "good way," and to avoid *hashkeeki naat'aah*, "the bad or evil way of speaking."

The process has been described as a ceremony.<sup>52</sup> Outside the Navajo perspective, a "ceremony" is seen as a gathering of people to use ritual to promote human activity. To Navajos, a ceremony is a means of invoking supernatural assistance in the larger community of reality. People gather in a circle to resolve problems but include supernatural forces within the circle's membership. Ceremonies use knowledge which is fundamental and which none of us can deny. Traditional Navajo procedure invokes that which Navajos respect (i.e. the teachings of the Holy People or tradition) and touches their souls. Put in a more secular way, it reaches out to their basic feelings.

For example, traditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for an injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt

50. Judge Toledo also saw a creative use of services, e.g. supplying firewood, in place of money—which the father did not have.

51. We find that peacemaking is an effective means to get at denial which is a psychological barrier present in driving-while-intoxicated, domestic violence, and child abuse or neglect cases making these cases difficult to resolve.

52. Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus. Before good relations can be restored, the community must arrive at a consensus about the problem.

Consensus makes the process work. It helps people heal and abandon hurt in favor of plans of action to restore relationships. The dispute process brings people together to talk out a problem, then plan ways to deal with it. The nature of the dispute becomes secondary (as does "truth") when the process leads to a plan framed by consensus. Consensus requires participants to deal with feelings, and the ceremonial aspects of the justice gathering directly addresses those feelings. If, for any reason, consensus is not reached (due to the human weaknesses of trickery, withholding information or coercion), it will prevent a final decision from being reached or void one which stronger speakers may force on others.<sup>53</sup>

There is another Navajo justice concept which we must understand for a better comprehension of Navajo justice, and that is distributive justice. Navajo case outcomes are often a kind of absolute liability where helping a victim is more important than determining fault. Distributive justice is concerned with the well-being of everyone in a community. For instance, if I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives.<sup>54</sup> This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all.<sup>55</sup> Distributive justice abandons fault and adequate compensation (a fetish of personal injury lawyers) in favor of assuring well-being for everyone. This affects the legal norms surrounding wrongdoing and elevates restoration over punishment.

Another aspect of distributive justice is that in determining compensation, the victim's feelings and the perpetrator's ability to pay are more important than damages determined using a precise measure of actual losses. In addition, relatives of the party causing the injury are responsible for compensating the injured party, and relatives of the injured party are entitled to the benefit of the compensation.

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53. The Navajo language tells us a lot about Navajo attitudes toward Anglo justice. A lawyer, *'agha'diit'aahii*, is one who takes away with words. It is a definition which describes someone who uses words for coercion. Someone who "takes away with words" is a pushy bossyboots.

54. Navajo maxims sometimes work their way into popular books. One which illustrates this point is: "A man can't get rich if he takes proper care of his family." ROBERT BYRNE, 1,911 BEST THINGS ANYBODY EVER SAID 307 (1988).

55. One study of Navajo witchcraft directly relates the beliefs and practices to sharing and group survival. See CLYDE KLUCKHOHN, NAVAHO WITCHCRAFT (1944).

These are the factors that Navajo justice planners have used in the development of a modern Navajo legal institution—the Navajo Peacemaker Court. Before the development of the Peacemaker Court, Navajos experienced the vertical system of justice in the Navajo Court of Indian Offenses (1892-1959) and the Courts of the Navajo Nation (1959-present). Over that one hundred-year period, Navajos either adapted the vertical system to their own ways or expressed their dissatisfaction with a system that made no sense.<sup>56</sup> In 1982, however, the Judicial Conference of the Navajo Nation created the Navajo Peacemaker Court.<sup>57</sup> This court is a modern legal institution which ties traditional community dispute resolution to a court based on the vertical justice model. It is a means of reconciling horizontal (or circle) justice to vertical justice by using traditional Navajo legal values, such as those described above.

The Navajo Peacemaker Court makes it possible for judges to avoid adjudication and avoid the discontent adjudication causes by referring cases to local communities to be resolved by talking things out. Once a decision is reached, it may (if necessary) be capped with a formal court judgment for future use.

The Navajo Peacemaker Court takes advantage of the talents of a *naat'aanii* (or "peacemaker").<sup>58</sup> A *naat'aanii* is a traditional Navajo civil leader whose authority comes from his or her selection by the community. The *naat'aanii* is chosen due to his or her demonstrated abilities, wisdom, integrity, good character, and respect by the community. The civil authority of a *naat'aanii* is not coercive or commanding; he or she is a leader in the truest sense of the word. A peacemaker is a person who thinks well, who speaks well, who shows a strong reverence for the basic teachings of life and who has respect for himself or herself and others in personal conduct.

A *naat'aanii* acts as a guide, and in a peacemaker's eyes everyone—rich or poor, high or low, educated or not—is treated as an equal. The vertical system also attempts to treat everyone as an equal before the law, but judges in that system must single out someone for punishment. The act of judgment denies equality, and in that sense, "equality" means something different than the Navajo concept. The Navajo justice system does not impose a judgment, thereby allowing everyone the chance to

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56. Some of the best discussions of the still undeveloped legal history of the period are in 2 THE LAW OF THE PEOPLE: DINE BIBEE HAZ'AANII (Dan Vicenti et al. eds., 1972).

57. See JUDICIAL BRANCH OF THE NAVAJO NATION, THE NAVAJO PEACEMAKER COURT MANUAL (1982).

58. The word "*naat'aanii*" refers to someone who speaks well and whose words reflect good guidance. Sometime around the year 1832, Chinle area Navajos attacked the Hopi village of Oraibi because of the killing of a Navajo leader, Darts At the Enemy, by a Hopi. The death was particularly harmful to the man's Towering House Clan because when he delivered speeches, "he would 'talk in' all kinds of goods from every side (i.e. he would bring prosperity to his people by saying that they were to receive it)." SCOTT PRESTON, *The Oraibi Massacre*, in NAVAJO HISTORICAL SELECTIONS 31 (Robert W. Young & William Morgan eds., 1954). It shows that successful planning is the aspect of "speaking well" that Navajos respect in a leader.

participate in the final judgement, which everyone agrees to and which benefits all.

Finally, *naat'aanii* is chosen for knowledge, and knowledge is power which creates the ability to persuade others. There is a form of distributive justice in the sharing of knowledge by a *naat'aanii*. He or she offers it to the disputants so they can use it to achieve consensus.<sup>59</sup>

Today's consumers of justice in the Navajo system have a choice of using the peacemaking process or the Navajo Nation version of the adversarial system.<sup>60</sup> The Navajo justice system, similar to contemporary trends in American law, seeks alternatives to adjudication in adversarial litigation. The Navajo Nation alternative is to go "back to the future" by using traditional law.<sup>61</sup>

### NAVAJO JUSTICE THINKING

The contrast between vertical and horizontal (or circle) justice is only one approach or model to see how Navajos have been developing law and justice. We, as Navajo judges, have only recently begun to articulate what we think and do on paper and in English.<sup>62</sup> Navajo concepts of justice are simple, but our traditional teachings which we use to make peace, may sound complicated.<sup>63</sup> Peacemaking—Navajo justice—incorporates traditional Navajo concepts, or Navajo common law, into modern legal institutions. Navajo common law is not about rules which are enforced by authority; it deals with correcting self to restore life to solidarity. Navajo justice is a product of the Navajo way of thinking. Peacemakers use the Navajo thought and traditional teachings. They apply the values of spiritual teachings to bond disputants together and restore them to good relations.

This paper uses English ways of saying things and English language concepts. It uses "paper knowledge"<sup>64</sup> to try to teach you some of the

59. I have often said that "knowledge is power." To Navajos, knowledge is a form of wealth or property. Sharing it with those who do not have it is distributive justice and assumes that those the *naat'aanii* helps are entitled to a fair share of that power.

60. Peacemaking is open to all, Navajo or non-Navajo. The Navajo courts also attempt to incorporate traditional justice concepts into adjudication. See *The Navajo Nation Code of Judicial Conduct* (1991); Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992). (The Honorable Tom Tso is a former Chief Justice of the Navajo Nation.)

61. Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, JUDGES' J., Spring 1993, at 48.

62. One of the fruits of our efforts is a greater use of Navajo traditions in all phases of Navajo Nation programs. See *Traditional Healing Beliefs Are Utilized and Integrated into Navajo Sexual Abuse Prevention/Treatment Program*, 10 No. 5 LINKAGES FOR INDIAN CHILD WELFARE PROGRAMS 8 (1993) (Navajo Nation social service program use of traditional ceremonies and philosophies).

63. As the Navajo judges and their staffers discuss law, history, religion and philosophy to improve their system, language barriers and conceptual differences become more obvious—that is, there are difficulties when we discuss such things in English and write them down. Mary White Shirley, a Navajo lawyer, once complained to a non-Navajo lawyer: "You silly Anglos; you always have reasons for everything. Don't you know that some things just *are*?"

64. In the words of a Navajo academic-lawyer, Else B. Zion.

things that go on in a Navajo judge's mind. To give a flavor of Navajo language thinking consider the following:

Never let the sun catch you sleeping. Rise before the sun comes up. Why? You must not be dependent. You must do things with energy and do things for yourself. You must be diligent or poverty will destroy you.

Watch your words. Watch what you say. Remember, words are very powerful. The Holy People gave them to us, and they created you to communicate. That is why you must think and speak in a positive way. Be gentle with your words. Do not gossip. Gossip has a name. It has a mind, eyes and a voice. It can cause as much trouble as you make by calling it, so do not call it to you. It causes disharmony and creates conflict among people. It is a living monster because it gets in the way of a successful life. So, as we and our young Anglo friends say, "What goes around comes around." Remember that there are consequences to everything you say and do.

Know your clan. Do not commit incest. You cannot court or marry within your own clan. If you do, you will destroy yourself; you will jump in the fire. Incest is something so evil that it will make you crazy and destroy you.<sup>65</sup>

You have duties and responsibilities to your spouse and children. If you are capable and perform them, you will keep your spouse and children in a good way. If not, you will leave them scattered behind. You will not be a worthy man or woman. If you act as if you have no relatives, that may come to you.<sup>66</sup>

The Holy People created human beings. Due to that fact, each must respect others. One cannot harm another. If so, harm will come back on you. There are always consequences from wrongful acts, just as good comes from good. Like begets like, so harm must be repaired through restitution (*nalyeeh*), so there will be no hard feelings and victims will be whole again.

These teachings, and many others, are spoken from the beginning of childhood. Navajo judges are beginning to look at familiar childhood experiences as legal events. For example, when a baby first becomes aware of surroundings and shows that in a laugh, there is a ceremony—the "Baby's First Laugh Ceremony." Family and relatives gather around the baby, sharing food and kinship, to celebrate with it. What better way can we use to initiate babies into a world of good relationships and teach them the legal institution that is the clan?

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65. As retired Associate Justice Homer Bluehouse points out, Navajo prohibitions are figurative, not literal. The admonition that "you'll jump into the fire" uses the moth as a simile; the moth that flies around the flame is eventually destroyed by it.

66. Navajos say of a wrongdoer, "He acts as if he has no relatives." It is horrible to think that such a thing could happen. Again, relying upon the wisdom of Homer Bluehouse, he once said that when a person did something very evil, or was a repeat offender, the community would shun him or her. That often leads to suicide because being without relatives is the worst thing that can happen.

These learned values serve as a guide in later years. As a child grows, he or she will act according to the teachings. Elderly Navajos tell us that we must always talk to our children so they can learn these Navajo values and beliefs. If we do not there will be disorder in the family and among relatives. The children will not listen, and they will have no responsibility to live by. We have youth violence because parents failed to talk to their children.<sup>67</sup>

## CONCLUSION

Traditional peacemaking is being revived in the Navajo Nation with the goal of nourishing local justice in local communities. The reason is obvious: life comes from it. Communities can resolve their own legal problems using the resources they have. Local decisions are the traditional Navajo way, in place of central control. Everyone must have access to justice that is inexpensive, readily available and does not require expensive legal representation. Peacemaking does not need police, prosecutors, judges, defenders, social workers or the other agents of adversarial adjudication. Peacemaking is people making their own decisions, not others forcing decisions upon them. There are 110 chapters or local governmental units in the Navajo nation. As of this writing, there are 210 peacemakers in 89 chapters, and we will extend the Navajo Peacemaker court to every community.<sup>68</sup>

This revival assures that Navajo justice will remain *Navajo* justice, and not be an imported or imposed system.<sup>69</sup> Navajo peacemaking is not a method of alternative dispute resolution; it is a traditional justice method Navajos have used from time immemorial.

## AUTHOR'S NOTE

I adapted this article from an instructional outline I developed for presentations to non-Navajo lawyers and judges. It evolved in my thinking since January 20, 1992, when I assumed responsibilities as the Chief Justice of the Navajo Nation, and chose Navajo common law and the Navajo Peacemaker Court as personal priorities. These ideas will continue to grow as I discover more about my culture, language and traditions.

I draw upon two sources as I attempt to reconcile Navajo justice thinking with Anglo-European thought. I am a product of a Bureau of Indian Affairs (BIA) boarding school education which was so destructive

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67. See Hauswald, *supra* note 13 (relating contemporary social problems involving children to educational policies which stripped Navajos of the means of communication with their children—the Navajo religion, language and culture). Destruction of a common Navajo language or culture opens the door for systemic abuses. Cf. SAGAN, *supra* note 27.

68. In a nation which is as large as the island of Ireland and only slightly smaller than the State of South Carolina—the 40th state in size.

69. See generally Raymond Austin, *ADR and the Navajo Peacemaker Court*, JUDGES' J., Spring 1993, at 90. (an overview of the Peacemaker Courts by Associate Justice Raymond D. Austin who is a driving force in the Navaho Nation's "back to the future" movement).



of the Navajo culture.<sup>70</sup> When I got out of boarding school, I was given a ticket to California to learn a manual skill in an electronics school. They told me I could not go to college, so I went to college. I was fascinated with the power, authority and (as I thought then) the money that went with being a lawyer so I went to law school. When I got my law degree, I put it to use as a trial judge in the Courts of the Navajo Nation. That returned me to another school—the school of Navajo life. Now, I seek to reconcile my paper knowledge with the vast knowledge that is held by my Elders—“the keepers of the tribal encyclopedia.”<sup>71</sup>

Sometimes I get impatient when I consider how traditional wisdom has so much value that has been forgotten. Sometimes I get angry about how Anglo law has overcome Navajo law, to the harm of Navajos. I read an evaluation of my talk on Navajo common law after a conference with state judges and lawyers which said, “Yazzie is bashing Anglo justice systems again.” That is not my intent.

Emotions are important to me. The stereotype of the stoic, passive or unemotional Indian is false, and emotions are an important part of Indian life. Navajos have a lot of pride, and when used in a good way, it is a very positive emotion. How else could I have thrown away a ticket to an electronics school and insisted that I was capable of getting a college degree? It took a lot of drive, and a little angry pride to tough it through law school in a time when non-Indians assumed that Indians were not capable of understanding the mysteries of “the law.”

To me, and to many other Navajos, law is something that “just is.” To explain it in my own mind and to you, I need a basis for comparison. That basis is the shortcoming of modern American adjudication, and I am not alone in decrying its destructive elements. I share a fondness for centuries of English-American common law traditions, but changing circumstances now require us to take a new look at that undefinable quality we call justice. As we of the Navajo Nation discuss the traditional knowledge that gives us power to survive in modern times, I find a property that is immensely valuable. I want to share it with you out of respect and to honor Navajo distributive justice. You, who have taken an interest to read this, are like a relative. This relationship will help us grow together in a good way because life comes from it.

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70. See Hauswald, *supra* note 13, at 43-46.

71. In the words of Canadian philosopher Marshal Macluhan.