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## 1. Key Themes (to be explored)

- Adults that commit crimes or anti-social actions often need 'healing' because their actions were a symptom of an underlying 'imbalance'.
- There are links between community healing, nation building and a safe society.
- Community healing requires long-term dedication and hard work.
- In 1994, Federal/Provincial/Territorial Justice Ministers agreed that the justice as healing be reflected in the general justice system.
- Many scholars and practitioners are questioning why they have not thought much about why the *Criminal Code* sentencing provisions aim at punishing people instead of attempts to heal them.
- Many Aboriginal and Non-Aboriginal people are attempting to construct many forms of healing themselves based on their awareness of their knowledge, traditions and values. This will create many methods of healing and views of justice.
- Healing can be seen as community development in a broad sense.

The **perception of leniency** may be a reaction to the emphasis on healing and rehabilitation. This complaint may have merit if the emphasis is only on the healing of the offender rather than of the community. Notable also is the role of the victim in the community healing process. Concern over the interests of victims could also be caused by the emphasis on the healing of the offender/victimizer rather than the healing of the community. The New Zealand victim-centered Family Group Conference approach has provided an example of how justice devolution to the community can advance victims' interests.

## 2. Research Questions

### 2.1. Definition of Healing

Define healing?

Is there a single meaning given to the term “healing”?

### 2.2. Roles & Responsibilities

How does the conception of healing take into account the offender, victim and the community?

Is there role and responsibility of other stakeholders?

If so, how can they facilitate healing in the community, offender, and victim?

### 2.3. Healthy

How are a healthy offender, victim and community defined?

### 2.4. Process of Healing

What are key aspects of the process of healing – in an offender, a victim, and in a community?

What are the recognizable steps/activities which tend to set in motion the process of healing – in an offender, a victim, and in a community??

### 2.5. Readiness

What are the signs of readiness to heal – in the offender, in the victim, and in the community?

Who should determine when an offender, victim and community is ready to heal?

### 2.6. Common Understanding/Language

Is there a common understanding/language of “healing”?

Has there been any discussion with communities, government and other stakeholders on “healing”?

**3. Relevant Documents, Studies and Practices - Yukon**

#### **4. Relevant Documents, Studies and Practices – Other Northern Territories**

Healing wounds - Delegates discuss restorative justice at conference  
Malcolm Gorrill, Northern News Services, Inuvik (Feb 15/02) –

Restorative and community justice were the focus during the regional justice conference held Feb. 5-7 at the Midnight Sun Recreation Complex.

More than 80 delegates representing Inuvik, Paulatuuq, Holman, Sachs Harbour, Tsiigehtchic, Fort McPherson, Tuktoyaktuk and Aklavik took part in discussions and heard presentations on a wide range of topics.

Among the topics covered on day one were presentations on current trends in community justice, and on proposal writing, as well as a presentation by Lana Woodfine, the new victim services coordinator for Inuvik.

Const. Serge Robitaille of Inuvik RCMP gave a presentation Feb. 6 on the role of police in restorative justice. A group discussion took place on the proposed Youth Criminal Justice act.

A presentation on the NWT Community Mobilization Program took place Feb. 7. That afternoon Crown attorney Brent Lepage and defence lawyer John MacFarlane spoke on their relative roles pertaining to restorative justice.

They pointed out that community justice committees can receive referrals either prior to someone being charged, or afterwards.

Lepage said that restorative justice in some cases is better handled within the community than by the courts. He said there's a partnership between justice committees or other restorative justice agencies, the courts and the police.

"That's very important," Lepage said.

He pointed out that justice committees can refuse to hear cases, especially if they are serious in nature. MacFarlane agreed.

"The more serious the charge, the more it should be in front of the court," MacFarlane said. "I'm a very big fan of justice committees."

MacFarlane said these committees are better able to provide in depth, long term solutions than the courts. Lepage pointed out that with justice committees, not all the attention is focused on the accused.

"Victims are extremely important in the process," he said.

Lepage said the court system and restorative justice are not opposed to each other, just work differently. He said they are all trying to bring peace to communities and ensure people are saved from further injury and property damage.

Repairing harm

After the conference John Nash, coordinator of the Inuvik justice committee, said the whole purpose was to give people information on restorative justice and what it takes to start up and operate one.

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Aside from Inuvik, community justice committees also exist in Tuktoyaktuk and Fort McPherson, with one just started in Sachs Harbour. Nash said residents in Aklavik, Tsiigehtchic and Paulatuuq are trying to revive their justice committees.

Nash said one important aspect of restorative justice is that it involves community members in the wake of a crime.

"Healing damaged relationships between a victim and an offender, and repairing harm that's been done, that's all restorative justice is about," Nash said.

Probation's role

Tracy MacPherson, regional probation supervisor for the Beaufort Delta, spoke during the conference. On Monday she explained that she wanted people to understand what probation officers do.

"I talked about the role that probation can play with community justice, and how can we work together, because it's always seemed that it's been so separate," MacPherson said.

"We should be working with the community and community justice. Because that's my background, is community justice. Now coming into probation, I can see lots of links."

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#### 4.1. Nunavut (Northern) Justice Issues - 2000<sup>1</sup>

##### Prevention and healing

- Prevention plays a vital role in many of the communities that develop and operate community-based initiatives.
  - o In fact, in the literature it is expressed as a key element.
- In this collection it is clear that prevention can take many shapes, depending on the particular situation and the specific needs of the community.
- As well, prevention means different things depending on who the intended targets are. Some of the issues surrounding this theme include the following:
  - o A number of distinctions must be made regarding the role of prevention.
    - First, a different approach is necessary when discussing prevention as *preventing recidivism* and when discussing prevention as literally, the prevention of criminal activity from starting.
    - Very different strategies are required of each.
    - A second distinction has to be made regarding the role of prevention for adults and the role of prevention for young offenders.
      - Prevention strategies will be very different for these groups.
      - For adults, prevention often works in tandem with healing.
      - Adults that commit crimes or anti-social actions often need 'healing' because their actions were a symptom of an underlying 'imbalance'.
      - For many youths this may be the case as well, if they have already begun offending.
      - For younger children, however, prevention does not necessarily mean healing, as it does for adults, but rather refers to preventing the youth from engaging in the criminal activity; developing a strategy that addresses the factors that contribute to a youth starting to engage in criminal activities.

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<sup>1</sup> Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf>

## 5. Relevant Documents, Studies and Practices – Other Canadian

### 5.1. Exploring Justice as Healing - ?<sup>2</sup>

In Eurocentric thought, there are many theories about justice and punishment.<sup>3</sup> The biblical approach of equivalence (*lex talionis*) and nineteenth century British theories of intolerable wrongs, deterrence and retribution (*vergeltung*) establish the dominant theories of punishment in Canadian society. They seek to ensure that certain individuals physically suffer for their human weakness, conduct and mistakes big and small. These approaches have not been adequate at curtailing crime or even expressing solidarity with the victim.

In March 1994, the federal/provincial Justice ministers' reached a consensus on the problems of Aboriginal Peoples in the Canadian criminal justice system. They agreed that the Canadian Criminal justice system had failed and is failing the Aboriginal people. They agreed that a new holistic approach to criminal justice, based on Aboriginal values, practices and traditions, is essential in Aboriginal justice reform. In addition, they agreed that the Aboriginal of justice as healing be reflected in the general justice system. This statement is a good beginning for a renewed Canadian criminal justice system.

From my experiences, most Aboriginal peoples have never understood the exotic passion of Eurocentric society for labeling people criminals and making them suffer. The modern Canadian criminal justice system displays the Eurocentric elite's intolerance of human frailties, and justifies a theory of social control by violence. In the past, Aboriginal peoples have argued that the failure of a contrived code of conduct of another time could not be the measure of all societies, that the cultural remedies of certain societies cannot be reconciled with the idea that justice is to be reasoned about and not merely felt. Now others are sharing these thoughts. Many scholars and practitioners are questioning why they have not thought much about why the Criminal Code sentencing provisions aim at punishing people instead of attempts to heal them.<sup>4</sup>

Emerging out of our past struggles with deterrence, sentencing, punishment, and preventive strategies in the Canadian criminal justice system is the evidence that the most successful programs have been built on empowering Aboriginal languages, ceremonies, traditions, and values. Now these are being seen as theories that could inform a sustainable transformation in justice from punishment to healing.

While we must not allow others to appropriate our cultural values and processes, Aboriginal peoples must aid the transformation by articulating, renewing and living their vision of justice as healing. It will not be easy. Canadian society seems to want their world-view. This is not an objective standard, since such standard is the ultimate in subjectivity.

Justice as healing is an old tradition in Aboriginal thought and society. Yet, after our experiences with colonialism, racism, domination and oppression, we have returned to this tradition as a foundation for contemporary remedies. Systematic deprivation of the Aboriginal ownership of land and resources, wealth, income, as well as our culture, human dignity and social position has placed difficult demands on the traditional values and rituals. We need to explore in their totality our visions of justice as healing. We need to evaluate whether existing therapeutic treatments are tools of assimilation or cultural integrity. We need to ponder why the justice system refuses to treat our people as fully human, choosing instead to dehumanize us as deviant organisms or sick minds that need rehabilitation. We have to consider the relationship of punishment to human rights. We need to think seriously about replacing criminal law with tort and restitutionary remedies familiar to Aboriginal values. We need to rethink justice from our traditions.

The current theories of social justice which focus on the distribution of material resources, income, or position of reward and prestige are applicable to part of our situation. To focus on distributive justice continues to hide and reinforce systemic domination of Aboriginal peoples. Often such focus is the source of our problems with

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<sup>2</sup> James [sákéj] Youngblood Henderson, Research Director, Native Law Centre of Canada Exploring Justice as Healing [http://www.usask.ca/nativelaw/jah\\_henderson2.html](http://www.usask.ca/nativelaw/jah_henderson2.html)

<sup>3</sup> Baird and Rosenbaud, Philosophy of Punishment (1988).

<sup>4</sup> See, Gosse, Henderson, Carter, Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice (1994)



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administration of justice.<sup>5</sup> While the proper distribution of benefits and burdens is important to Aboriginal peoples, they should not be used to validate the continuation of colonial structures and contexts that determine modern distributive patterns and decision-making.

Our holistic approaches to justice as healing are crucial to resolving our experience with colonial oppression, domination, and racism. This requires us to begin the complex task of decolonizing Canadian law, which means the elimination of systemic dominion by the colonialists and their oppression of Aboriginal peoples. To undertake such an inquiry we have to understand the six explicate processes of systemic oppression: violence, exploitation, marginalization, powerlessness, cognitive imperialism, and terror. Additionally, we have to confront the more complex implicate context of colonial oppression and domination. At the centre of the implicate context is the denial of these cognitive differences that created group oppression. For example, in 1989, a U.N. Seminar on the effects of racism and racial discrimination on the social and economic relations between the Aboriginal peoples and States concluded that racism towards Indigenous people was a new form of global racism: racism in the guise of state theories of cultural, in addition to biological, superiority that results in the rejection of the legitimacy or viability of Indigenous people's own values and institutions.<sup>6</sup>

In articulating justice as a form of healing, Aboriginal peoples are not seeking to construct an abstract or universal theory of justice in the Eurocentric traditions. We are not obsessed with constructing any universal normative theory of justice or adopting a Eurocentric theory of the rational ideas of the good and the just. We are attempting to grasp the wisdom of our elders, to define ourselves, and to articulate a certain way of healing and apply it to our traumatic experiences. Many Aboriginal people are attempting to construct many forms of healing themselves based on their awareness of their knowledge, traditions and values. This will create many methods of healing and views of justice. This reflects our cultural diversity. While there is no single theory of Aboriginal justice, the common theme remains the necessity of our knowledge our people and ourselves. The goal of healing is not to assimilate to the other, but rather to allow ourselves to live in a world as Aboriginal people who feel connected with our unique shared culture. We do not desire to be healed in a manner that we feel disconnected from our identities or feel that our identities are better suited to other societies.

I feel it is important that our visions of justice as healing be founded upon our knowledge and language, and rooted in our experiences and feelings upon our knowledge and language, and rooted in our experiences and feelings of wrongs and indignation. These emotions cannot be avoided in constructing our vision of justice. Our vision of justice are to be based on Aboriginal knowledge about the nature of humans, their society, and our linguistic mode of understanding the ecology. We cannot simply borrow the Eurocentric versions of human nature or psychology or society, since they are not based on our wisdom, knowledge, or language. They have never known who we are.

Our visions of justice as healing are concerned more with equitable processes or ceremonies to resolve conflicts rather than with substantive rules. When Aboriginals say a certain behavior or rule is wrong, they are constructing a cultural vision of justice. Our vision of justice as healing recognize that when an appropriate healing process is clear and is not taken, expressions of abhorrence at the wrong and a demand for justice are often subtle ways of tolerating wrongs. When we look for visions of justice, we should look at the best in our traditions of raising children, rather than Eurocentric books on justice. While we should be willing to dialogue about these grand systematic European theories of justice in the modern society, we should also clarify their failures and how they are different from our visions.

When we begin to formulate a view of our true identity, we are inevitably forced to understand our past oppression as well as decolonize the criminal justice system. We need to acknowledge and affirm our world-view, language, consciousness and order. Our vision of justice as healing require us to understand the importance of world-views or landscapes rather than validate a social ontology of individualism. Our traditions and values emphasize the beauty of distinct consciousness and orders. We should not repress them for formal

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<sup>5</sup> Royal Commission on the Donald Marshall Jr. Prosecution (1989); Report of the Aboriginal Justice of Inquiry of Manitoba (1991); Justice on Trail: Report of the Task Force on the Criminal Justice System and Its Impact on Indian and Metis People of Alberta (1991); Report of the Saskatchewan Indian Justice Review Committee (1992).

<sup>6</sup> Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and the States, Commission on Human Rights, 45th Sess., U.N. Doc E/CN.4/1989/22 (1989). See Barsh, "United Nations Seminar on Indigenous Peoples and States" (1989) 83 (3) American Journal of International Law 599.

equality with our oppressor's values. We must acknowledge that equal treatment under the law arose from the idea of fairness, and idea that presupposes differences. If every thing was the same, fairness would be a moot point. Contemporary notions of equality have a difficult time acknowledging and affirming the right of Aboriginal people to be different, since it attempts to suppress all differences for universal pretence of equality. Pretence is no substitute for knowing who we are; only the value of having an authentic identity and learning how our traditional values can begin the process of healing us is more important than validating alien ideas of justice.

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## **5.2. First Nation Research Project on Healing in Canadian Aboriginal Communities - 2002<sup>7</sup>**

### **Release Of Report On Aboriginal Community Healing**

**OTTAWA, JUNE 13, 2002** -- Federal Solicitor General Lawrence MacAulay and Mr. Georges Erasmus, President of the Aboriginal Healing Foundation, today released "Mapping the Healing Journey: Final Report of a First Nation Research Project on Healing in Canadian Aboriginal Communities".

"This report contributes to our understanding of the links between community healing, nation building and a safe society -- goals shared by both Aboriginal people and the Government of Canada," said Minister MacAulay.

The report was co-funded by Solicitor General Canada and the Aboriginal Healing Foundation, as part of the Solicitor General's Aboriginal Peoples' Collection.

"This is a valuable contribution to our understanding of healing in Aboriginal communities," said Mr. Erasmus. "The report demonstrates that community healing requires long-term dedication and hard work."

The research was undertaken by Four Directions International and the Four Worlds Centre for Development Learning. The project involved a review of academic research and project documentation, case study site visits to six First Nation communities, consultations, as well as a national gathering.

The process resulted in the development of a healing "map", which identifies four distinct stages in individual and community healing.

Single copies of the report are available from the Aboriginal Corrections Policy Unit of the Solicitor General of Canada at 340 Laurier Avenue West, Ottawa, Ontario K1A 0P8 (fax: 613-990-8295).

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## **5.3. A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process – 2001<sup>8</sup>**

## **5.4. Planning/Evaluating Community Projects - 1998<sup>9</sup>**

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<sup>7</sup> Solicitor General Canada and the Aboriginal Healing Foundation, Four Directions International and the Four Worlds Centre for Development Learning., Mapping the Healing Journey: Final Report of a First Nation Research Project on Healing in Canadian Aboriginal Communities -2002 <http://www.sgc.gc.ca/Releases/e20020613.htm>

<sup>8</sup> Solicitor General Canada and the Aboriginal Healing Foundation, Native Counselling Services of Alberta Dr. Joe Couture, Ted Parker, Ruth Couture, Patti Laboucane, A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process, 2001, <http://www.sgc.gc.ca/EPub/Abocor/eAPC2001/eAPC2001.htm>

<sup>9</sup> Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998 <http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm>

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**Traditional healing** is a means of reconciling wrongs within a person or a community. Healing is a broad notion that encompasses restorative justice. The commission of a crime indicates a lack of spiritual balance within the person, and the healing process is intended to restore this balance by uniting the four elements of the person: the Spiritual, Emotional, Physical and Mental. Justice is the restoration of this balance. Healing is at the core of the Hollow Water program in which justice was "not only a consideration of the imbalance that led to the wrongful act, but also the external forces that caused the imbalance, as well as the consequences of the act" (cited in Lee 1996). A conference at Waseskun House (1991) outlined several dimensions of the Aboriginal perspective on healing:

Workers, healers, and community leaders need to be encouraged to incorporate the holistic approach to healing. This means focusing on the four spokes of the medicine wheel: physical, mental, emotional and spiritual health.

Workers need to be encouraged to work on healing the expanding circles of the individual, the family, the community and the nation, instead of focusing only on the individual. Exclusion from the community is one of the major problems affecting offenders and reintegration is a major part of the healing process.

Traditional culture, ritual, ceremony, language and spirituality need to be revived and reintroduced as an integral aspect of healing.

The Waseskun House program for offenders is based on a daily routine of several types of healing, including a community healing circle, in order to rebuild the relationship between offenders, their victims, and their communities.

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### 5.5. Defining Traditional Healing -1996 <sup>10</sup>

<http://www.usask.ca/nativelaw/jah.html>

#### **Defining Traditional Healing<sup>11</sup>**

The four elements of the person are the Spiritual, Emotional, Physical and Mental. The physical manifestations of a weakness are seen as disease or a bodily ailment. The disease is traditionally seen as a symptom of the weakness. The weakness may be derived within the spiritual, emotional or psychological aspects of the person. When a person is inflicted with a disease, the traditional view is that it is an offering of a teaching to the individual. The teaching will ultimately be of oneself but the person may choose to deal only with the symptom of physical manifestation of the weakness and not address the root of the disease itself. If the person chooses to treat only the disease and ignores the teaching which it is offered, then the disease will return. Physical manifestations may continue to appear until the individual accepts the teaching.

The weaknesses are caused by being out of balance or off Centre. There are many reasons why an individual is out of balance. The reasons range from working too much in one area or over-working at a job, being too greedy, wanting too much, and not paying attention to the other parts of ones' self or ones' life and family. If we do not pay attention to all of our parts then we will become unbalanced and an illness may come forward to

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<sup>10</sup> Gloria Lee, Research and Curriculum Developer, Saskatchewan Indian Institute of Technologies. Ms. Lee is of Cree ancestry and is from the Pelican Lake area. She is currently developing the curriculum for the 2-year Justice Diploma Program which is being delivered in North Battleford, Saskatchewan. The following is an excerpt from her draft academic paper prepared for a [Native Studies'](#) research course with the [University of Saskatchewan](#) under the advisement of Patricia Monture-Angus. [vol. 1, no.4 \(Winter 1996\) Justice as Healing](#)  
[http://www.usask.ca/nativelaw/jah\\_lee.html](http://www.usask.ca/nativelaw/jah_lee.html)

<sup>11</sup>The information in this section was obtained through the oral tradition from Elders Mary Lee, Danny Musqua, Henry Ross and others, except where otherwise noted.

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remind us of the fact that we have not paid attention to other parts of ourselves. Being out of balance may also be caused by not receiving the appropriate teachings from our Elders because First Nations culture was hidden to protect it from total loss.

There are traditional ways of dealing with illnesses. With the support of Elders and the assistance of Healers and Elder Apprentices we can find the right healing for the illness and an explanation for why the illness happened in the first place. If we ignore this explanation and continue with the same behaviour or activity which is said to have caused the illness, the illness will return. Inevitably the illness is said to be caused because the person is out of balance. Being out of balance happens because one has not lived a "careful" life.

When speaking to a traditional healer, one will discover that much of what a healer does is sorting out the jumble of disorder found in and around the patient. The disorder has many causes but primarily is caused by not living life in a good way. The job of the Healer, simply put, is to help reorder the elements of the person and to explain why and how disorder was achieved. The Healer then explains how to ensure that the illness does not return.

Traditional healing by a Healer was utilized when a family determined that there was an "Indian" illness:

"(w)hen people discuss a particular case of illness, identifying the probable cause was often a central topic. Indeed, when the cause of a particular illness was not readily apparent, individuals would commonly note that the illness "just didn't occur for no reason". In conversations about serious or complex cases, several different explanations may be discussed."<sup>12</sup>

Understanding the cause of the illness or observable behaviour was important in finding the appropriate treatment for the illness or behaviour:

"Indian" illnesses are those which can be explained by reference to a potentially observable event. These include such things as colds, fevers, and respiratory infections, like bronchitis, attributed to exposure to excessive cold, or to being overheated and catching a chill; and stomach aches or diarrhea that come from overeating."<sup>13</sup>

These are physical manifestations of a problem. As part of the diagnosis, a Healer can determine if the physical manifestation is due to spiritual or emotional imbalance, this is part of the diagnosis.

Understanding begins with the Elders and what they have to teach. Their knowledge comes from the Creator. Because traditional healing is within each of us, we are all capable of healing ourselves, sometimes with the assistance or support of others such as Elders, Healers, and Helpers. Healing begins at one's own centre, this is the ultimate responsibility for one's own well being.<sup>4</sup> This traditional approach to healing is found in discussions on the meaning of justice. For example, the meaning of 'justice' found in the *Report of the Aboriginal Justice Inquiry of Manitoba* states:

"The dominant society tries to control actions it considers potentially or actually harmful to society as a whole, to individuals or to the wrongdoers themselves by interdiction, enforcement or apprehension, The emphasis is on the punishment of the deviant as a means of making that person conform, or as a means of protecting other members of society.

"The purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal system for Aboriginal people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good orders."<sup>5</sup>

From the First Nations understanding, the Euro-Canadian concept of justice is too narrow and too confining for a complete appreciation of all the elements involved in a Wholistic perspective of justice. The Euro-Canadian justice model is focuses on delivering punishment for wrongdoing. In this model, justice is the

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<sup>12</sup>Linda C. Garro, "Ways of Talking About Illness in a Manitoba Anishinabe (Ojibway) Community" in *Circumpolar Health* 90, p. 226.

<sup>13</sup> Ibid p. 226.

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maintenance or administration of what is righteous by determining awards or punishment; it is the quality of being just, impartial, or fair.

The First Nations' philosophy of justice is really an expanded understanding which, in the end, does not even mean 'justice' anymore. There is not an English word for the First Nations' Wholistic meaning. Aboriginal people have inherently a higher standard or a fuller concept of what is required to make things right. This understanding is guided by the spiritual realm and the teachings of the Creator. These teachings are sometimes referred to as Natural Laws. The following is an excerpt from the Federation of Saskatchewan Indian Nations' Justice Unit *Historical/Customary First Nations Law Practices - The Natural Law*, which and is respectfully included:

"The teachings of our culture tell us that we as aboriginal people were placed here by our Creator, the same Creator who is responsible for all of creation. This of course includes all nations, regardless of race. Each nation was provided with a means of communication to the Creator, or as some would call it, a faith or religion for which to follow. These various religions are considered gifts to mankind and are to be treated with respect by all. Therefore, for one nation to denounce or show disrespect to another faith is in essence, committing an act of disrespect to the Creator even though it is done unintentionally. Once we, as a Nation of people, begin to acknowledge the existence of one Creator, a teaching of respect for mankind emerges.

"If one chooses to accept or acknowledge this concept, one can easily see that our culture, customs and traditions were also provided to us by the Creator. We are told that our culture is based on the natural law and that the natural law is connected to the natural universe.

Long ago our ancestors had a clear understanding of the natural law and they understood how all things were inter-connected. It was understood by our ancestors that when one walked with disrespect, their own spirit paid with retribution. Even by insulting the smallest child, one already insulted their own spirit. Such acts were considered an abuse or violations of the natural law and the individual was obligated to correct the wrong doing through service to mankind. We have been told that such teachings have not been a part of our people, as a nation, for several hundred years. This is not to suggest that natural law has diminished for the natural law is constant and does not change. Rather, our own understanding and practice of the natural law as a whole nation has diminished. This is not intended to discourage First Nations people as we are told that we as a nation, are entering a new cycle of life which will bring increased harmony and balance. As we learn more about our traditional past, we will be challenged to the degree that we will doubt our own ability to learn. We are to have faith in our Creator and the power of the Spirit and to continue no matter how it is perceived.

"The natural law as we know it, is connected to the natural universe which is comprised of positive and negative energy forces. Our white brothers and sisters understand this concept to a certain degree, however, they have chosen to acknowledge it in a different manner, namely in scientific terms. At times, they have chosen to direct these energies in a negative fashion, i.e.; splitting of the atom, thus allowing the creation of atomic weapons. We have, on the other hand, chosen to acknowledge and respect these energy forces in accordance with our traditions, for even the negative energy that is present in the universe can show us the beauty of love. The negative energy is used as a balance to maintain harmony within and by doing so, can provide a greater understanding of love. We are told that as humans, we have to maintain that balance."<sup>6</sup>

This brief introduction to natural law, while not a complete explanation does provide a sense that natural law encompasses the workings of the universe (physics) and emotions such as love which are all guided by the power of the Creator. The Euro-Canadian understanding of justice does not consider neither physics nor love.

#### **Cultural and religious contexts**

The way in which an Individual chooses to relate to the Creator and to all of Creation will determine how justice is perceived and how restorative justice is viewed. This is attributed to fundamental beliefs and values which are inherently different and are in a state of ongoing conflict between Aboriginal and non-Aboriginal peoples' laws.

Hollow Water has discussed the meaning of justice and how different cultural perspectives define justice. . The following is an extensive quote from the Hollow Water material which helps us understand that culture and values are important in determining what a society or community will accept and develop as justice. It is included because of its usefulness and clarity on the issue of cultural and spiritual contexts:

"In looking at the relationship between Community Holistic Circle Healing (CHCH) and the Manitoba justice system, it is useful to consider the cultural and religious contexts in which the respective views and systems of

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justice have been developed. This is not intended to be an in-depth analysis of the contexts, but rather an overview from which to understand the differences, and perhaps to understand the resulting tensions between the systems.

"A community's justice system reflects its culture and values, which are often entrenched in its religion. In comparing the Hollow Water notions of justice with those of the Euro-Canadian system, it is easy to perceive the religious roots.

"The overriding rationale for the use of traditional teachings for CHCH is found in the importance of healing, which has an important spiritual significance due to the need to unite all aspects of a person's being: the physical, the spiritual, the mental and the emotional elements. For CHCH the act of sexual abuse clearly indicates a lack of balance in all aspects of a person's being.

"Because the spiritual being is integrally interwoven into the relationship with the Creator, a lack of balance in the spiritual being has an impact on the relationship with the Creator.

"While it can perhaps be over-simplifying a very complex process, it can be said that justice for CHCH is restoring the balance.

"This implies, for the "justice process" of CHCH, not only a consideration of the imbalance that led to the wrongful act, but also the external forces that caused the imbalance, as well as the consequences of the act. One would be foolish to think, for example, that an act of sexual abuse would not affect the spiritual balance of the victim. Justice then would include righting that imbalance as well.

"One can easily see the role of Christianity in the concepts of the Canadian justice system. Christianity is a "top down" system with God at the top. In the Old Testament at least, God smote those who offended him. Christians pay for their sins with God doling out the punishment.

"In our justice system, the role of God is played by the judge. Christianity is founded on the notion of free will. People choose to sin and are held accountable for that choice. Sinners are punished.

"This context, translated into the Canadian system, makes justice focus on very simple issues. Free will is, in the justice system, translated into "mens rea" (guilty mind). It forms the most important concept in our justice system. It allows us to focus our attention on a single act.

"We never need to ask "Why?" because that answer is always supplied to us through the precepts. The presence of mens rea means the accused chose to commit the act, and that's all we need to know. The offender is then held blameworthy, ready to be punished.

"The result of the fact finding approach in a justice system which seeks to lay blame on an individual is to pit the offender and the victim against one another, thus further exacerbating the harm that has come between them.

"Having established guilt we then invoke the wisdom of experts, ie. complete strangers to the protagonists, to advise us as to the implications of the wrong doing.

"The only time we look beyond the offender is in the punishment stage. But this is only to determine what caused the offender to go wrong. (We already know this because of our free will concept.)

"It arises in a concept called "general deterrence". Simply put, this amounts to punishing the offender for an offence someone else might commit in the future. No doubt the rationale for this can be traced back to the concept of "original sin" which in essence makes us responsible for the sins of others.

"In Christianity the ultimate punishment is Hell. In our justice system it is jail, a place similar to Hell where we organized the gathering of wrongdoers to cohabit with one another. It is not a place designed to make the offender a better person, but simply to punish him for his wrongful acts, just like Hell.

"It is not far removed from the "eye for an eye" concept of justice, about which Ghandi once said, if we practice an eye for an eye as justice, soon we will all end up blind.

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"Recent trends would not lead one to the conclusion that popular notions of justice are moving away from the notion that offenders deserve to have great amounts of suffering inflicted upon them in the name of justice.

"When one considers the two systems from this perspective, it is easier to understand the underlying causes of the tensions between them. If one accepts that the respective views of "justice", and the systems that have evolved around those views, are founded on the underlying belief structure of the culture, then it follows that each culture will have difficulty perceiving the merits of the other's approach to justice. It is difficult to accept as valid that which does not conform to one's fundamental beliefs. Even more problematic is the effort to inflict on one culture the justice system, and thus the underlying belief structure, of the other culture. Where the underlying belief structures are fundamentally inconsistent, the justice system of the one cannot work for the other, for in their eyes, what is being delivered is not justice."<sup>7</sup>

**Relationship Between Healing and Canadian Justice**

James Dumont's article, *Justice and Aboriginal People*, found in The Royal Commission on Aboriginal Peoples: Aboriginal People and the Justice System attempts to describe the Aboriginal concept of justice in the following passage:

"The Anishinabe way of expressing the concept of justice is gwaik/minodjiwi/dibaakonagwin (literally, "right, and respectful/judgement"). On the one side hovers the forever, unchanging and always-truth of the Creator, governed by the guardian of the creator's law who is strict and unbending. On the other side is the ever-changing, moving and unfolding truth of the human reality within the creation, which is governed by a guardian who is kind, compassionate and forgiving. In between these two is the law of balance and harmony toward which humankind must strive: this quest is governed by integrity, humility and respect. Justice is the pursuit of a true judgement required to re-establish equilibrium and harmony in relationship, family and society a judgement which is gwaik: straight and honest, while at the same time being *mimidjivim*: respectful of the integrity of all persons, both the wronged and the wrong-doer."<sup>8</sup>

The quality of justice in Dumont's article is of a very high degree of expectation, primarily because Aboriginal justice is guided by the Creator's Natural Law. Humans must abide by the order of things according to the way in which it was originally laid out. In many First Nations, the Elders speak of the retribution paid by the spirit in the spirit world and retribution which must be paid by the human in this physical world. The concept of punishment or retribution is present, the difference is that the punishment is determined by Natural Law and the Creator not by human beings. Human beings only abide by what is allowed of them. Dumont goes on to state that:

"The Anishinabe justice system is one that leans toward wise counsel, compensation, restitution, rehabilitation, reconciliation and balance, rather than obligatory correction, retribution, punishment, penance and confinement. As a people whose spirit and psyche revolves around a core of vision and wholeness that is governed by respect, it is natural that a system of justice be evolved that, in desiring to promote and effect right behaviour, not only attends to balance and reconciliation of the whole, but does so by honouring and respecting the inherent dignity of the individually"<sup>9</sup>

For a better understanding of the First Nations' value system and world view which influences the meaning of words and phrases, read the discussion by Judge Murray Sinclair in his article "Aboriginal Peoples, Justice and the Law", in *Continuing Poundmakers and Riel's Quest...*<sup>10</sup>

...The process of traditional healing is similar to the process called restorative justice because they share some common goals; to reconcile and restore balance and harmony through understanding of traditional teachings and ceremonies. It is for these similarities that it is useful to glean knowledge about traditional healing.

The previous discussions on traditional healing and justice describe the relationship between healing and Canadian justice as estranged. There is a great deal of hope that these two ways of understanding and doing things might be reconciled, or at the very least, acknowledge some common goals. As with any reconciliation that brings understanding, respect and acceptance, we will look towards common ground as the exploration continues into these two paradigms from a First Nations perspective...

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1. These concepts and others are discussed further by Edward A. Connors, Registered Mohawk Psychologist, in "How Well We Can See The Whole Will Determine How Well We Are and How Well We Can Become" found in Sue Deranger, *Culturally Specific Helping with First Nations People*, 1996.

2. A.C. Hamilton & C.M. Sinclair, *Report of the Manitoba Justice Inquiry*, (Winnipeg, Manitoba: Queen's Printer, 1990) p. 22.
  3. F.S.I.N. - Justice Unit, *Historical/Customary Law, First Nations Law Practices: The Natural Law*, December 1995) pp. 3-4.
  4. This section is respectfully included from the Hollow Water Community Holistic Circle Healing C.H.C.H. Discussion Paper.
  5. James Dumont, "Justice and Aboriginal People", in the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal Peoples and the Criminal Justice System in Canada* (Ottawa: Queen's Printer, 1996) p. 69.
  6. *Ibid* p. 69.
  7. Judge M. Sinclair, "Aboriginal Peoples, Justice and the Law", in Gosse, Henderson & Carter, *Continuing Poundmaker's and Riel's Quest: Presentations made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994), pp. 173-184
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## **5.6. The Seeds of a Community Healing Process – 1995 <sup>14</sup>**

### **The Sentencing Circle**

Background ...[T]he seeds of the Sentencing Circle concept have been within C.H.C.H. since the mid-1970's. It was at that time that a few individuals within our community began to look at traditional teachings and practices as a way of beginning personal healing journeys...

In 1984, these personal healing journeys became the seeds of a community healing process ... By then, most of us had come to occupy various social program positions in the community and we talked about how we could better meet the needs of the individuals and families with whom we were involved as service providers...

By 1989 ...[we] had come to the realization that sexual victimization seemed to be at the core of unhealthiness of most individuals and families in our caseloads... [W]e began to look for, develop, and then implement, a community healing process that would address sexual victimization. This eventually became known as Community Holistic Circle Healing (C.H.C.H.).

C.H.C.H. is our attempt to take responsibility for what is happening to us. Through the power of the circle we work to restore balance and make our community a safe place for future generations. C.H.C.H. stems from our beliefs: (1) that victimizers are created, not born; (2) that the vicious cycle of abuse in our community must be broken now; and (3) that, given a safe place, healing is possible and will happen.

C.H.C.H. utilizes the principles that were traditionally used to deal with matters such as victimization. The traditional way was for the community:

- (1) to bring it out into the open;
- (2) to protect the victim so as to minimally disrupt the family and community functioning;
- (3) to hold the victimizer accountable for his or her behavior; and
- (4) to offer the opportunity for balance to be restored to all parties of the victimization ...

### **Rationale**

In our conjunctive relationship with the legal system we see our role as one of representing our community. We do not see ourselves as "being on the side of" the Crown or the Defense. The people they represent are both members of our community, and the pain of both is felt in our community.

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<sup>14</sup><http://www.usask.ca/native-law/jah.htm> The following is an excerpt from Appendix 3 of the Interim Report of the Hollow Water First Nations Community Holistic Circle Healing (C.H.C.H.) which describes the activities of C.H.C.H. for the period of April 1, 1993 to February 9, 1994. [This excerpt was published in [Justice as Healing](#): a newsletter of Aboriginal concepts of justice. Winter 1995.] [http://www.usask.ca/native-law/jah\\_seeds.html](http://www.usask.ca/native-law/jah_seeds.html)



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Until now our efforts have focused on: (1) attempting to help both crown and defense see the issues in the court case as the community sees them, and asking for their support, therefore, in representing the community's interest, and (2) providing the court with a pre-sentence report which outlines the situation as we see it, informs the court of the work we are doing with the victimizer, and offers recommendations on how we see best proceeding with the restoration of balance around the victimization.

Now, however, we believe it is time to expand the community's involvement in this process. We believe that it is time for the court to hear directly from the community at the time of the sentencing. Up until now the sentencing hearing has been the point at which all of the parties of the legal system (crown, defense, judge) and the community have come together. Major differences of opinion as to how to proceed have often existed. As we see it, the legal system usually arrives with an agenda of punishment and deterrence of the "guilty" victimizer, and safety and protection of the victim and community; the community on the other hand, arrives with an agenda of accountability of the victimizer to the community, and restoration of balance to all parties of the victimization.

As we see it, the differences of the agendas are seriously deterring the healing process of the community. We believe that the restoration of balance is more likely to occur if sentencing itself is more consistent in process and in content with the healing work of the community. Sentencing needs to become more of a step in the healing process, rather than a diversion from it. The sentencing circle promotes the above rationale.

### **Purpose**

As we see it, the sentencing circle plays two primary purposes (1) it promotes the community healing process by providing a forum for the community to address the parties of the victimization at the time of sentencing, and (2) it allows the court to hear directly from the people most affected by the pain of the victimization. In the past the Crown and defense, as well as ourselves, have attempted to portray this information. We believe that it is now time for the court to hear from the victim, the family of the victim, the victimizer, the family of the victimizer, and the community-at-large.

### **Participants**

As we see it, the following need to be included, if at all possible, in the sentencing circle:

- A. the victim
- B. those support people working with the victim, including his or her individual worker, group workers, psychologist, as well as members of his or her support group. If the victim is not able to attend, we see the individual worker taking the role of victim representative
- C. the family of the victim
- D. the victimizer (offender)
- E. those support people working with the victimizer, including his or her individual worker, group workers, psychologist, as well as members of his or her support group.
- F. the family of the victimizer
- G. community this would include members of C.H.C.H. as well as whoever else from the community wishes to participate.
- H. court party this would include judge, crown, defense, and I. R.C.M.P. this would hopefully include the members responsible for the investigation as well as for policing our community.

### **Preparation for the Sentencing Circle**

Advance preparation will include:

1. tobacco being offered to the presiding judge
2. the preparation of the pre-sentence report by the C.H.C.H. team and distribution to crown, defense and judge
3. meeting of the C.H.C.H. team with chief, mayors, and councils to develop and implement a process for ensuring community participation
4. circles with victim, victimizer, and family/ies the day before the sentencing circle, and
5. the sweat lodge being available to any interested circle participants the evening before the sentencing circle

In the morning of the day of the sentencing circle, preparations will include:

1. a pipe ceremony
2. the hanging of the flags
3. the smudging of the court building
4. the placement of the community drum and eagle staff in the courtroom

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5. serving of breakfast to participants from outside of the community, and
6. offering of tobacco for a prayer to guide the sentencing circle.

**The Structure**

The courtroom will be set up in such a way that seating will consist of two circles – an inner one and an outer one. The inner circle will be for those participants who wish to speak. The outer circle will be for the participants who wish to just observe and listen. It is hoped that most participants will choose the inner circle.

**Sentencing Circle process**

The process of the sentencing circle will be as follows:

- A. personal smudges
- B. opening prayer
- C. court technicalities, e.g. confirmation of pleas
- D. outline of "ground rules" that will govern the sentencing circle by presiding judge
- E. first go around why did I come today? why am I here?
- F. second go around participants speak to the victim
- G. third go around participants speak to the victimizer (offender) about how the victimization has affected self, family, community
- H. fourth go around participants outline expectations to victimizer, and/or state opinion as to what needs to be done in order to restore balance
- I. judge gives decision re: sentencing
- J. closing prayer

Following the judge's decision and the closing prayer, participants will be invited to stay and use the circle for sharing/debriefing purposes.

**Seating/speaking order of inner circle**

The judge will occupy the seat at the northern point of the circle. On the judge's immediate left will be two C.H.C.H. members who will play the role of process facilitators. To their left will sit the victimizer, followed by his or her individual worker, then four members of the C.H.C.H. team, then the victim, followed by his or her support worker, then all other participants of the circle. Seated on the judge's immediate right will be the crown and defense lawyers. The first person to speak in the circle will be the person on the immediate left of the judge. Speaking will follow a clockwise direction and will end with the presiding judge.

**The rules that govern the circle**

The following shall govern participants' conduct in the circle:

- A. only one person may speak at a time;
- B. the Laws of the Creator shall govern the person speaking. Those laws are honesty, kindness, sharing and respect;
- C. a person may only speak in turn. There are to be no interruptions while a person is speaking;
- D. if desired, a person may pass when it is his/her turn to speak;
- and E. all other participants should be attentive to the person speaking.

**Conclusions**

- A. Use of the sentencing circle promotes sentencing as a step in the healing process.
  - B. Because those most affected by the victimization are involved and have input into the decision, the healing processes of individuals, family and community are enhanced.
  - C. The victimizer is both held accountable and supported by those most affected by the victimization.
  - D. Inclusion of the formal court party affirms the conjunctive relationship between the community and legal system, as established through the protocol with the Attorney General's Department and supported by the Federal Justice Department.
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### 5.7. Justice as Healing: thinking about change - 1995<sup>15</sup>

In 1967, Canada began to recognize that there exists a problem in the drastic over-representation of Aboriginal people in the criminal justice system. This over-representation did not begin in 1967, it was just

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<sup>15</sup> Patricia A. Monture-Okanee. Professor Monture-Okanee, a Mohawk woman, resides at the Thunderchild Reserve and teaches at the Department of Native Studies, University of Saskatchewan. [This article was posted in Justice as Healing: A Newsletter on Aboriginal Concepts of Justice Native Law Centre Summer 1995] [http://www.usask.ca/nativelaw/jah\\_okane.html](http://www.usask.ca/nativelaw/jah_okane.html)

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finally noticed by those with authority in Canada. The relationship between Aboriginal people and Canadian criminal law sanction is in actuality a historic one. A wing of Stoney Mountain Penitentiary was built to house the "rebels" of the "Metis Uprising" of 1885. The trials of Big Bear and Poundmaker are also notable. In 1897, five people from my partner's community, the Thunderchild First Nation here in Saskatchewan, were convicted of dancing offences contrary to the Indian Act. The relationship between Aboriginal Peoples and Canadian justice is as old as the country.

Since the 1967 "discovery" of the problem of over-representation of Aboriginal people in the Canadian criminal justice system, more than 20 major justice reports have been compiled by Canadian governments (federal, territorial and provincial). Recent statistics demonstrate that despite exhaustive study and numerous recommendations for reform, the problem of Aboriginal over-representation has not been solved. In fact, the over-representation of Aboriginal people in the criminal justice system continues to steadily increase every year. A number of reports note that the over-representation of Aboriginal youth in the justice system is even greater than the adult rate of incarceration. This provides a clear warning that Aboriginal rates of over-representation will continue to increase in the immediate future as offenders tend to "graduate" from youth facilities, to provincial institutions, to federal prisons.

The well documented fact of Aboriginal over-representation within Canadian criminal justice leads to some dramatic conclusions. Aboriginal offenders are the commodities on which Canada's justice system relies. If all Aboriginal offenders were released from custody tomorrow, prisons would be empty and forced to close. Justice personnel from parole officers to correctional workers to police officers would be laid off. The grave majority of any such fantasized layoffs would not affect employment in the Aboriginal community. As dramatic as the figures of over-representation of Aboriginal people in the criminal justice system as clients, the under-representation of Aboriginal people as employees within any component of the justice system is equally notable.

An important realization must follow. Aboriginal people cannot respect a justice system that ensures that the resources flow out of our communities. Our men (fathers, sons, uncles and nephews) are taken from us. At the same time the money paid in fines or to hire lawyers supports a system that is foreign to us. And the jobs created by the loss of our men to jails are rarely available to Aboriginal people nor do many Aboriginal people want those kinds of jobs. Many Aboriginal people continue to refuse to work in a system that they view as manifestly unjust. It is overly obvious that Aboriginal people cannot (and should not) respect a system of criminal law that entrenches our oppression under a pretense of justice and fairness.

Reforms to the existing justice system have not impacted significantly on Aboriginal over or under-representation in the justice system. Many of the multitude of justice reports recognize this fact. The Law Reform Commission of Canada in December of 1991 noted that the energy to reform the experience of Aboriginal people in the justice system must be directed in two ways. Reforms to the existing criminal justice must occur. These reforms will focus on an effort to "accommodate" Aboriginal culture, experience, and tradition within the existing justice system. Whether we like it or not, that system has custody over many of the citizens of our nations and we must not forget them. At the same time, an equal amount of Aboriginal energy must be devoted to the re-creation of Aboriginal justice systems.

The re-creation of "Aboriginal justice systems" (and as they were never formal systems in the way that we know justice systems today, I hesitate to use this phrase) is an idea that must be left with the people of Aboriginal communities. The state has only one job and that is to fully respect the dreams of Aboriginal people. The state cannot interfere in the development of Aboriginal justice aspirations. It is going to be a difficult journey for both Aboriginal communities and the Canadian state. Aboriginal communities must be allowed and encouraged to develop justice initiatives at their own pace in a way that is relevant to their communities. Justice in Aboriginal communities is an Aboriginal responsibility and must be fully respected as such. The wisdom does already exist in our communities to see our dreams fulfilled.

People in Aboriginal communities have always known that the Canadian criminal justice system does not reflect our desires or our ways of being. This knowledge is older than the 1967 Canadian recognition of our over-representation and the concern that recognition caused. Justice is a concept which does not easily translate into Aboriginal languages. As the attention paid to Aboriginal justice dreams has increased, Aboriginal people have been determined to find ways of expressing our ideas and views in the English language. This is one of

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the reasons that "justice as healing" conversations have increased. Healing expresses Aboriginal views on justice more clearly and accurately than any legal or justice words. Even the word justice has a negative connotation because the Canadian system of justice focuses on control, coercion and punishment. These are values that are very much contrary to traditional teachings. Healing more accurately describes a process that will return us to the place where we can recover Aboriginal methods of social control and social order. These methods are very much family based.

There is another important reason why the healing focus is important. In negotiations with federal and provincial justice officials, Aboriginal desires in the justice are becoming increasingly frustrated. Two road blocks are erected around Aboriginal dreams jurisdiction and fiscal restraint. Fiscal restraint requires little explanation, everyone understands that Canada faces a debt crisis. However, the fiscal restraint excuse infuriates me. Just as Aboriginal people are standing up and re-claiming our rightful places in society, Canada runs out of money to assist us in reaching our potential. Canada has fully benefited from the resource base that belonged solely to Aboriginal Peoples. Canada has not taken either their treaty responsibilities or their care taking role of this land very seriously. If Canada is bankrupt, it is not Aboriginal Peoples responsibility. Canada's fiscal difficulties do not end their treaty responsibilities. Yet, the fiscal restraint argument requires Aboriginal people accept that responsibility. Fiscal restraint is a 1990's phenomenon that is built on racist thought.

Jurisdiction issues are not always as well understood. Government officials still have a difficult time accepting that Aboriginal people have an inherent right to govern our own affairs and that this right includes "criminal" justice. Jurisdiction is a legal word that means the power or authority to act. Jurisdictional roadblocks indicate a fear on the part of Canadian officials to move toward different solutions to problems of crime and order.

Unfortunately, Aboriginal people often feel trapped by the provinces, territories and federal governments ability to erect these two barricades. This is why I think healing is so important for us to talk about. Money can help us heal by providing treatment programs. However, these programs have not proved completely successfully. Healing does not require money. Healing is really about being able to care for yourself, your family and all your relations. Healing also avoids the jurisdictional barricade, no one can stop us from caring!

Healing is also about taking responsibility. It is about re-learning how we are supposed to be. Without knowing what traditional responsibilities are, then the right to self-determination really means nothing. Healing is about learning to act in a good way.

There are many things Aboriginal people need to heal about. There's foster care and residential schools. Many women and children have been physically and sexually abused. This has also happened to some of our men too. Some of us have accepted Indian Act rules. We need to heal from abuse, oppression, and colonization. In my mind these things are more important than worrying about how we write down our rights in Canada's constitution.

Healing is the solution. Healing means that we are able to "turn off the tap". We will be able to stop our young people from running into conflict with the law. When we have healed, we will also begin to understand how to accept back and forgive those individuals who are currently serving sentences in Canada's prisons. That is the biggest challenge ahead. Many of our people know how to do "time" Jail "junkies" like myself know how to get them out. What we do not know is how to stop the revolving door of justice from re\_capturing them. We need to know how to keep our people out of institutions. That step requires healing our communities as well as providing healing opportunities for those who now fill Canada's criminal justice system.

### 5.8. From the power to punish to the power to heal -1995 <sup>16</sup>

"The commonest technique of control in modern life is punishment. The pattern is familiar: if a man does not behave as you wish, knock him down; if a child misbehaves, spank him; if the people of a country misbehave, bomb them. Legal and police systems are based upon such punishments as fines, flogging, incarceration, and hard labour. Religious control is exerted through penance, threats of excommunication, and consignment to hell fire. Education has not wholly abandoned the birch rod. In everyday personal contact we control through censure, snubbing, disapproval, or banishment." B.F. Skinner (1953)

#### **Punishment: A Questionable Technique**

Crime as a topic remains at forefront in the media. This is true particularly recently with occurrence of tragic murders and the allegation that these are committed by young persons. There have been calls for harsher punishment, longer jail sentences and the return of capital punishment. "Law and Order" has been on the agenda in recent political elections.<sup>1</sup>

Canada uses imprisonment as a sanction second only to the United States of America in the western world. From its inception, imprisonment as a means of punishment for socially disapproved behavior has been a topic of concern and reform movements. Yet the huge, grey, spaceship-like fortresses remain intact with greater numbers being built to meet the demand. The use of imprisonment as a legal sanction as a very complex conceptual base that is closely tied to the function and the purpose of law. The way a society deals with offenders has varied historically with diverse motivations: punishment; deterrence (both individually and general); retribution; the protection of society; incapacitation; humanitarianism; reform; treatment and rehabilitation. There is no consensus among contemporary authors as to the aims of legal sanctions. The philosophy of punishment has been described as a controversial, almost political subject. For example, Van Den Haag defined punishment as suffering or deprivation imposed by law.<sup>2</sup> On the other hand, Packer argued that the aims of punishment are "the prevention of undesired conduct and retribution of perceived wrongdoing."<sup>3</sup> No doubt the concepts and methods used in dealing with offenders are interrelated and linked to the underlying view of crime and the criminal (free will vs. determination) which is bound up with the view of humans in the nature of society, culture, values and economics which are reflected in the law and other mechanisms of social control.

The use of imprisonment as the most prevalent mode of punishment is a historically complex issue. Why do we still use imprisonment in light of its obvious failure? What function do prisons perform: In the past two decades various writers have attempted to grapple with the above questions, e.g. Foucault, Ignatieff, Hay, Rotham, Hall. These authors offered a significantly different explanation from traditional explanations. Despite almost immediate denunciations as a failure, prisons exist without obvious abatement. Foucault viewed this 'failure' from a different perspective. He saw the carceral system as deeply rooted and carrying out precise functions.<sup>4</sup> He argued that punishment in general is not intended to eliminate offences but rather to distinguish them, to distribute them, to use them. That is, it is not so much that they render docile those who are able to transgress the law, but they tend to assimilate the transgressor of the laws in general tactic of subjection, in short, penalty does not 'simply check irregularities; it differentiates them'. It provides then with general economy.<sup>5</sup> Foucault argued that the penal system in its entirety and ultimately the entire moral system both are the results of a power relationship established by the bourgeois and constitutes an instrument for exercising and maintaining that power. In short, prisons are an integral part of the control apparatus of industrial capitalism.

Whatever theory one subscribes to, traditional or modern, there are two facts that have to be dealt with. Firstly, it costs approximately \$10 billion dollars to operate the "justice" system and secondly, it does not work.<sup>6</sup> We have a justice system that is seriously flawed and is seen as unjust and ineffective. We need people with

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<sup>16</sup> Her Honour Bria Huculak, Provincial Court of Saskatchewan. B.A., B.Ed. and J.L.B. University of Saskatchewan (1977); J.L.M. (Hon.), University of Auckland, New Zealand, (1983). Judge Huculak was the legal Director of the Saskatchewan Legal Aid Commission, Saskatoon Rural Office, prior to being appointed to the bench January 1992. From the power to punish to the power to heal, <http://www.usask.ca/nativelaw/jah.html> This article was first published in Justice as Healing: a newsletter on Aboriginal concepts of Justice in Fall 1995  
[http://www.usask.ca/nativelaw/jah\\_huculak.html](http://www.usask.ca/nativelaw/jah_huculak.html)

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courage to challenge and develop an alternative vision at a time when pessimism is rampant and many given up in despair. Community based "restorative" justice models give hope.

In 1992 Judge Barry Stuart, Territorial Court of the Yukon, utilized circle sentencing. On the basis of the *Moses* case,<sup>7</sup> Provincial Court Judges in Northern Saskatchewan initiated sentencing circles approximately 3 years ago. Since then over 100 individuals in many communities have benefited from the process, primarily in the north.

One consequence of the use of sentencing circles has been a drop in the crime rate;<sup>8</sup> as well as reducing the numbers of individuals imprisoned.

The community is engaged in a direct way thereby shifting the focus from retribution to that of restitution, reintegration, restoration, reparation and rehabilitation. Reclamation is also critical. That is the return to the community what is rightfully theirs - the ownership and responsibility for its members. Specific criteria were developed in order to ensure consistency in application. They are as follows: The accused must agree to be referred to the sentencing circle. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn. There are elders or respected non political community leaders willing to participate. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing. The court should try to determine beforehand, as best it can, if the victim is subject to battered women's syndrome. If she is, then she should have counseling and be accompanied by a support team in the circle. Disputed facts have been resolved in advance. The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

The circles are held in informal settings where everyone is given the opportunity to speak. Participants include the offender, the victim, their families, elders and other community members, also the Judge and counsel. The goal is to reach a consensus as to the most appropriate way of dealing with the offender in the context of the community and the victim. Through the process and the group dynamics, healing starts.

The process is one that is often painful and emotional to the participant. The offender must face the victim, her/his own family and community. This is why it is more effective.<sup>9</sup> The involvement of the community validates aboriginal community values within the current system.<sup>10</sup> This is a first and important step in achieving the aspirations of self-determination and autonomy. The sentencing circle replaces the only Anglo-European based adversarial, punitive system with one where the objective is to restore harmony to the community. The focus is primarily on rehabilitation as opposed to punishment. In this way it provides the best hope for the protection of the public.

There is no "right" model for restorative justice as each community must find its own way and develop a model that reflects its community values. Justice reform cannot be removed from the demands for self determination of aboriginal people.<sup>11</sup>

The extension of the sentencing circle to precharge diversion program in some northern communities is significant in that the accused may be sent directly to the community for resolution as approved to being diverted from the court. The control over the process is within the community. This holds the most potential for the development of the community based restorative justice models. Whether this is "tinkering" with the justice system is subject to much debate. What is clear is that it is preferable to the "status quo". Fundamental change is necessary in the justice system which has failed aboriginal people<sup>12</sup> and is failing the non aboriginal as well. In the non aboriginal community diversion program based on restorative models operate successfully.<sup>13</sup> These models can easily be used in urban centres for aboriginal and non aboriginal offenders.<sup>14</sup>

In Saskatchewan the use of the sentencing circle has expanded to urban centres. We can also expect the northern precharge diversion community model to be utilized in the future.

These models are not a panacea. They do not deal with the complex causes of crime but they do provide a greater emphasis on prevention and on alternatives to prison. A redistribution of functions to the community, both aboriginal and non aboriginal, is a start in altering the hierarchy and paternalistic structure of our justice system.<sup>15</sup>

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We have everything to gain by being creative in terms of economics and, more importantly, the lives of individuals. We need to embrace change with an open mind and be willing to confront the hard political questions and rethink punishment and the role of penal institutions in order to move forward.

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1. *Globe and Mail*, July 1995. See also "Ottawa wants new regulations for dealing with violent offender" *Star Phoenix*, July, 1995.
2. Ernest Van Den Haag, *Punishing Criminals* (N.Y.: Basic Books, 1975) at 8.
3. Herbert L. Packer. *The limits of the criminal sanction* (Stanford: Stanford University Press, 1968) at 26
4. Michael Foucault, *Discipline and Punish - the Birth of a Prison* (N.Y.: Pantheon Books, 1977).
5. *Ibid.*
6. Anthony Doob, "Harsher Youth Laws Too Costly: Study" Toronto (C.P.) *Star Phoenix*, July 21, 1995
7. *R. v. Moses*, [1992] 3 Canadian Native Law Reporter 116 (Yukon Territory Court)
8. Yukon Statistics, see Justice Report, "Creative Justice" (Spring 1992) Vol. 8 No. 4 Canadian Criminal Justice Association
9. John Braithwaite and Stephen Mugford, "Conditions of Successful Reintegration Ceremonies," (1994) Volume 34 No. 2 *British Journal of Criminology*
10. Note: out of deference I will not use the word "accommodate".
11. Luke McNamara, *Aboriginal Peoples, the Administration of Justice and the Autonomy Agenda* (Winnipeg: legal Research Institute of the University of Manitoba, 1993) and also P. Monture-Okanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 *University of British Columbia Law Review* 366
12. Saskatchewan, *Report of the Saskatchewan Indian Justice Review* and *Report of the Saskatchewan Metis Justice Review* (Regina: Government of Saskatchewan, 1992) Chair: Judge P. Linn).
13. See "Restorative Resolutions Mediation Service: Winnipeg, Saskatoon, Calgary (CP) *Star Phoenix*, July 20, 1995
14. See the New Zealand Group Family Conference Models as per Judge F.W.M. McElrea, "Restorative Justice - The New Zealand Youth Court: A Model for Development in Other Courts?" (1994) 4 *Journal for Judicial Administration* at 33
15. See Christie Jefferson, *Conquest by Law* (Ottawa: Solicitor General Canada, 1994) and see also Joan Ryan, *Doing Things The Right Way* (Calgary: University of Calgary Press, 1995).

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**5.9. Aboriginal community healing in action: the Hollow Water approach - 1995<sup>17</sup>**  
**Community Holistic Circle Healing: A Community Approach<sup>18</sup>**

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<sup>17</sup> The following is an excerpt from Rupert Ross's discussion paper Duelling Paradigms? Western Criminal Justice versus Aboriginal Community Healing. This article does not represent either the thinking or the policy of any branch of government. This article was published in: Justice as Healing: A Newsletter on Aboriginal Concepts of Justice Native Law Centre Spring 1995  
[http://www.usask.ca/nativelaw/jah\\_ross.html](http://www.usask.ca/nativelaw/jah_ross.html)

<sup>18</sup> Bushie, Berma, Community Holistic Circle Healing: A Community Approach,  
[http://www.restorativepractices.org/Pages/vt\\_bushie.html](http://www.restorativepractices.org/Pages/vt_bushie.html)

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Hollow Water is an Ojibway community of some 600 people located on the east side of Lake Winnipeg, some 200 kms north of Winnipeg.

In 1984, a group of social service providers, concerned with the future of their young people, looked into the issues of youth substance abuse, vandalism, truancy and suicide. Their focus shifted to the children's home life and, upon closer examination, inter-generational sexual abuse was identified as the root problem. By 1987, they tackled sexual abuse head-on, creating their Community Holistic Circle Healing Program (C.H.C.H.). They presently estimate 75% of Hollow Water residents are victims of sexual abuse, and 35% are 'victimizers'.

They formed a broad-based team to promote and respond to disclosure. It includes the child protection worker, Community Health Representative, the Nurse In Charge and the NADAP worker, together with others from the RCMP, school division and community churches. The majority of team members are women, many of whom are volunteers.

They broke down the professional barriers between them, including separate chains of reporting and confidentiality, to create a coordinated response. They believed that if each 'helper' worked in isolation on separate aspects of each troubled person or family the result would be a further splintering, exactly opposite the goal of creating 'whole' people. Outside professionals were seen from the outset as necessary to the project's success but were required to 'sign on' to a coordinated team approach. They also had to permit a 'lay' member of the team be with them at all times, so their skills could be learned by community members and so they could learn the community approach to healing. Partnership was, and remains, the model.

They evolved a detailed protocol of 13 steps, from initial disclosure to the Healing Contract to the Cleansing Ceremony. The Healing Contract, designed by people involved in or personally touched by the offence, requires each person to 'sign on' to bring certain changes or additions to their relationships with the others. Such contracts are expected to last more than 2 years, given the challenges in bringing true healing. One is still being adhered to 5 years after its creation. If and when the Healing Contract is successfully completed, the Cleansing Ceremony is held to "mark a new beginning for all involved" and to "honour the victimizer for completing the healing contract/process".

Criminal charges are laid as soon as possible after disclosure. The victimizer can either proceed on his/her own through the criminal process, or with the healing support of the team. For the latter, they must accept full responsibility for their acts and enter a guilty plea at the earliest opportunity. Virtually all accused have requested the team's support, with the result that trials are rare.

The team requests delay sentencing so they can begin their healing work and prepare a Pre-Sentence Report. The Report analyzes everything from the offender's state of mind, level of effort, and chance of full rehabilitation, to the reactions, feelings, plans and suggestions of all people affected, with special attention to the victim, the non-offending spouse, and the families of each. It proposes an Action Plan based on the Healing Contract. The team requests that any Probation Order require his/her full cooperation with their healing efforts. If jail is imposed, they try to arrange regular work with the offender while in custody and prepare everyone for the day of release.

At all times team members work with, protect, support, teach and encourage a wide range of people. It is their view that since many people are affected by each disclosure, all deserve assistance and all must be involved in any process aimed at creating healthy dynamics and breaking the intergenerational chain of abuse. I watched them plan for a possible confrontation with a suspected victimizer, and the detailed dispersal of team members throughout the community to support those whom disclosure would touch reminded me of a military operation in its logistical complexity.

Virtually all community team members are themselves victims of long-standing sexual abuse, primarily at the hands of family members. Their perspectives on the dynamics of sexual abuse prevails. Even former victimizers who have been honoured for completing their healing process are asked to join the team. The personal experience of team members in the emotional, mental, physical and spiritual complexities of sexual abuse permits them an extraordinary rapport with victims and victimizers alike. In circles they share their own histories to coax others out of the anger, denial, guilt, fear, self-loathing and hurt that must be dealt with. Their personal experience permits them the patience necessary to embark on very long processes, and to see signs of progress which might escape the notice of others. It gives them the insight to recognize who is manipulating or



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hiding in denial, and the toughness to keep them there. This healing process is painful, it involves stripping away all the excuses, justifications, angers and other defences of each abuser until finally, confronted with a victim who has been made strong enough to expose his or her pain in their presence, that abuser actually feels the pain they created. Only then can re-building begin for both the abuser and the abused. The word 'healing' seems such a soft word, but the process of healing within the Hollow Water program is anything but.

When the accused finally goes to court for sentencing, the Team is brutally honest about the sincerity of his/her efforts and about how much work still has to be done. That does not mean the accused who is still resisting the Team's efforts is abandoned to jail. Far from it. While western justice systems seem to have forged an unbreakable link between "holding someone responsible for their crime" and sending them to jail, Hollow Water fiercely denies the wisdom of that connection. I will let their 1993 position paper on the issue of jail speak for itself:

"C.H.C.H.'s position on the use of incarceration, and its relationship to an individual's healing process, has changed over time. In our initial efforts to break the vicious cycle of abuse that was occurring in our community, we took the position that we needed to promote the use of incarceration in cases which were defined as "too serious". After some time, however, we came to the conclusion that this position was adding significantly to the difficulty of what was already complex casework.

"As we worked through the casework difficulties that arose out of this position, we came to realize two things:

(1) that as we both shared our own stories of victimization and learned from our experiences in assisting others in dealing with the pain of their victimization, it became very difficult to define "too serious". The quantity or quality of pain felt by the victim, the family/ies, and the community did not seem to be directly connected to any specific acts of victimization. Attempts, for example, by the courts and to a certain degree by ourselves to define a particular victimization as "too serious" and another as "not too serious" (e.g. "only" fondling vs. actual intercourse; victim is daughter vs. victim is nephew; 1 victim vs. 4 victims) were gross oversimplifications, and certainly not valid from an experiential point of view; and

(2) that promoting incarceration was based in, and motivated by, a mixture of feelings of anger, revenge, guilt and shame on our part, and around our personal victimization issues, rather than in the healthy resolution of the victimization we were trying to address.

"Thus, our position on the use of incarceration has shifted. At the same time, we understand how the legal system continues to use and view incarceration as punishment and deterrence for the victimizers (offenders) and protection and safety for the victim(s) and community. What the legal system seems to not understand is the complexity of the issues involved in breaking the cycle of abuse that exists in our community."

"The use of judgement and punishment actually works against the healing process. An already unbalanced person is moved further out of balance."

"What the threat of incarceration does do is keep people from coming forward and taking responsibility for the hurt they are causing. It reinforces the silence, and therefore promotes, rather than breaks, the cycle of violence that exists. In reality, rather than making the community a safer place, the threat of jail places the community more at risk."

"In order to break the cycle, we believe that victimizer accountability must be to, and support must come from, those most affected by the victimization the victim, the family/ies, and the community. Removal of the victimizer from those who must, and are best able to, hold him/her accountable, and to offer him/her support, adds complexity to already existing dynamics of denial, guilt and shame. The healing process of all parties is therefore at best delayed, and most often actually deterred."

"The legal system, based on principles of punishment and deterrence, as we see it, simply is not working. We cannot understand how the legal system doesn't see this."

Their Position Paper speaks of the need to break free of the adversariness which characterizes court proceedings, the impediment to healing which arises when defence counsel recommend both complete silence and pleas of "Not Guilty", and the second 'victimization' which occurs as victims are cross-examined on the witness stand. In their view, "(t)he courtroom and process simply is not a safe place for the victim to address

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the victimization nor is it a safe place for the victimizer to come forward and take responsibility for what has happened".

Towards the conclusion of the Position Paper, the following passages appear:

"We do not see our present position on incarceration as either "an easy way out" for the victimizer, or as the victimizer "getting away". We see it rather as establishing a very clear line of accountability between the victimizer and his or her community. What follows from that line is a process that we believe is not only much more difficult for the victimizer, but also much more likely to heal the victimization, than doing time in jail could ever be. "Our children and the community can no longer afford the price the legal system is extracting in its attempts to provide justice in our community."

To this point, most of Hollow Water's work takes place away from the courtroom. The team works with affected people wherever and whenever they can. Virtually all their work takes place in a circle format, opened and closed by prayers, and respecting the 'non-blaming' imperative the circle demands and fosters. Only their Assessments, Pre-Sentence Reports and Action Plans have been part of court proceedings thus far. In the fall of 1993, however, they will take their circle into the courtroom so the judge can hear directly from the people, the family/ies, and the community.

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### **5.10. Healing, Spirit And Recovery: Factors Associated With Successful Integration - 1995<sup>19</sup>**

#### **Executive Summary**

This report is an in-depth study of twenty Aboriginal persons who came into serious conflict with the law, served time in Canadian penal institutions, and subsequently turned their lives around.

Seventeen men and three women agreed to participate in unstructured interviews designed to elicit their own understanding of their early years, how they got into trouble, how they got out of trouble, and how they stayed out of trouble.

Seven of the participants had convictions for murder or manslaughter, all had convictions for a variety of assault charges, some had been sentenced to life imprisonment and were currently on parole, and some had spent most of their adult life going in and out of prison. Now, all of the participants are employed full- or part-time, some are in college or university and all are maintaining their sobriety. All are considered to be law-abiding citizens.

The type of research used for this report focuses on the meaning attached by the individuals to their experiences and how these experiences and meanings fit into the pattern of their lives. It is considered a particularly useful research tool for Aboriginal corrections, since a perennial concern is that many correctional programs are not "holistic" and tend to be based on standard models which do not fit Aboriginal peoples' way of looking at things. The report consists of verbatim quotes from the participants, together with analysis by project staff.

The study finds that most of the participants had early lives which were painful and difficult in significant respects. Although a few had happy early years, most experienced troubled childhoods and suffered from negative influences such as drinking and violence in their immediate environments. Many of them emerged into their teenage and early adult years with feelings of anger, fear, grief, loss, and rejection by significant others and by society as a whole (often in the form of perceived racism).

The participants had different experiences of getting into trouble, and attached significance to different factors and feelings. For all the participants, getting into trouble was associated with extensive use of alcohol or drugs or both. Drinking and taking drugs began in different ways and, to some extent, had different uses for the various participants in the study, but for all of them, the dependency became a serious problem, and getting

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<sup>19</sup> Healing, Spirit And Recovery: Factors Associated With Successful Integration An Exploratory Study Examining the Lifestyles of Aboriginal Offenders Who Have Become Law-abiding Citizens - <http://www.sgc.gc.ca/epub/Abocor/eAPC11CA/eAPC11CA.htm>

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control of it critical to turning their lives around. Relapses on the path towards sobriety were a common experience.

For some, one or more pivotal movements stood out in the events that led to the eventual change in their lives. Sometimes these were associated with a particular person or a realization that life was not working for them.

Getting in touch with one's own Spirituality was identified as a key to recovery by all the participants. Spirituality was, in turn, linked to a sense of life purpose and personal identity and was seen as a key element or individual to find their right place in the world. Since "living the good life" is, in the end, a personal choice, a personal responsibility and personal goal, the strength given to the individuals by his or her Spirituality can be critical.

Important influences along the path to successful reintegration included Elders, family, recovering alcoholics, and counsellors or other professionals in the correctional or addictions fields. Some of the useful things which correctional and other staff did in the lives of these twenty individuals are described and analyzed. Other Aboriginal persons are more likely to be seen as able to "reach" these offenders that are non-Aboriginal persons. On the other hand, Aboriginal workers whose actions are inconsistent with their teachings can be a singularly destructive force.

The report makes a number of recommendations regarding correctional programming, staff training and selection, the presence of spiritual advisers and practices in correctional facilities, future research, and related matters. They include:

the critical need for and active promotion of substance abuse programs in institutions and in the community, including treatment, intervention and prevention programs;

the need for a holistic approach which incorporates mental, physical, spiritual and emotional dimensions;

the need for private and public-sector correctional and aftercare staff who exhibit certain qualities, such as caring about their work and about people; demonstrating that they can focus on and point out an offender's positive qualities and abilities; not giving up on people, and "keeping after them"; noticing when an offender takes an interest in something positive; the ability to communicate their humanness, respect for others, and ability to forgive; following through on undertakings; and "walking their talk" through sobriety and integrity in particular; and

the continuing availability of Aboriginal spiritual programs and representatives in correctional settings, with great care being taken to ensure these programs incorporate genuine teachers and teachings.

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### 5.11. Understanding the Role of Healing in Aboriginal Communities -1994 <sup>20</sup>

#### Abstract

- What does healing mean in Aboriginal communities?
  - o How does the conception of healing take into account the offender, the victim and the community?
  - o Do Aboriginal peoples and non-Aboriginal government officials understand healing in similar ways?
  - o How can government facilitate healing in Aboriginal communities?
- In this brief report Krawll discusses the results of her research into these timely questions.

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<sup>20</sup> Krawll, Marcia. *Understanding the Role of Healing in Aboriginal Communities*. Ottawa: Solicitor General Canada, Aboriginal Peoples Collection, 1994 (also available at this Internet site) cited in Ministry of the Solicitor General of Canada, Don Clairmont, Dalhousie University and Rick Linden, University of Manitoba, *Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature*, 1998 <http://www.sgc.gc.ca/epub/Abocor/e199805/e199805.htm>

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- Using a variety of methods, she explored perspectives and experiences regarding healing in several Aboriginal communities (including interviews with elders, youths and caregivers) and secured the views and opinions of federal and provincial officials.
- All told, she contacted some 121 persons across Canada.
- In presenting her research results Krawll develops a handful of organizing themes and draws out their central points, illustrating them with quotations from the persons interviewed.
- The central conclusions Krawll draws from the research are three-fold.
  - First she suggests that there is both a common core and also much variety among Aboriginal peoples with respect to their perspectives and experiences of healing.
    - The common core centres on the idea that healing is a process which has three key aspects, that
      - healing comes from within individuals and moves outward to encompass the family and the community,
      - it must reflect a balance among all parts of life, and
      - while initiated in discrete fashion through specific programs (e.g. alcohol and drug counselling), it must become holistic.
  - Secondly, Krawll contends that healing can be seen as community development in a broad sense.
    - The people interviewed envisaged healing in the context of the healthy community.
    - From a justice perspective this entails a recognition that both offender and victim are part of the same community and that the community must support both as part of a healing-based approach.
    - As community development, Krawll reports that the key indicator of healing is that people take responsibility for their community.
    - The community development process usually has been initiated by core community groups and is built upon what is already in place.
  - Thirdly, Krawll observes that Aboriginal peoples and non-Aboriginal peoples (at least, in her sample) understand and feel about healing in quite similar ways.
    - Moreover, they tend to have similar views on the role of government as listener, observer, and facilitator, allowing the community itself to maintain control and develop/acquire the skills and resources needed to carry on more autonomously.
- The report has some limitations.
  - The heavy dependence on quotations means that there is little context given either for the communities involved or the individual interviewees.
    - It is unclear as to how much consensus is associated with the themes that the author has derived from the research.
    - Also, the role of government is rather superficially developed and it seems that there are no principles for governmental policy other than to support community actions.
    - Still it is a useful contribution to an important issue in Aboriginal justice.

**Executive Summary<sup>21</sup>**

- The report attempts to develop a common understanding of "healing" among Aboriginal community members and non-Aboriginal government representatives.
  - "Healing" is a term now widely used but perhaps not well understood.
  - It is used to refer to certain positive developments occurring in Aboriginal communities in Canada and elsewhere.
- The purpose of this report is threefold:
  - to provide the reader with a working definition of "healing" in Aboriginal communities;

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<sup>21</sup>Solicitor General of Canada, Marcia B. Krawll, Understanding the Role of Healing in Aboriginal, Communities, July 1994  
<http://www.sgc.gc.ca/epub/abocor/e199410/e199410.htm>

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- to describe healing approaches that are currently being undertaken or developed which have included offenders as a part of the healing process; and
- to recommend possible government roles and strategies for supporting healing processes in Aboriginal communities.
- Chapter II describes how the study was conducted.
  - The report is based on in-depth interviews with Aboriginal community members in five communities across Canada, together with similar interviews with federal and provincial government representatives.
  - In total, 121 in-person interviews were conducted.
  - In addition, telephone and mail contact was made with persons in three other Aboriginal communities.
  - The report relies heavily on the actual words of the people interviewed in order to give life to the analysis.
- Chapter III describes a **healthy or healing community**.
  - Several aspects of the healing process are also common to a concept which is probably better known to non-Aboriginal people under the name community development.
  - The author suggests that the language and process of community development may assist governments to understand what Aboriginal people mean when they say "healing".
  - Aboriginal and non-Aboriginal participants alike identified many of the same aspects of a healthy community, or one which has been on the road to healing.
    - These aspects included:
      - people getting involved in their community;
      - a greater sense of trust, caring and sharing among community members;
      - positive parenting and the sharing of intergenerational wisdom;
      - openness and communication among community members, without blaming or shame;
      - clear role expectations and people taking responsibility; and
      - a sense of connectedness and sensitivity to one another which promotes healthy partnerships and collective action.
- Chapter IV explores the **process of healing**. Healing was universally recognized to be a very complex phenomenon, and one which was difficult to define. No single definition was found.
  - However, it is suggested that there are three key aspects to the process of healing:
    - that it comes from within and moves outward, often starting with the individual and then moving to the family and then to the community;
    - that to be successful, it must address all parts of life concurrently and keep them in balance; and
    - that it may start from a series of discrete programs such as substance abuse counselling, but must move into a holistic process involving a community mandate which is more than the sum of these individual parts.

- In Chapter V, the report explores **the community's readiness** to heal itself.
  - o It is important to be able to recognize when a community is ready, because that is the time when support is critical and unnecessary barriers to development should be removed.
  - o Among the signs of readiness are that people
    - recognize the problems,
    - are motivated to change, and
    - are willing to take responsibility.
  - o This Chapter also raises the question of who should determine when a community is ready to heal.
  - o It is the community itself that should do so, but it is unrealistic to expect that all individuals in a community will reach consensus on readiness at the same time.
  - o Often, it is a core group in the community who recognize that the community is ready, and initiate activities which start the process of healing.
- Chapter VI outlines some of the **recognizable steps and activities which tend to set in motion the process for healing**.
  - o The community's vision crystallizes; people move from a belief that change can occur to a process for making it happen; there is self-exploration, community support and the beginnings of a spiritual journey; a core group of people initiate activities in support of change; and people recognize the value of what is already in place in the community, and begin to build on that in a natural, organic way.
- Chapter VII deals specifically with the ways in which a **healing approach can apply with victims of crime and offenders**.
  - o Many community members suggested that such an approach can effectively respond to certain concerns about the criminal justice system and provide an ideal community response to crime:
    - the healing approach addresses the problems of both victim and offender, not focusing on one to the exclusion of the other;
    - victims and their families, often considered "the forgotten players" in the criminal justice system, are supported and protected in a healing model, which sees all community members as critical and interconnected parts of the whole;
    - in fact, the healing approach would seek to repair the harm done by the offence, and to address the underlying causes of the offence, within the entire community and for all community members who are affected;
    - the healing approach can also act much more quickly than the criminal justice system, whose slow workings can "tear families up";
    - healing can deal more directly and effectively with the offender's behaviour than, for example, the imposition of a prison sentence, which is often nothing more than punishment;
    - on the other hand, healing can be a trying and painful experience for offenders, who are made to face their responsibility and their problems;

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- a healing approach also supports the offender to reintegrate successfully into the community, a process which can be made more difficult by conventional criminal justice approaches; and
  - healing victims and offenders can have spin-off benefits for the entire community, restoring community balance and showing the community that it can develop and give life to its own solutions.
- Chapter VIII further explores some of the **ways in which "healing" may be understood as a process of community development.**
- Ways are suggested in which outsiders may be of assistance in the process, but emphasizes that the community itself must maintain control.
  - Some **new ways are suggested for assessing the impact of healing**, which is slow, complex and profound, and therefore invisible to some of the more commonly used measures of change.
  - Perhaps the most important indicator of healing is that people take more responsibility for their community.
- Chapter IX addresses some of the **ways in which non-Aboriginal government programs and processes could be made to be more responsive to and supportive of communities' healing.**
- One of the biggest obstacles is that the narrow confines of many government programs and mandates get in the way of holistic approaches which seek to treat the whole person, the whole family, and the whole community.
  - Some of the most useful things governments can do include acknowledging similarities and differences through open dialogue, being supportive instead of directive, and providing skills training.
  - Most of all, government assistance should be provided in ways designed to support a sustained and integrated community effort, and to build on skills and resources in the community so that people can carry on independently after funding is withdrawn.
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### **5.12. Western Criminal Justice Versus Aboriginal Community Healing - 1993<sup>22</sup>**

- Ross contrasts Aboriginal traditional justice practices and the mainstream justice system.
- He argues that insofar as there are to be Aboriginal alternatives, then these interventions should be Aboriginal-based, involving community control and healing principles, and focusing on serious familial and interpersonal violence which is a major problem in many reserves.
  - He contrasts sharply this type of 'healing' intervention which he sees in the famous Hollow Water program, with initiatives on reserves such as Sandy Lake and Attawapiskat where the offences considered are modest and the program is basically an appendage to the regular court system, a case processing approach in his view.
  - Ross compares these 'healing' and 'case processing' approaches on a variety of practical issues such as the successful involvement of elders.
  - While calling for the former (i.e. the healing approach) as the major "intervention or alternative" strategy in Aboriginal society, Ross also refers to the need for (and participation

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<sup>22</sup> Ross, R. *Duelling Paradigms: Western Criminal Justice Versus Aboriginal Community Healing*. Ottawa: Aboriginal Justice Directorate, Department of Justice. 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, *Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature*, March 1998  
<http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm>

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of) trained and independent professionals or para-professionals who can command community support.



## 6. Relevant Documents, Studies and Practices – USA

<http://www.usask.ca/nativelaw/jah.html>

### 6.1. Punishment versus Healing: How Does Traditional Indian Law Work? -1997 <sup>23</sup>

Many people are skeptical of justice methods which do not have punishment as their driving force. There is a great deal of disbelief about traditional Indian law for that reason, and there are many who are leery of the growing restorative justice movement. One of the difficulties with "law" as it is viewed in Canada and the United States (two English common law jurisdictions) is that it is dominated by legal positivism and its definition that "law" is "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."<sup>1</sup> Western law is built on the relationship of "superiors" to "inferiors." That is relevant to Indians and their nations within the modern states of the western hemisphere, because conquest itself may create law as we know it. Franz Oppenheimer holds

"that law in the strict sense is found only where one group has conquered another and remains in the territory of the conquered as a dominant caste or class. The resulting social stratification is then rationalized, the inferior group is subjected to punishment for any infringement of the interests of their superiors, and thus formal law comes into being."<sup>2</sup>

That sort of relationship nourishes political oppression, which

"... 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."<sup>3</sup>

There is a contradiction in the ways Canadian and American law view Indians and their nations: Given these definitions of law and their consequences in states created by conquest, states try to treat Indians as "equals" in democratic societies without honoring their rights *as* Indians. We see attempts to maintain societies where "all share the same language, culture, and history" through civil rights legislation or court rulings which deny Indian values because they do not fit an equal protection model, the rejection of Indian nation jurisdiction over non-Indians, English-only legislation, and voiding affirmative action programs. Of course we all know that history is written by the oppressor and not by the oppressed. Legal positivism is a dangerous and racist doctrine.<sup>4</sup> We must remember that contemporary Canadian and U.S. "Indian law" is the product of social Darwinists who strongly influenced 19th century thought at a time when the foundations of present day Indian law were established. Canada attempts to create a multicultural society while the U.S. is dominated by a white male Protestant authoritarian power structure. In contrast, most Indian societies are genuinely egalitarian in nature.

They do not rely on artificial and imposed "equality." For example, a great deal of traditional Indian law is distributive justice: the notion that people should share limited resources. We see that in Potlatch and Giveaway ceremonies and in the way Indians look to their relatives for help when they have problems. Most traditional justice methods are based on talking things out to reach consensus. A great deal of the early (Anglo) literature on Indian justice methods stresses retribution, punishment, revenge and strong institutions such as "chiefs,"<sup>6</sup> powerful councils and soldier societies. The reality is that such may have been caused by pushing groups of Indians away from their original homes into a new environment.<sup>7</sup> The horse was introduced to the Americas by the Spanish, creating the Plains Culture, which did have authoritarian elements. More recent research (especially by Indian writers), shows that most traditional Indian justice methods were consensus and equality-based.

Another distinction between Western and Indian justice is the role of religion or spirituality. Modern constitutional provisions on the separation of church and state make it difficult for Western justice bodies to utilize religion or spirituality in dispute resolution. Traditional Indian justice depends upon it. There is

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<sup>23</sup> James W. Zion. Mr. Zion is the Solicitor to the Courts of the Navajo Nation, a recovering lawyer, and an old-fashioned humanist. He thanks many wise teachers of the Cree, Chippewa, Navajo, Pima, Maori, Ndebele, Swana, Xhosa, Zulu, Saami and other nations for their counsel and guidance. He hopes he gets things right. Punishment versus Healing: How Does Traditional Indian Law Work? [Justice as Healing](http://www.usask.ca/nativelaw/jah_zion.html) Vol. 2, No. 3 (Fall 1997) [http://www.usask.ca/nativelaw/jah\\_zion.html](http://www.usask.ca/nativelaw/jah_zion.html)

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insufficient space here to detail the importance of Indian spirituality in traditional dispute resolution, but belief systems which integrate spiritual beings into everyday life can address conflict using them.

Western law does not attempt to reach into the mind or deal with psychological injuries. Traditional Indian law does, and that is why it heals. Most disputes are the product of bad attitudes, feelings, or thinking. We use "head thinking" about others, and traditional Indian process moves people to "heart thinking" and empathy with others. When there is an injury which creates a dispute, there is anger and hurt. Often, there is cognitive dissonance, which is the mind creating excuses and justifications to avoid shame.<sup>9</sup>

Most traditional Indian justice methods address cognitive dissonance and shame. They involve relatives. They do not make a sharp distinction between "victim" and "offender."<sup>10</sup> They use a talking out process among relatives (by both blood and clan) to reach practical consensus about what to do about a problem. They use ceremony and prayer to bond people to the process and to involve the Spirits in both the path to a solution and a binding decision. It is a process which gets to the bottom of things.

Most indigenous peoples have a word to describe group and person solidarity, or as Justice Raymond D. Austin of the Navajo Nation Supreme Court puts it, "freedom with responsibility." The Navajo word for it is *ke'e*, the Lakota term is *ti ospaye*, and the Zulu word is *ubuntu*. Indigenous peoples believe in individual freedom, but it is exercised in the context of the group. Indigenous justice uses respect, consensus, solidarity, mutuality, interdependence, relationships, reciprocity, and even love as the means to heal in traditional justice methods. Those are values which bind the individual to the group and the group to support the individual. We do not see those values at play in Canadian or American courts or legislatures.

In sum, Indian thought is sophisticated thought. It is humanist, and humanism is a value which has been lost in the current social Darwinist climate. Indian law uses emotions and feelings but rationalist thought rejects it. While Thomas Aquinas said that law is a "rule of reason," he also reminded us that humans possess both reason and emotion. Emotion was thrown out the window in the structure of modern Western law as it is found in the U.S. and Canada.

Western law is based on punishment, and Indian law<sup>11</sup> is based on healing. The problem with many contemporary justice initiatives directed at Indians is that they are integrationist and ultimately assimilationist. Assimilation is a genocidal and ethnocidal force which is not yet prohibited by human rights law, but it should be. Indian justice works because it heals. It should not be taken captive by a legal system based on force, as with circle sentencing dominated by a judge or family group conferencing directed by a non-Indian police officer. Indian justice should stand on its own, and if the Western systems of power, force, and authority wish to utilize Indian methods in their own way, they should do so.

We must take a close look at the institutions and rules which dominate in North America and see that there is an alternative methods which heal. We must recognize the forces of authoritarianism, social Darwinism and racism in today's political and legal discourse and reject them in favor of multiculturalism and humanism. Canada seems to be headed in that direction while the United States is still affected by its sad history of slavery, criminal exile, race conflict, and the fact that a small white elite holds most of the power and the money and struggles to maintain its dominance through repressive law. Both Canada and the U.S. have a lot to learn from traditional Indian law and its foundations in genuine equality, respect, humanity and spirituality.

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1. Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* at 85 (1953) (quoting John Austin, and English academic and legal philosopher who lived from 1790 through 1859).
  2. Howard Becker & Harry Elmer Barnes, *Social Thought from Lore to Science* at 30 (3rd ed. 1961)
  3. Eli Sagan, *At the Dawn of Tyranny: The Origins of Individualism, Political Oppression and the State* at 278 (1985).
  4. See e.g. Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position" 110 *Harvard Law Review* 816 (1997). Bradley and Goldsmith warn Americans that the United Nations is creating new customary law human rights norm which may be applied by U.S. courts and thus override the prerogative of the Congress to deny human

- rights. Accordingly, they say, we should change our reading of the Supremacy and Treaty clauses of the U.S. Constitution to reaffirm the power of Congress to do so. This is legal positivism at its worst. The theories of parliamentary supremacy and the devolution of authority from a parliament or legislature are a species of the genus.
5. I think that the Black culture(s) of North America retain a great deal of their Indigenous thought. For example, a few years ago I had the pleasure of hearing Lani Guinier, the "Quota Queen" whose nomination as the head of the Civil Rights Division of the U.S. department of Justice was shot down by right wing Republicans and a cowardly president. She explained her theory of proportional representation in legislatures in a simple way. She said they are based on the simple concept of "sharing." See, Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (1994).
  6. The office of "chief" as a domineering and authoritarian figure was of course invented by the Europeans.
  7. The essays in *War in the Tribal Zone: Expanding States and Indigenous Warfare* (R. Brian Ferguson & Neil L. Whitehead, 1992) clearly point that out. Indians suffer from five centuries of warfare, and they suffer from mass post-traumatic stress disorder as a result. That makes the healing component of traditional Indian law even more important.
  8. This is the thesis of Laurie Melchin Grohowski, "Cognitive-Affective Model of Reconciliation (CAMR)" (M.A. thesis based on a study of Navajo peacemaking)(cited with permission).
  9. For a definition of cognitive dissonance, see Elliot Aronson, *The social animal* at 178 (7th ed. 1995). Psychiatrist James Gilligan maintains that: "The emotion of shame is the primary or ultimate cause of all violence, whether towards others or towards self." Violence, he says, is designed to replace shame with pride to prevent "the individual from being overwhelmed by the feeling of shame". James Gilligan. *Violence: Our Deadly Epidemic and Its Causes* at 110 (1996).
  10. For Example, in one Navajo peacemaking case:

"... as a reticent teenager explained why she was causing such disharmony in a troubled home, she broke down, saying she desperately wanted to stop drinking. Then she dropped a bombshell - another family member had been molesting her. The courtroom silenced. The peacemaker declared the need for a follow-up with the accused. A look of relief, even a few smiles, crossed family member faces. One by one, they effusely thanked [peacemaker Ruthie] Alexius"

Vince Bielski, "The Navajo Model" *California Lawyer* at 39 (November 1995). Peacemaker Liaison Betty Donald of the Tuba City (Navajo Nation) District Court says that such situations are common.
  11. That is, "Indian law" in the sense of the laws of the Indians. The "Indian Law" texts we see in law schools teach the law of the oppressor and not that of the oppressed subjects of that corpus of law

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## 6.2. Healing As Justice: The American Experience - 1995<sup>24</sup>

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

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<sup>24</sup> His Honour Robert Yazzie, Navajo Nation Judicial Branch, May 4, 1994. The Honourable Robert Yazzie is the Chief Justice of the Navajo Nation. He is a graduate of [Oberlin College](#), B.A. 1973, and the [University of New Mexico School of Law](#), J.D. 1982. [This article was published in [Justice as Healing](#): a newsletter on Aboriginal concepts of justice. Spring 1995] Healing as justice: the American experience [http://www.usask.ca/nativelaw/jah\\_yazzie.html](http://www.usask.ca/nativelaw/jah_yazzie.html)

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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 *nahyeeh* 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

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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

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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 on-going 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

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baby first learns about *ke'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 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.

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## 7. Relevant Documents, Studies and Practices – International

<http://www.usask.ca/nativelaw/jah.html>

### 7.1. Justice as Healing in a Small Australian Town - 1998 <sup>25</sup>

The following story is an account to the impact of a Community Conference<sup>26</sup> on the residents of the tiny Australian town of Boggabilla. Boggabilla lies close to the border of New South Wales (NSW) and Queensland in a wheat, sheep and cotton belt. It has a significant Aboriginal population and has an Aboriginal reservation called Toomelah some ten kilometres outside the town. In most rural towns in Australia there is a local chapter of the Country Women's Association (CWA). The CWA was formed by rural women to support women isolated on properties and country towns. Largely conservative in nature, it has become a powerful and highly respected political lobby group for women and rural issues. Most country town in Australia would have a CWA hall which is used for a variety of purposes and is a central point for a variety of purposes and is a central point for many town activities and meetings.

John McDonald and David Moore, both directors of the Australian company **Transformative Justice Australia (TJA)**, were touring through NSW to collect data on the conferencing program which was, at the time, being trialed by NSW Police Service. Senior Sergeant Steve Williams, the local Boggabilla police officer, had recently trained in the process and so Boggabilla was a local stop for the two men.

In a town where relations between Europeans and Aboriginals were poor, Williams was keen to use the earliest opportunity to try out this new Community Conference process. He had already made important changes in the town which has experienced considerable tensions over the last two decades, with a safety audit for the elderly, buildings relationships with the residents at the reservation, and instigating a dusk-till-dawn patrol by the local Aboriginal Cooperative to keep young people off the streets. It did not take long before Williams was presented with a chance to try out the new conference process. Four young Aboriginal children (aged four, five, six and eight) vandalised the CWA hall. Having broken in, they damaged paneling in the walls and ceilings, ruined preschool play equipment stored there, threw paint around, poured kerosene over the carpet and set fire, using a wall heater, to the CWA branch records dating back some forty years. Luckily, the fire did not spread.

The damage was discovered by the CWA branch president, Thora Reeves, when she went back to check the hall after returning from a holiday. She reported the incident to Sgt. Williams, who soon discovered who the offenders were. He decided that this was a perfect case where the justice system would not produce the outcomes needed in this small community and where a conference might just do it.

#### **The Conference**

The conference was convened on the grass outside the CWA hall. The four young offenders (all boys) were accompanied by their mothers, fathers, aunts, uncles and grandmothers. The youngest boy sat on his grandmother's knee for the duration of the conference. Twenty-two CWA women also attended. The conference proceeded as usual with the young boys telling the story of what they had done, the older boys doing most of the talking.

The CWA women were then asked to talk about the impact of the vandalism of the hall to them. Thora Reeves, the CWA president, had just lost her husband and spoke of finding the hall damaged and how it had

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<sup>25</sup> Margaret Thorsborne, Director (Queensland), Transformative Justice Australia (TJA). Ms. Thorsborne has a background in education and counselling with particular expertise in the management of behavior, conflict and trauma in public and private sectors. She grew up in the country town of Goondiwindi which is eight kilometers from Boggabilla, the town in the case study. Editor's Note: TJA is recognised internationally as the foremost exponent of training in the Conferencing process. TJA is currently a consultant to the Royal Canadian Mounted Police and the Canadian Department of Justice. Justice as Healing Vol. 3, no.2 (Summer 1998)[http://www.usask.ca/nativelaw/jah\\_thorsborne.html](http://www.usask.ca/nativelaw/jah_thorsborne.html)

<sup>26</sup> Also known as Family Group Conference or (in Canada) Community Justice Forum.



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compounded her grief and loss. Other women spoke of the years of hard work and fundraising it had taken to build the hall as a community centre. They

*...the process provided a bridge for the beginnings of reconciliation between two groups of people who have lived somewhat unhappily side-by-side in recent years*

spoke of the years of hard work and fundraising it had taken to build the hall as a community centre. They spoke about how they felt when they had found out it had happened and who had done it. They talked of their disappointment, hurt and anger at something they had worked so hard for being vandalised by some of the young people who had enjoyed its use.

The families of the boys spoke of their shame at what the boys had done, and their understanding of the CWA women's feelings. The younger boys, by the end of this, understood very clearly the impact their behaviour on the whole community.

An agreement was readily reached whereby the boys and their families would repair the damage to the hall over the next weekends.

### **After the conference**

As it transpired, both the young boys and their families and tradespeople become involved in the repair of the hall. The hall and the resulting activities became a magnet and a great talking point for the locals, especially the children, who wanted to know if the young boys had been sent away to jail. People were able to explain that instead of being sent away, the boys had to face up to the harm they had caused and be part of fixing it. This had a sobering impact on the young people of the town.

This good news story attracted the local press who reported:

"Boggabilla is at the forefront of a new judiciary process that is already getting the thumbs up from Boggabilla residents. And it has nothing to do with court of jail. Called Family Group Conferencing, it was instrumental in cleaning up a break and enter case in more ways than one last week"

The press went on to say:

"Mrs. Reeves, the CWA president, said that things happened in the town in the past and the Police had been unable to do anything because of the offender's ages. But after the Family Group Conference that afternoon she was singing the praises of the process and of the man who had brought it to town, "The whole thing worked out better than any of us expected. I have to thank Sergeant Williams, and also I have to take my hat off to the children and to their families."

So impressed was the CWA that it has invited Sgt Williams to its North-West conference late in the year so he can speak about Family Group Conferencing.

### **Much later**

McDonald and Moorse spent time with both groups some months later during their visit to Boggabilla. They visited the four young Aboriginal boys at their grandmother's house. They were a little shy, but said the conference and the clean-up of the hall had been a good thing. The families of the boys spoke of how much they had appreciated the efforts of the police officer, who they felt at last had something to offer them. They also spoke of the trouble and frustration they had in disciplining their kids and that in the past it had been hard to make themselves understood. The CWA women invited McDonald and Moore to afternoon tea in the hall.

Over scones and tea they reported the changes that had taken effect in the community as a result of the conference. The kids had stopped throwing rocks on their houses and stopped annoying their dogs and interfering with their property. They now greeted them in a friendly fashion around town.

The afternoon tea session also yielded a social history of the town and revived memories of some decades past where white and aboriginal women were friends, and shared time together in sporting and other community activities. They remembered that there was a time when they all got along, and how things had changed

gradually in response to past government policy which had divided their community. They recognized that the Aboriginal people had been treated appallingly. They told McDonald and Moore that the conference was the first time in fourteen years that the two groups of women had sat down and talked together.

Both the CWA and the Aboriginal women spoke of their past frustrations and anger with the police, the courts, and the prisons which never dealt with the fundamental problems associated with crime and the cultural divide in the township. The relationship between the community was transformed from anger, frustration and distrust to respect and hope, thanks to Williams' efforts.

### **Transforming the community**

It is important for readers to understand that we are not for one minute suggesting that the community conference worked some miracle within the community of Boggabilla and they became a model township. What is suggested here, though, is the process provided a bridge for the beginnings of reconciliation between two groups of people who have lived somewhat unhappily side-by-side in recent years.

The structure of the conference allows people to unburden themselves of the toxic emotions which play havoc with relationships and their lives. The young people, despite their ages, finally understood how they had harmed themselves, their families and the community. What was miraculous was transformation of those negative feelings into cooperation and disparate individuals and factions into a community. This community of people now shared the responsibility for deciding what needed to be done to repair the harm and minimise the chance of further harm, and who should do it. The first tentative steps were taken to heal the rifts in this small town.