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### Navajo Therapeutic Jurisprudence

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## Navajo Therapeutic Jurisprudence

Cover Page Footnote

18-3

# NAVAJO THERAPEUTIC JURISPRUDENCE

*James W. Zion*<sup>1</sup>

## I. INTRODUCTION: "WHERE THE TWO CAME TO THEIR FATHER"

The Second International Conference on Therapeutic Jurisprudence is important for many reasons. There are several new paradigms in law, including ideas such as "visionary law," exemplified in areas of practice such as:

- Traditional practice
- Spiritual lawyering
- Lawyer-coaches
- Legal counseling
- Creative Problem-solving
- Drug Treatment Courts and Community-Oriented Lawyering
- Holistic Justice or Holistic Law
- Procedural Justice
- Restorative Justice
- Transformative Mediation
- Peacemaking
- Legal Education

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<sup>1</sup> James W. Zion is a graduate of the Columbus School of Law, Catholic University of America (J.D. 1969), and the University of Saint Thomas (B.A. 1966). He is the former Solicitor to the Courts of the Navajo Nation (1981-1983, 1990-2001) and a private jurisconsult. He is the author of books and articles on traditional Indian law and the international rights of indigenous peoples. I thank Dr. Jon'a Meyer of Rutgers University and Richard Paul of Northern Arizona University for their assistance as "diggers." Jon'a and Richard found many obscure articles on Navajo healing and kindly sent them to me to help write this article. I thank Caroline Cooper of American University for her suggestion to the organizers of this conference that there should be Indian representation so that the indigenous voice on therapeutic jurisprudence can be heard. I also thank Sondra Leftoff, of the John Jay College of Criminal Justice, for providing me a copy of the most recent Navajo healing material in a journal special issue. These fine people show that non-Indians recognize the fundamental Indian concept that "we are all related."

- Not practicing law<sup>2</sup>

Given the desire of many to find new ways to approach law, it is almost trite to say that the judicial and legal professions have “seen the light” and now recognize that there must be approaches to victimization, offending, and addressing the harms done by individuals which are better than incarceration, punishment, and “shaming,” in the sense of abusing offenders.<sup>3</sup> The American legal community got two shots across the bow to warn us that we are in shallow water and about to strike the shoals, but there is a therapeutic alternative: a comprehensive article by the Honorable Peggy Fulton Hora, the Honorable William G. Schma, and John T.A. Rosenthal gives a review of the drug treatment court movement and its role in using therapeutic jurisprudence as a response to drug abuse and crime,<sup>4</sup> and there is now a definitive text on the subject.<sup>5</sup> There is a

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<sup>2</sup> See, e.g., *Renaissance Lawyer* website, available at [www.renaissancelawyer.com](http://www.renaissancelawyer.com). (last visited on October 9, 2002) (listing numerous practice areas in the field of Therapeutic Jurisprudence).

<sup>3</sup> There is now a large therapeutic jurisprudence literature base, a great deal of which expresses dissatisfaction with current punitive approaches from policy, philosophical or utilitarian (“it don’t work”) points of view. See *The Resource Page on Therapeutic Jurisprudence*, 37 CT. REV., Spring 2000, at 67; International Network on Therapeutic Jurisprudence (University of Arizona); *Selected Recent Publications*, available at [www.law.arizona.edu/urp-intj/intj-srp.html](http://www.law.arizona.edu/urp-intj/intj-srp.html) (last visited on September 19, 2002). A piece on sexually violent predator (“SVP”) legislation sums up the problem well in its title, Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199 (2000). There are other fears about the current thrust of American law, e.g., Gerhard Casper, *The United States at the End of the “American Century”: The Rule of Law or Enlightened Absolutism*, 5 J.L. & POL’Y 149 (2000) (based on experiences of the President of Stanford University).

<sup>4</sup> The Honorable Peggy Fulton Hora, Honorable William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

<sup>5</sup> Bruce J. Winick & David B. Wexler, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) (reviewed in Thomas T. Merrigan, *Law in a Therapeutic Key: A Resource for Judges*, 37 CT. REV., Spring 2000, at 8). There is also a comprehensive piece on “rehabilitative

special issue of the American Judge's Association journal on it, with an overview that calls therapeutic jurisprudence "judging for the new millennium,"<sup>6</sup> an article on the implications of therapeutic jurisprudence for judicial satisfaction<sup>7</sup> and its use on appeal.<sup>8</sup> The United States Justice Department, as it was with the restorative justice movement,<sup>9</sup> has given its preliminary endorsement of therapeutic jurisprudence.<sup>10</sup> Our motivations in response to the failures of law and judicial systems can be negative, as with noting the failure of the use of power and force as a judicial technique or fearing the modern state and the effects of politics on criminal sentencing, or positive, as with many who are proud of the common law tradition in American law but who seek ways to implement it in contemporary times.<sup>11</sup>

As I understand the literature (being a practitioner of Indian law), the new movement is about using science and medicine (including psychology and psychotherapy) as tools to

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punishment" in Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U.L.Q. 1205 (1998).

<sup>6</sup> William Schma, *Judging for the New Millennium*, 37 CT. REV. 4 (2000).

<sup>7</sup> Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12 (2000).

<sup>8</sup> Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, 37 CT. REV. 64 (2000).

<sup>9</sup> See, OFFICE OF JUVENILE JUSTICE PROGRAMS, U.S. DEP'T OF JUST., GUIDE FOR IMPLEMENTING THE BALANCED AND RESTORATIVE JUSTICE MODEL (1998).

<sup>10</sup> See David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT'L INST. OF JUST. J. 12 (July 1999); Richard S. Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, 6 SENTENCING AND CORRECTIONS 1 (May 2000).

<sup>11</sup> I cannot help but note the similarity between therapeutic jurisprudence, which seeks to use science and medicine as healing tools, and the mid-war Legal Realists. EDWIN W. PATTERSON, *JURISPRUDENCE AND IDEAS OF LAW* 552-56 (1953); *id.* at 556 ("[T]he phases of American legal realism show that it was a true child of the period (1919-1940) between the World Wars, when skepticism of tradition, reverence for science and faith in man's ability to make his world better by inquiry and effort were articles of the American academic creed."). One of the major thinkers of legal realism, Karl N. Llewellyn, author of the Uniform Commercial Code, also initiated the first formal studies of traditional Indian law with anthropologist E. Adamson Hoebel. See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941).

approach offending, seizing crime as an opportunity for healing rather than retribution and punishment, and making new alliances with the healing professions to help offenders and victims. There are some critics who raise fears from the point of view of judicial independence and courts avoiding becoming simply another public service provider,<sup>12</sup> skepticism about the value of the “shaming” aspect of therapeutic jurisprudence,<sup>13</sup> and civil libertarian-conservative fears of the “therapeutic state.”<sup>14</sup> Another critique attempts to balance modern “emergent experimentalist government” with traditional concepts of civil liberties.<sup>15</sup> In sum, there are critics who have concerns about due process or judicial independence implications of the therapeutic jurisprudence movement, or they are afraid of violations of traditional civil liberties.<sup>16</sup> However, the core concepts of therapeutic jurisprudence are sound if we use them while keeping the best traditions of the common law in mind.

The Second International Conference on Therapeutic Jurisprudence is unique, because those who convened it invited speakers to address indigenous theories. That is very important. American Indians, in particular, and indigenous peoples, in general, have not been listened to on matters of public interest, and they have had little voice in policy development. That is a product of the fact that Europeans “invented” the American Indian based upon longstanding presuppositions, and Indians have

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<sup>12</sup> See Bennett H. Brummer, *Independent, Professional Judgment: The Essence of Freedom*, 10 ST. THOMAS L. REV. 607 (1998).

<sup>13</sup> See John B. Owens, *Have We No Shame? Thoughts on Shaming*, “White Collar” Criminals, and the Federal Sentencing Guidelines, 59 AM. U. L. REV. 1047 (2000) (critiquing the shaming theories of Dan Kahan).

<sup>14</sup> E.g., Robert Higgs, *We’re All Sick, and Government Must Heal Us*, 3 INDEP. REV. 623 (1999); Thomas S. Szasz, *The Therapeutic State: The Tyranny of Pharmacracy*, 5 INDEP. REV. 485 (2001). Szasz, a psychiatrist, is a longtime critic of coerced mental treatment.

<sup>15</sup> Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

<sup>16</sup> Given that this is a discussion of Navajo views of therapeutic jurisprudence, concerns about coercion will be discussed below.

had no voice of their own.<sup>17</sup> Indigenous peoples have been left out when important policies were made affecting them, for example, when the United States evolved its Indian affairs policy on what to do with Indians once they were confined to reservations in the late nineteenth century. There was a group of “reformers,” primarily clerics, politicians, and a Harvard Law School evidence professor, who met at exclusive venues to plan out Indian policy as “Friends of the Indian,” without Indians present.<sup>18</sup> European nations carved up Africa at the Congress of Berlin (1883-1884), leaving indigenous Africans out of the proceedings.<sup>19</sup> There have been some important changes and developments in recent years, however. The World Commission on Environment and Development took a fresh position in its 1987 Bruntland Report.<sup>20</sup> When examining population and human resources as an element of environmental planning, the report recognized the indigenous and tribal peoples of the world and said:

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<sup>17</sup> An important study of the fact of invention, based upon a thorough review of European literature and art, concludes that Indians were not seen for who they were because Columbus thought he was actually sailing to the Garden of Eden, which was assumed to be off the south coast of India. When he saw naked Indians and a lush landscape, he was convinced that he had found Eden. The rest of Europe thought so too. Europe also had the notion of an “anti-Eden.” Accordingly, Indians were ignored as simple savages or demonized as devil-worshippers, and not listened to. The situation has been much the same to this day. JOHN F. MOFFITT & SANTIAGO SEBASTIAN, *O BRAVE NEW PEOPLE: THE EUROPEAN INVENTION OF THE AMERICAN INDIAN* (1996). See also ROBERT F. BERKHOFFER, JR., *THE WHITE MAN’S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (1978).

<sup>18</sup> *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880-1900* (Francis Paul Prucha ed., 1978) (annotated collection of documents).

<sup>19</sup> On the point of whether native peoples’ consent mattered, “The Berlin Conference itself curtly dismissed the suggestion that uncivilized peoples enjoyed rights which made their free consent necessary to the establishment over them of a Government possessing international validity, and in many countries the judiciary adopted a similar tack.” GORDON BENNETT, *ABORIGINAL RIGHTS IN INT’L L.* 5 (1978).

<sup>20</sup> *THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE* (1978) (called the “Bruntland Report” after its chair, Gro Harlem Bruntland of Norway).

These communities are repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance is a loss for the larger society, which could learn a great deal from their traditional skills in sustaining and managing very complex ecological systems.<sup>21</sup>

Nathalie Des Rosiers, a keynote speaker at the Second International Conference on Therapeutic Jurisprudence, acknowledged the importance of therapeutic process in dealing with majority-minority conflicts. She wrote an important article on the role of courts in using therapeutic jurisprudence to address it.<sup>22</sup> In examining a case that went through the Canadian courts (the legality of Quebec's succession from Canada), she gives us the essence of a therapeutic jurisprudence approach to conflicts with minorities, which includes Indigenous Peoples: "1. That the process of explanation of one's position should be valued; 2. That the continuous relationship between the parties should also be valued."<sup>23</sup> Commissioner Des Rosiers, of the Law Commission of Canada, identified healing approaches very well, and the insight that opportunities for self-expression and a detailed examination of relationships as a mode of healing expresses indigenous thought as well. That is an important public policy approach that has relevance beyond appellate process and positive implications for decision-making in general. This conference gives an opportunity for the explanation of one (of many) indigenous position, and the opportunity to contribute to therapeutic jurisprudence thinking will indeed highlight the continuous relationship of indigenous peoples with majority societies which has value in opportunities to contribute to therapeutic jurisprudence thinking.

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<sup>21</sup> *Id.* at 114-115.

<sup>22</sup> Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54 (2000).

<sup>23</sup> *Id.* at 55.



The Navajo Nation judicial system anticipated the therapeutic jurisprudence movement about twenty years ago by integrating traditional Navajo justice concepts into a western-styled judicial system. The therapeutic jurisprudence movement is, in many ways, simply the “discovery” of healing concepts which are ancient and which pre-date the modern state.<sup>24</sup> When told of the possible healing nature of law, traditionalist Indians and members of other indigenous groups might say, “So what else is new?” This article expands on that (fictitious) reply by attempting an overview of traditional Navajo approaches to therapeutic jurisprudence. It will address (1) the universal human need for therapeutic jurisprudence to deal with the nature of violence; (2) shame, as a cause of violence, in relation to healing methods in law; (3) the concept of healing; (4) Navajo Nation violence and its causes; (5) Navajo views of illness, treatment, and healing; (6) Navajo therapeutic jurisprudence; (7) Navajo peacemaking as a healing ceremony; (8) some thoughts about coercion as a therapeutic jurisprudence tool; and (9) some general conclusions about the relationship between Navajo therapeutic jurisprudence and the rest of the movement.

Navajos tend to explain life and their environment by reference to *Hajine’ Bahane’*, which means Navajo creation and journey narratives<sup>25</sup> or creation scripture (my term of preference). One account of creation speaks of two hero twins, Monster Slayer and Born-for-Water. The two were born into a world where certain monsters (*nayee* in Navajo) were ravaging the Five-Fingered People (humans), and the pair went in search of their father, The Sun, to acquire weapons to slay or weaken

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<sup>24</sup> I have previously made the point that indigenous justice is the pre-state form of justice. It is not necessarily a separate development, confined to indigenous thought, but the original political arrangement. James W. Zion, *The Use of Custom and Legal Tradition in the Modern Setting*, 1 CONTEMP. JUST. REV. 133 (1998).

<sup>25</sup> A term used by Philmer Bluehouse, the first Director of the Peacemaking Division of the Courts of the Navajo Nation and current advisor to the Dine’ [Navajo] Medicine Man’s Association.

those monsters.<sup>26</sup> The word *nayee* means “anything that gets in the way of a person living his life,”<sup>27</sup> and that includes depression, poverty, physical illness, worry, a bad marital relationship, and old age.<sup>28</sup> There are many other but similar kinds of “monsters” we address in the new field of therapeutic jurisprudence. Rather than punish the person, we seek to identify the harmful act to find ways to make recompense for it and to prevent it from happening again in the future.<sup>29</sup>

We can say, in a metaphorical sense, that western therapeutic jurisprudence and indigenous therapeutic jurisprudence are also hero twins, and that the two are going to their “father” to seek the weapons to deal with the monsters we see and attempt to confront. Who is that father? I suggest that it is humanity and very real and human ways of using law and legal procedure as healing methods. We need to go beyond rules of law and adjudication, with unilateral orders from judges rather than negotiated problem solving, and examine our basic human drives to uncover healing approaches to the monsters of life.

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<sup>26</sup> The title for the introduction was taken from MAUD OAKES & JOSEPH CAMPBELL, *WHERE THE TWO CAME TO THEIR FATHER: A NAVAHO WAR CEREMONIAL* (1969) (transcription of a Navajo “war” ceremony). The official spelling is “Navajo,” but earlier writers used “Navaho”.

<sup>27</sup> Robert Yazzie & James W. Zion, “*Slay the Monsters*”: *Peacemaker Court and Violence Control Plans for the Navajo Nation*, in *POPULAR JUST. AND COMMUNITY REGENERATION* 67, 69 (Kayleen M. Hazlehurst ed., 1995).

<sup>28</sup> *Id.*

<sup>29</sup> Dr. Paul McCold, in a presentation to the United Nations on restorative justice in April 2000, gave a perceptive overview of dispute resolution process (including Navajo peacemaking), and he established the “core” of the restorative process in negotiation and peacemaking by addressing “right relationships” through a process of: “1) facts discussed, 2) feelings expressed, 3) reparation negotiated, and 4) reform implemented.” Paul McCold, *Overview of Mediation, Conferencing and Circles* (Tenth United Nations Congress on Crime Prevention and Treatment of Offenders, Vienna, April 10-17, 2000), available at <http://www.restorativejustice.org/conference/UN/Overview.pdf> (last visited on February 27, 2001).

## II. THE UNIVERSAL HUMAN NEED FOR THERAPEUTIC JURISPRUDENCE

We need therapeutic jurisprudence because people hurt each other.<sup>30</sup> While violence is part of our human nature as “symbolic hunting turned sour,”<sup>31</sup> with aggression as a form of intimidation and dominance,<sup>32</sup> or redirected aggression by people who have been hurt against weaker victims (e.g. women, children and animals),<sup>33</sup> it is a more severe problem for our society because of urbanization - the human zoo.<sup>34</sup> What do we do about urbanization and consequent violence? While the English common law model we have for dealing with traditional crime and violence is a valuable one, and one which should not be thrown out in our quest for alternatives to retributive justice, the fact is that our contemporary situation is far different from the kinds and levels of violence in the formative period of the common law.<sup>35</sup>

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<sup>30</sup> I am focused on this particular aspect while writing, because this afternoon, my daughter, Olowan Tenoso, asked for help on a school assignment to write a short paper on human nature. She chose the theme, “People are selfish” to sum up the literature she had been reading in an English class. When I objected that a descriptive approach to selfishness should include the peaceful aspects of our “hard-wired” animal nature, she said, “Pops, my assignment is to describe human nature; not find solutions. Maybe I could write about that over the weekend for extra credit.” I urged her to look at FRANS DE WAAL, *PEACEMAKING AMONG PRIMATES* (1989) Using the biological approach, peacemaking may be as natural as violence.

<sup>31</sup> DESMOND MORRIS, *THE HUMAN ANIMAL: A PERSONAL VIEW OF THE HUMAN SPECIES* 80 (1994). Morris is a member of that school of behavioralist writers which attributes human failings to our animal nature as a part of the longstanding “nature versus nurture” debate.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 91-92.

<sup>34</sup> *Id.* at 82-115. This is an issue for the Navajo Nation, because crime and violence are a product of the Navajo Nation’s unique urbanization in “agency towns,” which are small administrative centers for the delivery of public services to Navajos. See also Eric Henderson et al., *The Origins of Navajo Youth Gangs*, 23 AM. INDIAN CULT. & RES. J. 243 (1999).

<sup>35</sup> See, e.g., David Friedman, *Making Sense of English Law Enforcement in the 18<sup>th</sup> Century*, 2 U. CHI. ROUNDTABLE 475 (1995).

We must revisit some basic assumptions we have about “law” and “justice.” Who is the “victim” of a crime? Is it the state or people who get hurt? Do we punish the actor or perpetrator of violence, and if so, what is the effect of the punishment? Do we punish the action rather than the actor, as Navajos believe? Using healing terminology, do we address the symptoms of violent crime, namely violent acts, by the incapacitation of those who have hurt by incarcerating them, or do we try to discover the etiology of violence as an illness and attempt to address its causes? Are the most successful methods to prevent violence incapacitation, deterrence, or repression (with all their frightening civil liberties implications), or are they getting at the root causes of violence to understand them and act on that understanding through successful intervention and prevention tactics? What are the ultimate causes of violence?

We are a human animal. While we can disagree on the extent to which violence is a product of nature - our animal origins - or of socialization, environment, economics and conditioning (either as individuals or as groups of people), the fact is that we are confronted with heightened levels of severe violence. We must turn our attention to dealing with those who have already offended (which may seem to be a hopeless task, given the nature and depth of their hurt), and address how we can prevent the conditions which lead to violence. To do that, we must begin to get an understanding of the nature of violence. It is something that indigenous peoples share with general societies, given the colonization, marginalization, and destruction of the original homelands, economies, and societies of those peoples. We all share the problem of violence in common as peoples in a contemporary world.

### III. SHAME AND VIOLENCE

Dr. James Gilligan, a psychiatrist who was a director of mental health for a prison and for a hospital for the criminally insane, and the Director of the Center for the Study of Violence at Harvard Medical School, concludes that shame is the cause of

violence.<sup>36</sup> He says that “the emotion of shame is the primary and ultimate cause of all violence, whether toward others or toward the self.”<sup>37</sup> He also says that “the different forms of violence, whether toward individuals or entire populations, are motivated (caused) by the feeling of shame. The purpose of violence is to diminish the intensity of shame and replace it as far as possible with its opposite, pride, thus preventing the individual from being overwhelmed by the feeling of shame.”<sup>38</sup> What does Gilligan mean by “shame”? It is “the absence or deficiency of self-love,” and its opposite is “pride” or “a healthy sense of self-esteem; self-respect; and self-love.”<sup>39</sup>

Dr. Donald L. Nathanson has contributed a great deal to our understanding of the “shame affect” for purposes of restorative justice and therapeutic jurisprudence, and he gives us some insight about what it is and how it works.<sup>40</sup> It is an affect or feeling, and it has both biological and behavioral elements.<sup>41</sup> On the behavioral side, we acquire “scripts” as children, which are developed through positive and negative interplay, and come from learning that “certain scenes follow each other with such regularity that rules for their association and governance can be determined.”<sup>42</sup> This is what we know as conditioning, where the internal rules for a given response to a stimulus are learned.<sup>43</sup>

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<sup>36</sup> JAMES GILLIGAN, M.D., *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 110-11 (1992). See also *UNDERSTANDING AND PREVENTING VIOLENCE* (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993) (studying the state of knowledge of the causes of violence, and concluding that there are many things about it we do not know).

<sup>37</sup> *Id.* at 110.

<sup>38</sup> *Id.* at 111.

<sup>39</sup> *Id.* at 47. Hal Pepinsky picks up on Dr. Gilligan’s approach and talks about making peace with shame, by recognizing it and dealing with it. Hal Pepinsky, *Making Peace with Shame*, 8 RED FEATHER J. POSTMODERN CRIMINOLOGY (2000), available at [www.tryoung.com/journal-pomocrim/vol-8-shaming/pepinsky.html](http://www.tryoung.com/journal-pomocrim/vol-8-shaming/pepinsky.html) (last visited on October 10, 2002).

<sup>40</sup> DONALD L. NATHANSON, *SHAME AND PRIDE: AFFECT SEX AND THE BIRTH OF SELF* (1992).

<sup>41</sup> *Id.* at 134-149.

<sup>42</sup> *Id.* at 246.

<sup>43</sup> While I cited some biological preconditions for violence above, and while there is a debate over the extent to which a given behavior is natural or

There are “defensive scripts” we learn as children which are associated with shame,<sup>44</sup> in four major patterns Nathanson calls “the compass of shame.”<sup>45</sup> It defines the behavioral *and* resulting biological reactions to a challenging event (to the person) which we know as shame. There is a shame affect, or a physiological reaction when the emotion of shame is triggered, and when someone or something sets it off, we will use a defensive strategy that “best fits these particular circumstances,” and “fly to one of the four points on this compass,” namely “withdrawal, attack self, avoidance, or attack other.”<sup>46</sup>

To sum up my understanding of Nathanson’s theory, shame has to do with the exposure of the inner self. (I always knew that as guilt, which includes a fear of exposure.) We are conditioned to acquire “scripts” or learned ways of responding to situations, and we learn “defensive scripts,” which are ways we respond when someone or something challenges us and thus triggers our biological shame affect. The four possible reactions on the compass of shame make a great deal of sense in practical experience. We see withdrawal in the form of homelessness, substance abuse, addiction and alcohol-dependence, frequent unemployment, and other forms of withdrawing from one situation in life and assuming a negative one. We can see it in otherwise quiet and polite children and people who shock us when they are involved in a homicide. Attack-self can be seen in self-mutilation (particularly in adolescents), suicide, prostitution,

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learned, there is a role for both. We have a predisposition to violence in our human nature, particularly given urban living patterns, but we still learn specific behaviors as individuals.

<sup>44</sup> Shame describes a “family of emotions.” NATHANSON, *supra* note 40, at 19. “These are uncomfortable feelings, ranging from the mildest twinge of embarrassment to the searing pain of mortification, the Latin roots of which imply that shame can strike one dead. Shame often follows a moment of exposure; what has been exposed of an intimate and personal nature. Although it can be handled or diminished by laughter, anger, or withdrawal, shame always speaks about our inner self rather than our actions.” *Id.* There are degrees of shame, which may manifest themselves in different ways. *Id.* at 321.

<sup>45</sup> *Id.* at 312.

<sup>46</sup> *Id.*

and other severe self-effacing or defacing behaviors. Avoidance is a common tactic, and it too can reach extremes as people avoid situations in life through flight or homelessness, or finding ways to avoid their responsibilities (as in abandoning families or moving frequently to avoid paying child support). People "avoid" their debts, obligations, families and children, and roles in civil society. "Attack other" is likely the most common form of defensive script; we see it in serious crimes against persons, gang fights, sexual offenses, domestic violence,<sup>47</sup> road rage, and other forms of violent outbursts - "offense is the best defense." We can also look to our experience in the criminal justice system and domestic relations law to see that there are obvious mixes of the four reactions. At end, defensive scripts can be mild, as with reactions that are appropriate to the situation, to ones which can escalate to the most violent and senseless forms of reaction to shame. Shame is both a cognitive and a physiological affect. It is cognitive in the sense that there is a reason or motivation for behavior, or one can be produced upon confrontation with the actor,<sup>48</sup> but there is a physical one as well. We see that in descriptions of rage and acting out while "seeing red."<sup>49</sup>

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<sup>47</sup> Domestic violence is the most common and most severe form of "attack other." If we can devise effective approaches to that vicious manifestation of the shame affect, then we will have clues as to how to address and prevent violence in general. See Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, 37 CT. REV. 40 (Spring 2000) (describing therapeutic jurisprudence implications of understanding and having empathy for domestic violence victims).

<sup>48</sup> When someone is confronted with bad behavior, there is cognitive dissonance, where one's behavior conflicts with one's values, and the usual reactions are denial, minimalizations ("It's no big deal!") or externalizations ("It's *his* fault, not mine!"). James W. Zion, *The Dynamics of Navajo Peacemaking*, 14 J. CONTEMP. CRIM. JUST. 58, 63 (1998).

<sup>49</sup> I have done experiments on this on myself and with our dog and recognized the scripts at play in the compass of shame. As for our dog, Mocha, I made an agreement with my wife that Mocha would be raised using permissive Navajo methods of dog-rearing rather than the harsh methods I learned as a child. The experiment was successful, Mocha - a mixed-breed dog who is part Pit Bull is a very gentle and well-behaved member of our family. One day, my wife went out for an acupuncture session, and wore a very attractive outfit. After she left, I went into a jealous rage. I talked to

Morris, Gilligan and Nathanson essentially agree that feelings of inadequacy, inferiority, powerlessness, hurt, etc. trigger shame, and violence can result. Nathanson tells us that our challenge is what he calls "affect modulation."<sup>50</sup> In other words, while we can recognize the extremes of a shame affect when it gets set off, we need to learn how to condition people to acquire scripts which are not so extreme as to injure others or self. What scripts do we see being played out in our courtrooms? We see people who think that violence is a solution, aggression is a successful tactic, and those reactions are their best protection against shame. Unfortunately, given our historical culture of violence in the United States of America, we are constantly bombarded with images which not only create or reinforce negative and extreme scripts and affects, but also intensify them. We see that not only in violent entertainment, which we deplore but do not know how to handle, but in the news — "If it bleeds, it leads" — and we see glorifications of official violence masked as patriotism. Violence, to restate the obvious, is learned behavior. We should be concerned with violence -or neglect-directed against children, because we now know that child abuse and neglect form violent personalities.<sup>51</sup>

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myself, saying that I had nothing to be jealous about, but recognized that I was having a physiological reaction to an emotion. I had a difficult time dispelling it, so I finally took a bag of my wife's chili peppers (a favorite) out of the refrigerator and flung it off a balcony toward the river. I felt quite foolish confessing what I had done when my wife returned after I calmed down. But, the confession had therapeutic value and I learned that Dr. Nathanson's theory is correct.

<sup>50</sup> NATHANSON, *supra* note 40, at 114-15, 409.

<sup>51</sup> See Cathy S. Widom & Michael G. Maxfield, *An Update on the "Cycle of Violence,"* NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF (February 2001) (reporting a longitudinal study showing that child abuse and neglect tends to lead to violent behavior); Cathy Spatz Widom, *Childhood Victimization: Early Adversity, Later Psychopathology*, NAT'L INST. OF JUSTICE, JOURNAL 2 (January 2000). See also, American Academy of Pediatrics, *The Role of the Pediatrician in Youth Violence Prevention in Clinical Practice and the Community Level*, 103 PEDIATRICS 173 (1999) (RE9832). The American Academy of Pediatrics recognizes the need for early intervention in its policy statement. Available at [www.aap.org/policy/re9832.html](http://www.aap.org/policy/re9832.html) (last visited on October 10, 2002).



We have been attempting to deal with the violence that is caused by the shame affect using punitive methods. They do not work because they simply reinforce shame. Perhaps suppression tactics (the basis of the current criminal justice system) make shame stronger and reinforce it. We should have learned in the last century that suppression does not work and that instead, it may reinforce resistance.<sup>52</sup> At end, we need to think of the causes of shame, how to deal with it, how to moderate or “modulate” it, and how to prevent its worst manifestations in crime and violence.

An alternative to suppression tactics (i.e. retribution, repression and disabling) is healing as an approach to affect modulation. While we are well aware of suppression methods, what do we know about healing and how it works? We must understand the concept of healing before we can figure out how to apply it to law and use it for affect modulation.

#### IV. THE CONCEPT OF HEALING

There has been a longstanding fascination with indigenous healing, and there are many popular images of the “medicine man,” “witch doctor,” “voodoo priestess” and other indigenous healers. We are now going beyond the stereotypes, and modern studies of indigenous healing methods can teach us a great deal about healing processes.<sup>53</sup> We must first distinguish between the concepts of *curing* and *healing*.<sup>54</sup> Curing is “a primarily biological process that emphasizes the removal of pathology or

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<sup>52</sup> I think of the various bombing campaigns in Vietnam, the Gulf War, and recent American forays in the former Yugoslavia and the Middle East. Intensive bombing did not have its intended military effect, and instead strengthened the target populations. The same holds true of suppression efforts aimed at street gangs and others of the “criminal element.”

<sup>53</sup> For a bibliography of traditional Indian medicine, see Association of American Indian Physicians, *Traditional Medicine-Bibliography*, available at [www.aaip.com/tradmed/tradmedbib.html](http://www.aaip.com/tradmed/tradmedbib.html) (last visited on October 10, 2002).

<sup>54</sup> James B. Waldram, *The Efficacy of Traditional Medicine: Current Theoretical and Methodological Issues*, 14 MED. ANTHROPOLOGY Q. 603, 604 (2000) (italics in the original).

the repairing of physiological malfunctions, that is, disease," while healing "refers to a broader psychosocial process of repairing the affective, social, and spiritual dimensions of ill health or illness."<sup>55</sup> While it is easy to think that western medicine or biomedicine deals with "curing" disease and that traditional indigenous medicine only "heals illness," all medicine or methods of healing are actually part of cultural systems.<sup>56</sup> Healing is not the same as curing,<sup>57</sup> and one can be healed in the biomedical sense but not cured in a cultural and affective sense. We need to think of healing in a proper framework, and consider the social, economic, historical, and cultural context of sickness.<sup>58</sup>

This is the insight we have been looking for. We are primarily concerned with the social impacts of "sickness" in the sense of people who hurt out of shame. We now recognize that aside from our societal reactions to people who hurt and our attempts to prevent hurting in the future, we need to look at offenders as people who hurt themselves.<sup>59</sup> Indigenous healing methods work because they deal with the whole person. Western medicine tends to segment dealing with sickness. A physician can mend a broken leg or give a medication for an invasion of some kind of bug, but the patient must go to a psychologist, psychiatrist, counselor, or cleric for mental or spiritual healing. Western medicine deals with either the physical or emotional

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<sup>55</sup> *Id.* Waldram adds, "Together they describe *sickness*." *Id.*

<sup>56</sup> *Id.* at 605.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> I believe we should abandon "offender-victim" labels, because they are harmful. While we need to pay special attention to victims and their needs, many violent events particularly domestic violence are complex, and if we are going to use a therapeutic approach to violence, we need to look to healing both the "offender" and the "victim" without assigning fault, but also require personal responsibility for conduct. See Ezzat A. Fattah, *Victimology: Past, Present and Future*, 33 CRIMINOLOGIE 17 (2000); Robert Elias, *Paradigms and Paradoxes of Victimology* (n.d.). There is a very good reason the common law of assault both criminal and civil does not allow provocation as a defense - it is too difficult to sort out fault if that is a consideration. Our approach should be based on healing and not fault.

aspects of sickness, but it does not deal with the whole person. There are some essential differences between western and indigenous methods of thinking and approaching problems. Western thought tends to downplay or suspect emotions as being associated with “devalued qualities” - which are “irrational, physical, unintentional, weak, biased, and female.”<sup>60</sup> Indigenous thought tends to be very concrete in approaching things, and emotions are an important part of the analytical process.<sup>61</sup> Indigenous thought deals with the “whole person,” and that includes both body and spirit together. In addition, many indigenous groups are animists, and that gives us an important insight. Animism is the belief that everything has a soul, spirit or inner form and that non-animate beings are sentient. That is (as a Cree educator once explained to me), everything has a soul and everything is a being. If you see the interrelationship of the animate and physical world as that of co-equal beings, that is an important insight for healing, because of the importance of relationships.<sup>62</sup> Indigenous healing works, in large part, because of its consideration of a wider scope of relationships. It considers the patient in a much broader context than western medicine.

## V. NAVAJO NATION VIOLENCE AND ITS CAUSES

Before outlining Navajo conceptions of healing and Navajo therapeutic jurisprudence, it is important to describe

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<sup>60</sup> GERALD M. ERCHAK, *THE ANTHROPOLOGY OF SELF AND BEHAVIOR* 176 (1992).

<sup>61</sup> See HOWARD BECKER & HARRY ELMER BARNES, 1 *SOCIAL THOUGHT FROM LORE TO SCIENCE* 15-19 (1961). It is a discussion of “abstract” Western thought as contrasted with more concrete indigenous thinking patterns. Becker and Barnes’ judgmental descriptions are typical of earlier writing on indigenous peoples.

<sup>62</sup> The role of relationships in Navajo healing will be explained below. Many years ago, I stopped on a mountain pass in the State of Washington with a Cree family to gather cedar needles to use in sweat lodge ceremonies. The family taught me to make an offering (tobacco) to the spirit of the tree, to pray, and to ask permission to gather the needles. That is a “traditional environmental impact statement” that one must consider the proper uses of non-animate things in prayer and offering so that resources are not abused.

Navajo Nation violence as a point of reference in comparison with general American violence. Navajo crime and violence rates have, until recent times, been quite low in comparison with general rates.<sup>63</sup> However, that has changed in recent years. My examination of Navajo Nation court statistics from 1981 through 1983, and 1991 through 2000,<sup>64</sup> indicates that there has been a sharp increase in crime and violence in the Navajo Nation in the past twenty years (as indicated in court records). The primary criminal cases filed at the beginning of this period were largely disorderly conduct and public intoxication, and violent offense and sexual offense filings were comparatively low. More recently, disorderly conduct and public intoxication have been largely pushed aside in numbers, so that the highest filings for crime are assaults and batteries, driving while intoxicated, disorderly conduct,<sup>65</sup> and crimes against the family (primarily sexual offenses involving children).

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<sup>63</sup> See Jerrold E. Levy et al., *Navajo Criminal Homicide*, 25 SW. J. ANTHROPOLOGY 124 (1969); Jerrold E. Levy & Stephen J. Kunitz, *Indian Reservations, Anomie and Social Pathologies*, 27 SW. J. ANTHROPOLOGY 128 (1971). Anomie theory does not describe Navajo crime; crime among Navajos was comparative low, given the records available at the time. I have suggested to Dr. Kunitz that his and Dr. Levy's studies were dated and that anomie may describe the contemporary crime situation among Navajos. He replied that I might be correct.

<sup>64</sup> I was the Solicitor or chief court lawyer to the Courts of the Navajo Nation from 1981 through 1983 and from 1991 through 2001, and I reviewed court filing statistics each year.

<sup>65</sup> Disorderly conduct is a catch-all offense, and given large numbers of arrests at remote night time gatherings (around Navajo ceremonies) and at dances, officers may charge disorderly conduct when the more correct offense (upon investigation) may be a violent assault or a sexual offense. See Martin D. Topper, *Drinking as an Expression of Status: Navajo Male Adolescents*, in DRINKING BEHAVIOR AMONG SOUTHWESTERN INDIANS: AN ANTHROPOLOGICAL PERSPECTIVE 103, 130-34 (1980) (discussing Navajo drinking patterns and environments). Half the Navajo population is age 20 and under and there are large Navajo teen cohorts with many members who drink, many to excess.

Most Navajo crime is alcohol-related,<sup>66</sup> and domestic violence rates are high. In recent years, there has been a shift to gang-related crime and to more violent crimes, including serious assaults with deadly weapons and homicide.<sup>67</sup> Why has there been a rapid and dramatic change in the nature of crime in the Navajo Nation?

The answers are complex and many. As a general matter, Indian crime rates in general are high because of colonial practices in American Indian policy,<sup>68</sup> and economic deprivation.<sup>69</sup> One popular contemporary theory, advanced by many, is that Indian crime and violence is in actuality a form of “mass post-traumatic stress disorder” (PTSD), which is the result of over five centuries of failed European experiments to resolve the “Indian problem” (a problem only from the European and settler point of view).<sup>70</sup>

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<sup>66</sup> The National Research Council reported that “Intoxicated Navajo fight almost exclusively with family members.” UNDERSTANDING AND PREVENTING VIOLENCE, *supra* note 36, at 198. The Council gave no citation to support this statement, but it is generally true. See STEPHEN J. KUNTZ, M.D. & JERROLD E. LEVY, DRINKING CAREERS: A TWENTY-FIVE YEAR STUDY OF THREE NAVAJO POPULATIONS 168 (1994). The context of Navajo drinking as an historical process in relation to patterns in the region. See also, STEPHEN J. KUNTZ, M.D. et al., DRINKING, CONDUCT DISORDER, AND SOCIAL CHANGE: NAVAJO EXPERIENCES (2000) (analyzing Navajo drinking in the context of social change).

<sup>67</sup> While the report is somewhat sensational, there is a good description of recent trends in Debra Weyermann, *And Then There Were None: On the Navajo Reservation, a Passion for Blood Sport*, HARPER’S MAGAZINE, April 1998.

<sup>68</sup> NATIONAL MINORITY ADVISORY COUNCIL ON CRIMINAL JUSTICE, THE INEQUALITY OF JUSTICE: A REPORT ON CRIME AND THE ADMINISTRATION OF JUSTICE IN THE MINORITY COMMUNITY 131 (1982); RONET BACHMAN, DEATH AND VIOLENCE ON THE RESERVATION 124-25 (1992).

<sup>69</sup> *Id.* at 124 (discussing “one of the primary factors”).

<sup>70</sup> See EDWARD DURAN, B. GUILLORY & P. TINGLEY, DOMESTIC VIOLENCE IN NATIVE AMERICAN COMMUNITIES: THE EFFECTS OF INTERGENERATIONAL POST TRAUMATIC STRESS (1992); EDUARDO & BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY (1995); Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60 (1998).

While the theory of intergenerational learned violence is likely correct,<sup>71</sup> it is also likely that there are other reasons for the increase. There appear to be two major contributors to crime and violence in the Navajo Nation. The first is urbanization.<sup>72</sup> The Navajo Nation is a remote and rural Indian nation -the largest in the United States- with 25,000 square miles of territory spread over three states (Arizona, New Mexico and Utah) and an estimated population of 220,000.<sup>73</sup> The Nation has undergone a rapid transformation from a rural, pastoral economy (primarily transhumant sheep grazing) to semi-urbanized wage economy.<sup>74</sup> Federal livestock reduction policies, accompanied by population growth, and a culture transformation caused by Navajo participation in World War II and the arrival of modern roads and communications, destroyed the grazing economy.<sup>75</sup> As a result, the new Navajo economy is largely based upon the provision of public services to the Navajo population. They are provided at

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<sup>71</sup> I have pointed out that Indians fall at the bottom of every indicator of economic well being (as the basis for human rights under international law), and that shows that the theory has some basis. James W. Zion, *North American Indian Perspectives on Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 191, 196 (Abdullahi Ahmed An-Na'im ed., 1992). The statistics have not changed materially since I wrote the chapter in 1989.

<sup>72</sup> Henderson et al., *supra* note 34.

<sup>73</sup> This is not an official Census figure, but one commonly used by the Navajo Nation in reaction to an argued undercount in 1990. The Navajo Nation has the largest on-reservation population of any American Indian nation.

<sup>74</sup> The Navajo transhumant economy which involves moving stock to different areas for grazing in different seasons is described well in LYNN R. BAILEY, *BOSQUE REDONDO: THE NAVAJO INTERNMENT AT FORT SUMNER, NEW MEXICO, 1863-68* (1998), and the destruction of that traditional Navajo economy is described in RICHARD WHITE, *THE ROOTS OF DEPENDENCY: SUBSISTENCE, ENVIRONMENT, AND SOCIAL CHANGE AMONG THE CHOCTAWS, PAWNEES, AND NAVAJOS* 212-314 (1983).

<sup>75</sup> Visitors to the Navajo Nation are amazed when I point out that there is a land shortage. That is, because transhumant grazing practices there involved grazing one's herd in the mountains during the warm months and moving the herds to valleys during the winter. Most of the Navajo Nation is arid, and only transhumant grazing works well. There are too many people and too little land for that kind of economy.

administrative centers, which are small in comparison to most American towns, but large for the rural Navajo Nation.<sup>76</sup> Another factor is alcohol-related crime, which is a product of child abuse and neglect.<sup>77</sup> One of the most devastating Indian policies was sending Navajos to boarding school. While there are doubts that alcohol abuse is connected with the practice of taking Navajo children from their homes and sending them to a boarding school for long periods of time,<sup>78</sup> it is likely that Navajo child abuse and neglect stems from the boarding school experience, where Navajos did not learn traditional parenting skills and children were sexually abused by teachers. Child neglect is also related to drinking behaviors and the practice of “dumping” children on grandparents and other relatives to engage in drinking.<sup>79</sup>

Moving Navajos off the land (voluntarily, to seek work, or involuntary, because there is no choice), putting them into federal cluster housing projects,<sup>80</sup> and exposing them to strangers outside traditional family and clan relationships, likely has a great deal to do with the contemporary rise in crime and violence. The Navajo Nation, as it is with other Indian nations, has rates of

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<sup>76</sup> The primary centers are Shiprock and Crownpoint in New Mexico, and Window Rock (the political capitol), Chinle, Tuba City and Kayenta in Arizona. Utah Navajos are served from Shiprock, New Mexico, and Kayenta, Arizona.

<sup>77</sup> Stephen J. Kunitz et al., *Alcohol Dependence and Domestic Violence as Sequelae of Abuse and Conduct Disorder in Childhood*, 22 CHILD ABUSE & NEGLECT 1079 (1998).

<sup>78</sup> Eric Henderson, et al., *Boarding and Public Schools: Navajo Educational Attainment, Conduct Disorder, and Alcohol Dependency*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 28 (1998).

<sup>79</sup> See Lizabeth Hauswald, *Child Abuse and Child Neglect: Navajo Families in Crisis*, 1 DINE BE'IINA': J. OF NAVAJO LIFE 37 (1988). The most severe form of child abuse is child neglect, and it is most often related to “dumping” children upon grandparents who do not know how to care for children and who have abusive child care methods learned from experiences in abusive boarding school environments.

<sup>80</sup> Navajos prefer rural scattered site housing, but federal housing officials reject that demand or make it too complicated or expensive. Navajo police commanders have told me that they directly link cluster housing and rental housing projects for the poorest Navajos to violent, alcohol-related crime.

crime and violence that are much higher than the general population.<sup>81</sup>

In sum, the Navajo Nation, as a semi-industrialized and modern-rural nation, shares the same underlying problems as other industrialized nations - violence begotten by urbanization, and a cycle of violence where abused and neglected children are likely to become violent offenders as teens and adults. We add children who were sexually abused (in boarding schools for Navajos) who enter the cycle of sexual abuse and become predators when they reach puberty to the mix. The Navajo Nation has a shortage of jails, and the United States Government does not live up to its obligation to prosecute crime in a meaningful way, so the Navajo Nation has no choice but to seek non-punitive alternatives to deal with crime.<sup>82</sup>

## VI. NAVAJO CONCEPTIONS OF ILLNESS, TREATMENT AND HEALING

As it has been for most contacts between Navajos and non-Navajos, the introduction of new technologies and cultural ways to the Navajo People created conflict and yet synthesis. Navajos are precisely "Navajo" because of their contacts with the Spanish, Mexicans, and *Bilagaanaa* ("White People") in and near the Navajo homeland in the Southwest. The same holds true with medicine. Navajos have persistently kept their traditional

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<sup>81</sup> See LAWRENCE A. GREENFELD & STEVEN K. SMITH, AMERICAN INDIANS AND CRIME (Bureau of Justice Statistics, U.S. Justice Department 1999). The statistical base used for this study is doubtful, because of the lack of a meaningful justice statistic gathering and reporting system for Indian country i.e. Indian nation territories.

<sup>82</sup> Chief Justice Robert Yazzie gives an optimistic appraisal of the opportunity for non-punitive justice based in Navajo traditions in *Navajo Justice, YES! A J. OF POSITIVE FUTURES* 36 (2000). The Navajo Nation decriminalized over 50 offenses including common law *malum in se* crimes, and the Chief Justice had no choice to be optimistic in the face of a bizarre policy decision by the Navajo Nation Council; prompted by non-Indian lawyer-advisors. See also Todd D. Minton, *Jails in Indian Country, 2000*, BUREAU OF JUSTICE STATISTICS BULLETIN (July 2001) (discussing shortages of jail space, including the Navajo Nation).



medical practices while accepting western medicine.<sup>83</sup> While there were conflicts between early Army and missionary doctors about *Bilagaanaa* acceptance of traditional Navajo medicine,<sup>84</sup> Navajos quickly adapted to western medicine and, as it was with other items of cultural exchange, Navajos took the best of western medical culture while retaining their own ways.<sup>85</sup>

The first serious study of Navajo religious beliefs was done by an Army physician, Dr. Washington Matthews, who was stationed at Fort Wingate, New Mexico Territory, beginning in September 1880.<sup>86</sup> While posted as an Army physician, Matthews was also fascinated with Indian culture. He began studying the Navajo language, and he entered into relationships with local *hatahli*, paying them as informants on Navajo culture.<sup>87</sup> While we hear little of Matthew's work as a physician, in 1887 he was the first non-Navajo to record and publish a Navajo ceremonial chant.<sup>88</sup> Matthews showed great respect for his subject, attempting to record both the basic Navajo creation story (creation scripture),<sup>89</sup> The Mountain Chant,<sup>90</sup> and The Night

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<sup>83</sup> There are two good general histories of the interaction of Navajo and Western medicine and the symbiotic relationship of the two cultural views of curing and healing, JOHN ADAIR et al., *THE PEOPLE'S HEALTH: ANTHROPOLOGY AND MEDICINE IN A NAVAJO COMMUNITY* (1988), and ROBERT A. TRENNERT, *WHITE MAN'S MEDICINE: GOVERNMENT DOCTORS AND THE NAVAJO, 1863-1955* (1998).

<sup>84</sup> See TRENNERT, *supra* note 83.

<sup>85</sup> See Louise Lamphere, *Comments on the Navajo Healing Project*, 14 MED. ANTHROPOLOGY Q. 598, 599 (2000). The Navajo culture is "integrative" because "it draws elements from other cultural traditions . . . and pulls them into an overall Navajo pattern." *Id.* (citations omitted).

<sup>86</sup> WASHINGTON MATTHEWS, *NAVAJO LEGENDS* ix (1994). Fort Wingate was established at its present location, east of Gallup, New Mexico, in 1868 as the Army fort that "guarded" Navajos. Its mission was to exercise military supervision over Navajos, and its soldiers also performed a law enforcement function to protect them.

<sup>87</sup> *Id.* *Hatahli* (pronounced ha-TATH-lee) translates as "medicine man," although women can also practice healing ceremonies which *hatahli* perform. Most ceremonial practitioners are male.

<sup>88</sup> FRANC J. NEWCOMB & GLADYS A. REICHARD, *SANDPAINTINGS OF THE NAVAJO SHOOTING CHANT* 1 (1937).

<sup>89</sup> MATTHEWS, *supra* note 86.

Chant.<sup>91</sup> Unlike his followers, he did not attempt to explain the meaning of the chants as such, simply recording them, and he left that (including explanations of the curing aspects of the ceremonies) to successors.

The next visitors who took an interest in Navajo ceremonies, the Franciscan Fathers, were also fascinated by Navajo ceremonials, but appeared to take little interest in them as curing methods.<sup>92</sup> The work the Franciscan Fathers prepared for their own reference and the education of others gives some mention of Navajo herbal remedies,<sup>93</sup> but aside from describing Navajo religion,<sup>94</sup> a "synopsis of [Navajo] legend,"<sup>95</sup> and ceremonial paraphernalia,<sup>96</sup> there is little mention of Navajo healing, other than a discussion of the selection of the proper chant for a given ailment.<sup>97</sup> Gladys A. Reichard, who spent more than thirty years with Navajos to study their ways, examined Navajo theories of disease and healing in one of her most extensive works.<sup>98</sup> She thought that the Navajo theory of disease was that there are two basic causes, which are definite and

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<sup>90</sup> WASHINGTON MATTHEWS, *THE MOUNTAIN CHANT: A NAVAHO CEREMONY* (1997).

<sup>91</sup> WASHINGTON MATTHEWS, *THE NIGHT CHANT: A NAVAHO CEREMONY* (1955).

<sup>92</sup> For the biographies of the first Franciscans who went to the Navajo Nation, see ROBERT L. WILKEN, ANSELM WEBER, O.F.M.: *MISSIONARY TO THE NAVAHO 1898-1921* (1955) and *TALES OF AN ENDISHODI: FATHER BERARD HAILE AND THE NÁVAJOS, 1900-1961* (Fr. Murray Bodo, O.F.M. trans. & ed., 1998) (transcribed autobiography). John Farella, one of the leading researchers and writers on Navajo culture, wrote a funny memoir, *Wind in a Jar* in 1993, where he maintains that the Franciscans were so busy learning how to become Navajos that they (as Catholics) forgot to convert anyone.

<sup>93</sup> THE FRANCISCAN FATHERS, *AN ETHNOLOGIC DICTIONARY OF THE NAVAHO LANGUAGE* 179-203 (1910).

<sup>94</sup> *Id.* at 346-422.

<sup>95</sup> *Id.* at 347-61.

<sup>96</sup> *Id.* at 402-21.

<sup>97</sup> *Id.* at 379-80 (describing various ailments).

<sup>98</sup> GLADYS A. REICHARD, *NAVAHO RELIGION: A STUDY IN SYMBOLISM* (1990).

indefinite.<sup>99</sup> “Definite” causes of disease are based upon a failure to observe the restrictions laid out for a correct life, which can include excess in any activity,<sup>100</sup> ignorance of ceremonial law, or transgressing it.<sup>101</sup> Some of the indefinite causes include contact with dead things (e.g. carrion),<sup>102</sup> sorcery or witchcraft,<sup>103</sup> and like supernatural causes. One of Reichard’s informants summed up the difference between definite and indefinite causes of illness, saying, “Causes and mistakes you know about are not bad because you know what to do about them, but those you don’t know-*they* are the ones that are dangerous.”<sup>104</sup> As for disease, symptoms, disease and the cure are approached in an “emotional” manner, where “the mind’s control over the body is stressed.”<sup>105</sup> “Illness is fundamentally the same as disturbance,” so Navajos use terms to refer to illness such as “confusion, bewilderment, frustration, futility.”<sup>106</sup> Having identified the definite and indefinite causes of illness, Reichard said that the next step was to seek a diagnosis for sickness - a method involving divination.<sup>107</sup>

Reichard then addressed the theory of curing. The first step is to review past behavior to identify the evils that are responsible for an illness.<sup>108</sup> Aside from definite causes of illness, “Bad things sent by malevolent spirits, or even the spirits themselves, may enter the body.”<sup>109</sup> The curing process is an attack on evil to force it to yield to good, and since fear is a primary cause of illness, curing is the use of one’s own powers to

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<sup>99</sup> *Id.* at 80.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 81. Reichard does not indicate what she means by “ceremonial law” or transgression of it, but the “law” to which she refers most likely means restrictions or mandates in ceremonial practice.

<sup>102</sup> *Id.*

<sup>103</sup> REICHARD, *supra* note 98, at 82.

<sup>104</sup> *Id.* at 82-83 (emphasis in the original).

<sup>105</sup> *Id.* at 88. In this, Navajos maintain that the mind controls the body, rather than the other way around, in the “mind-body connection” debate.

<sup>106</sup> *Id.* at 89.

<sup>107</sup> *Id.* at 99.

<sup>108</sup> REICHARD, *supra* note 98, at 105.

<sup>109</sup> *Id.* at 104.

overcome evil.<sup>110</sup> There are various physical curing techniques, including purification by sweating (in a sweat lodge ceremony), purgatives, fasting,<sup>111</sup> bathing and shampooing hair,<sup>112</sup> sexual continence,<sup>113</sup> and (minor) "brushing rites."<sup>114</sup>

Reichard doubts the therapeutic value of those "measures," and she also questions the psychological efficacy of what she described.<sup>115</sup> She relates the healing ceremonies in detail throughout her study, but, unfortunately, Reichard was unable to appreciate what she "saw." While she clearly recognized the basis of Navajo theories of disease and curing as being psychological in nature, she failed to see the connection between Navajo sickness theory and healing methods.

A few of Reichard's contemporaries were also interested in healing techniques, with a few small studies of Navajo diagnosticians or hand-tremblers,<sup>116</sup> but overall, many of the classic works of anthropology largely ignored Navajo ceremonials as healing processes.<sup>117</sup> It was not until the advent of uncritical physicians, psychiatrists and psychologists that the materials developed by Matthews and his followers would begin to bear fruit in the form of a contemporary (and usable) analysis of the dynamics of Navajo healing.

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<sup>110</sup> *Id.* at 106. The patient is the center of the cure, as the ailment or "monster" is made concrete and tangible so that the patient can deal with it. There are Navajo divination ceremonies where the patient can actually see the material or physical cause of illness in glowing embers.

<sup>111</sup> *Id.* at 109.

<sup>112</sup> *Id.* at 110.

<sup>113</sup> REICHARD, *supra* note 98, at 111.

<sup>114</sup> *Id.* Reichard does not explain what a "brushing rite" is.

<sup>115</sup> *Id.* at 119.

<sup>116</sup> William Morgan, *Navaho Treatment of Sickness: Diagnosticians*, 33 AM. ANTHROPOLOGIST 390 (1931); W.W. Hill, *The Hand Trembling Ceremony of the Navaho*, 38 EL PALACIO 65 (1935).

<sup>117</sup> See CLYDE KLUCKHORN & DOROTHEA LEIGHTON, *THE NAVAJO* (1974). Alexander and Dorothea Leighton, M.D. recognized that there are "therapeutic values" in Navajo ceremonies, but they simply described them without much analysis; Alexander & Dorothea Leighton, M.D., *Therapeutic Values in Navajo Religion*, 43 ARIZ. HIGHWAYS 2 (August 1967).

A pioneer in the new science was Dr. John Adair. He first approached his subject by describing a physician-health aide partnership in a Navajo Nation clinic.<sup>118</sup> He then ventured a preliminary analysis of Navajo healing based on studies of the anthropological work generally described above.<sup>119</sup> At that point, Dr. Adair did not have the tools to more completely close the gap between recognizing and honoring traditional Navajo healing, with some attempt to understand it, and later work which would more fully shed some light on how Navajo healing works.<sup>120</sup>

Jungian psychiatrists discovered Navajo healing and made their own unique approaches to it. Fascinated by symbolism, two works essentially restated portions and summaries of the Navajo *Hajine' Bahane'*-creation scripture- as source works from the Jungian point of view.<sup>121</sup> A third work attempted a more detailed Jungian analysis of Navajo healing,<sup>122</sup> and a recent paper uses Jungian analysis to examine Navajo justice.<sup>123</sup>

The Jungians advanced our understanding of Navajo healing in these ways: Link's collection contains "A Psychological Commentary" by Dr. Joseph L. Henderson<sup>124</sup> which invites the reader to look at the "stories"<sup>125</sup> collected by Link as enjoyable folklore but something more. Dr. Henderson

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<sup>118</sup> John Adair, *The Indian Health Worker in the Cornell-Navaho Project*, 19 HUMAN ORG. 59 (1960).

<sup>119</sup> John Adair, *Physicians, Medicine Men and Their Navaho Patients*, in MAN'S IMAGE IN MEDICINE AND ANTHROPOLOGY 237 (Iago Galdston ed., 1963).

<sup>120</sup> Another Western physician who did a great deal of work with Navajos gave us only a colorful, but not very analytical, account of his work with medicine people in an autobiography. CLARENCE G. SALSURY, *THE SALSURY STORY: A MEDICAL MISSIONARY'S LIFETIME OF PUBLIC SERVICE* (1969).

<sup>121</sup> See MARGARET SCHEVILL LINK, *THE POLLEN PATH: A COLLECTION OF NAVAJO MYTHS RETOLD* (1956); SHEILA MOON, *A MAGIC DWELLS: A POETIC AND PSYCHOLOGICAL STUDY OF THE NAVAHO EMERGENCE MYTH* (1970).

<sup>122</sup> DONALD SANDER, *NAVAHO SYMBOLS OF HEALING* (1979).

<sup>123</sup> MARILYN HOLLY, *THEORY OF NAVAJO CRIMINAL JUSTICE: A JUNGIAN PERSPECTIVE* (University of Florida, 2000) (in publication).

<sup>124</sup> LINK, *supra* note 121, at 125.

<sup>125</sup> *Id.* at 127.

of its theoretical introduction to Navajo symbolic healing. He demonstrates the concept of symbolic healing by pointing out that "Suffering is an integral part of human life."<sup>140</sup> Therefore, the basis of all "cultural-psychological methods of healing" is "a symbolic structure that explains, or at least provides a context for, the sufferings of its members."<sup>141</sup> The foundation for that structure is "life symbols."<sup>142</sup> "A symbol is any *thing* that may function as a vehicle for a conception."<sup>143</sup> It can be a word, a mathematical notation, an act, a gesture, a ritual, a work of art, "or anything else that can carry a concept."<sup>144</sup> A "life symbol" is one which "may carry the ethos of an entire culture," and its symbols "shape the psyche and culture and bind them together."<sup>145</sup> They make a culture what it is, and they govern the thoughts and feelings of that culture.<sup>146</sup> Origin and "cosmogonic" myths tell a given culture what the world is, how it came to be, and how it will function in the future.<sup>147</sup> A given culture's mythic view of reality defines it, and Navajo life symbols, summed up in their creation and journey narratives (using Philmer Bluehouse's terminology) or creation scripture (mine) represent "an ethic prizing calm deliberateness, untiring persistence, and dignified caution [which] complements an image of nature as tremendously powerful, mechanically regular and highly dangerous."<sup>148</sup> Navajo conceptions of disease, healing and the disposition of evil fit into that "prevailing ethos," represented in the creation and journey narratives.<sup>149</sup> The "sing" or curing ceremony uses those narratives to give a patient "a vocabulary in terms of which to grasp the nature of his distress and related it to a wider world," "with the presentation of a specific and concrete image of truly human, and so enduring, suffering powerful enough to resist the challenge of emotional

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<sup>140</sup> *Id.* at 11.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 12-16.

<sup>143</sup> *Id.* at 12 (emphasis in the original).

<sup>144</sup> SANDER, *supra* note 122, at 12.

<sup>145</sup> *Id.* at 13.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 14 (quoting Clifford Geertz).

<sup>149</sup> SANDER, *supra* note 122, at 14.

Twins as symbols of the achievement of identity; as introvert and extrovert who, together, achieve synthesis.<sup>135</sup>

Finally, Henderson points out how Navajo symbols, represented by the figures in the stories, are utilized by a Navajo medicine man as an “introverted intuitive type” who knows the “forms of the collected images” and who exposes himself to the “imprint of archetypes” for healing.<sup>136</sup> Unfortunately, while Link gives us a good collection of the Navajo “stories,” Henderson assumes that the reader understands the basic concepts of Jungian symbolism and the interpretation of symbols. This Jungian work is “shadowy” in giving us concrete understandings of Navajo healing, as revealed in the base stories of Navajo philosophy and worldview.

Sheila Moon’s collection and analysis of the “Navaho Emergence Myth”<sup>137</sup> likewise analyzes Navajo creation beliefs using Jungian symbol interpretation, and it also is too abstract for our purposes.<sup>138</sup> Sander’s book<sup>139</sup> is much more helpful, because of its theoretical introduction to Navajo symbolic healing. He demonstrates the concept of symbolic healing by pointing out that “Suffering is an integral part of human life.”<sup>140</sup> Therefore, the basis of all “cultural-psychological methods of healing” is “a symbolic structure that explains, or at least provides a context for, the sufferings of its members.”<sup>141</sup> The foundation for that structure is “life symbols.”<sup>142</sup> “A symbol is any *thing* that may function as a vehicle for a conception.”<sup>143</sup> It can be a word, a

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<sup>134</sup> *Id.* at 133. For a more concrete explanation of Coyote, see Guy H. Cooper, *Coyote in Navajo Religion and Cosmology*, 7 CANADIAN J. NATIVE STUD. 181 (1987).

<sup>135</sup> LINK, *supra* note 121, at 134-36.

<sup>136</sup> *Id.* at 136-37.

<sup>137</sup> MOON, *supra* note 121.

<sup>138</sup> It may be that I am too impatient with the Jungian literature to absorb it, or it may be (as my wife tells me in Navajo) that it is “shi cago” (sounds like “Chicago” - phonetic) “over my head.”

<sup>139</sup> SANDER, *supra* note 122.

<sup>140</sup> *Id.* at 11.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 12-16.

<sup>143</sup> *Id.* at 12 (emphasis in the original).

mathematical notation, an act, a gesture, a ritual, a work of art, "or anything else that can carry a concept."<sup>144</sup> A "life symbol" is one which "may carry the ethos of an entire culture," and its symbols "shape the psyche and culture and bind them together."<sup>145</sup> They make a culture what it is, and they govern the thoughts and feelings of that culture.<sup>146</sup> Origin and "cosmogonic" myths tell a given culture what the world is, how it came to be, and how it will function in the future.<sup>147</sup> A given culture's mythic view of reality defines it, and Navajo life symbols, summed up in their creation and journey narratives (using Philmer Bluehouse's terminology) or creation scripture (mine) represent "'an ethic prizing calm deliberateness, untiring persistence, and dignified caution [which] complements an image of nature as tremendously powerful, mechanically regular and highly dangerous.'"<sup>148</sup> Navajo conceptions of disease, healing and the disposition of evil fit into that "prevailing ethos," represented in the creation and journey narratives.<sup>149</sup> The "sing" or curing ceremony uses those narratives to give a patient "'a vocabulary in terms of which to grasp the nature of his distress and related it to a wider world,'" "with the presentation of a specific and concrete image of truly human, and so endurable, suffering powerful enough to resist the challenge of emotional meaninglessness raised by the existence of intense and unremovable brute pain."<sup>150</sup>

Sander explains that symbols not only provide a vocabulary and explanation for disease, but "also change the psyche by converting energy into a different form, a form that can heal."<sup>151</sup> Quoting Jung, "[t]he symbols act as transformers, their function being to convert libido from a 'lower' into a

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<sup>144</sup> SANDER, *supra* note 122, at 12

<sup>145</sup> *Id.* at 13.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 14 (quoting Clifford Geertz).

<sup>149</sup> SANDER, *supra* note 122, at 14.

<sup>150</sup> *Id.* (again quoting Geertz).

<sup>151</sup> *Id.*



'higher' form.'" <sup>152</sup> Thus, a cure comes as a response to the presentation of a symbol, and that prompts an experience that actually works (put in terms of "validity of the cure"). <sup>153</sup> As with the discussion of the meaning of "healing" above, there are two kinds of healing - scientific and symbolic. <sup>154</sup> While scientific ["biomedical"] healing is universal to humanity, and while Navajo medicine men are aware of its uses in mending broken bones, using hot earth trenches and sweat baths to deal with pain, and using herbal remedies, <sup>155</sup> the primary basis of Navajo medicine is symbolic healing. It has a structure and an approach in stages, namely:

Stage One: Preparation or purification. Here, the medicine man and the patient go through purifying rituals to prepare themselves for the presentation and utilization of symbols by washing, sweating, taking emetics, dressing in special clothes and abstaining from activities such as eating specific foods, sexual intercourse, or certain kinds of work. <sup>156</sup>

Stage Two: Presentation or evocation. Symbolic images are "made and presented" in a visible or audible form, and the senses of taste, smell and touch are used in the process. Symbols can be presented as icons, statues, prayer sticks, or sand paintings, or in songs and prayers. Special incense or special herbs and foods can be used for "fumigation." This stage is used to make "the symbolic presence" "*real*," so that "supernatural powers or divine beings invest the symbols," and "[t]he way is prepared for the culminating action." <sup>157</sup>

Stage Three: Identification. This is the "high point of the ceremony," where the medicine practitioner, the patient, and sometimes even spectators, "become identified or intimately invested with the powers that have been evoked and reified." <sup>158</sup>

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<sup>152</sup> *Id.* at 14-15.

<sup>153</sup> *Id.* at 15. One premise of the book is demonstrating the validity of Navajo curing.

<sup>154</sup> SANDER, *supra* note 122, at 15

<sup>155</sup> *Id.* at 18-19.

<sup>156</sup> *Id.* at 21.

<sup>157</sup> *Id.* (emphasis in the original).

<sup>158</sup> *Id.*

Stage Four: Transformation. Having prepared in this way, the healer has “extraordinary power” in the eyes of the patient and onlookers to bring about “the desired good results.” “He wins the battle, banishes the disease, expels the evil, counteracts the sorcery, or recovers the soul.” At that point, “Symbolically transformed, the patient believes that actual restoration to health and harmony will soon follow.”<sup>159</sup>

Stage Five: Release. The final stage is rituals to release the patient, the medicine man, and the other participants from “the powerful symbolic force they have activated, and to return them to a normal state of being.” When the patient has experienced the transforming power of the symbol, that patient must “divest himself of it,” through special songs or prayers, or other restrictions, to bring “the cycle of symbolic healing to a close.”<sup>160</sup>

Sander makes things a little more concrete for us, as we begin to understand that symbolic healing is a culture system. Symbols incorporate a given society’s essential beliefs and expectations, and they can be used to heal a patient by attuning him or her to those essentials. Symbolic healing is a transforming process, from illness to acceptance, done by immersing the patient in tangible symbols of the culture so that there is cultural healing. Sander’s book develops that point in detail as it examines the various tangible and intangible elements of Navajo symbolic healing.

Holly’s recent examination of a “Jungian perspective” of Navajo criminal justice complements the Jungian literature by applying Jung’s notions of symbolism to traditional Navajo justice methods.<sup>161</sup> To a great extent, she recapitulates the literature generated by the Navajo Nation Judicial Branch’s justices, judges, program people, and lawyers, so I will not review her excellent analysis further, leaving that to the reader when her work is published.

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<sup>159</sup> SANDER, *supra* note 122, at 21.

<sup>160</sup> *Id.* at 22.

<sup>161</sup> HOLLY, *supra* note 123.

The Jungians give us one approach to Navajo healing, but it is largely unsatisfactory because our search is for more concrete understandings. *How* does Navajo healing work? Despite Sander's conclusion that a given method of symbolic healing is "culture-bound" and "cannot be extended from one culture to another except under special conditions,"<sup>162</sup> we should not be satisfied with that conclusion. That is, if the majoritarian view of healing predominates in therapeutic jurisprudence, and that view is of itself culture-bound, then why should difficulties of replication be a barrier to using indigenous thought? If Sander is correct, then any theory of therapeutic jurisprudence will apply only to the culture of its given framers, and will not apply to others, particularly America's "minorities."<sup>163</sup> However, it is possible to identify and communicate certain base values and dynamics in the many healing systems to better understand them and to share new ideas in cross-cultural communication.

Non-Navajo conceptions of illness and treatment have developed over a period of slightly more than a century from the ethnocentric view of Army and missionary physicians that Navajos have nothing to contribute to an understanding of healing, through initial attempts to simply record ceremonies, early explanations of Navajo healing as only religious beliefs, attempts to "explain" Navajo healing, and more modern Jungian analysis. Today, we have the advantage of many productive partnerships between Navajos and non-Navajos that are beginning to produce a large medical literature base.<sup>164</sup> Returning to the

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<sup>162</sup> SANDER, *supra* note 122, at 17.

<sup>163</sup> The concept of "minority" is not frozen. We now have the fact that there is no ethnic or cultural "majority" in Hawaii, New Mexico or California, and the United States is increasingly becoming a multi-cultural society. That being the case, we need to focus upon intercultural communication to understand each other better and to contribute to everyone's cultural understandings. Such communication can be said to be synergistic, because a better appreciation of the worldlier of all will make the whole much greater than the sum of its parts, or holistic. Chief Justice Robert Yazzie dislikes this term, but we can say that holism is synergistic and gives us the ability to see "the big picture" rather than fragments.

<sup>164</sup> E.g., Stephen Kunitz & Jerrold Levy, *Navajos*, in ETHNICITY AND MEDICAL CARE 337 (A. Harwood ed., 1981); M.C. Sobralske, *Perceptions of*

voice and participation issues which began this article, we now have a Navajo woman surgeon's views on the partnership between modern medicine and traditional Navajo healing,<sup>165</sup> and a non-Navajo physician's accounts of his personal journeys with Indian healing.<sup>166</sup> Together, Navajos and non-Navajos have developed understandings of the nature of Navajo healing to formulate a theory of Navajo therapeutic jurisprudence.

## VI. NAVAJO THERAPEUTIC JURISPRUDENCE

Before attempting a statement of Navajo therapeutic jurisprudence for a contribution to the field, it is important to define the scope of this section. Many Indians, and Navajos in particular, resent attempts to synthesize Navajo thought and beliefs by non-Navajos. There are likely many reasons for the resentment, including past mistreatment of Navajos by *Bilagaanaas* and others; the appropriation of Navajo thought for money or fame; or exclusion from discussions of themselves (i.e. in literature), so that Navajo thought is not being expressed by Navajos. There is resentment of the discursive process itself, and that is particularly true when discussing Navajo healing to develop a Navajo therapeutic jurisprudence theory. We have seen thus far that medicine is a cultural construct, even though

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*Health: Navajo Indians*, 7 TOPICS IN CLINICAL NURSING 32 (1985); C. Hanley, *The Navajo Indians*, in TRANSCULTURAL NURSING: ASSESSMENT AND INTERVENTION 215 (J.N. Giger & R.E. Davidhizar eds., 1991); R. Bell, *Prominence of Women in Navajo Healing Beliefs and Values*, 15 NURSING AND HEALTH CARE 232 (1994); Trudy Griffin-Pierce, "When I am Lonely the Mountains Call Me": *The Impact of Sacred Geography on Navajo Psychological Well Being*, 7 AM. INDIAN AND ALASKA NATIVE MENTAL HEALTH RES. 1 (1997); Catherine Kim & Yeong S. Kwok, *Navajo Use of Native Healers*, 24 THE IHS PRIMARY CARE PROVIDER 1 (1999); Thomas J. Csordas, *Ritual Healing and the Politics of Identity in Contemporary Navajo Society*, 26 AM. ETHNOLOGIST 1 (1999); AMY C. HO, WESTERN MEDICINE AND NAVAJO MEDICINE: TWO VIEWS OF ASTHMA (2000).

<sup>165</sup> LORI ARVISO ALVORD, M.D. & ELIZABETH COHEN VAN PELT, *THE SCALPEL AND THE SILVER BEAR* (1999).

<sup>166</sup> CARL A. HAMMERSCHLAG, M.D., *THE DANCING HEALERS* (1988); CARL A. HAMMERSCHLAG, M.D., *THE THEFT OF THE SPIRIT* (1992).

biomedical "curing" can be used almost universally across cultures. The problem comes from talking about traditional Indian healing, which uses Indian discourses of wellness and the paths to wellness. A great deal of Navajo healing is related to Navajo "religion"<sup>167</sup> and problems arise when non-Navajos attempt to understand or describe it. That is, they may not take it seriously and describe it as something "other" than reality and only the quaint beliefs of a given people.<sup>168</sup> The problem is one of respect, where we accept the beliefs of others in their own context.<sup>169</sup> There is also an epistemological or knowing, learning and understanding problem: When non-Indians approach Indian culture, they do so using three levels of knowledge - taboo, ritual, and synthetic knowledge or understandings.<sup>170</sup> When non-Indians first arrive, they do not speak the language, and they are compelled to use interpreters to study the Indian culture. Often, the first kind of knowledge non-Indians are able to "see" is the "taboo" or "an awareness of things that are safe and things that are dangerous-that is, things to approach and things to avoid."<sup>171</sup> That leads to mistakes in describing the culture under study, ethnocentrism in reciting the taboos and mocking them, explicitly or implicitly.<sup>172</sup> The second level of knowledge is ritual, and there are ritual practitioners in all societies.<sup>173</sup> It is one thing to translate and record a ritual, as many of the "Navajoists" have done, but it is quite another to explain what the ritual means. Usually, only a practitioner can accurately describe the meaning of a ritual or a part of it, and explanations vary, depending upon the education and understanding of the practitioner. The third level of knowledge is "synthetic," meaning the theoretical, meta-

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<sup>167</sup> Chief Justice Robert Yazzie of the Navajo Nation Supreme Court explains that there is no word for "religion" in the Navajo language. It is *iina* or life itself.

<sup>168</sup> See JOHN R. FARELLA, *THE MAIN STALK: A SYNTHESIS OF NAVAJO PHILOSOPHY* 4-9 (1984) ("truth and belief").

<sup>169</sup> *Id.*

<sup>170</sup> See *id.* at 9-14 ("levels of knowledge").

<sup>171</sup> *Id.* at 10.

<sup>172</sup> See *id.* at 10-11.

<sup>173</sup> FARELLA, *supra* note 168, at 11.

theoretical, paradigmatic, or abstract mode of thinking and knowledge.<sup>174</sup> Navajos often say of non-Navajo writers about things Navajo that “they got it wrong.” It is one thing to translate a ritual, with all the problems of linguistics, and it is quite another to explain what has been translated in its proper context.

If, for example, I actually spoke the Navajo language, and I understood Navajo healing ritual in its own context (which only a medicine man or healer can do), you, the reader, would not understand what I was talking about. I have seen this when Navajos who speak their own language and English very well explain Navajo concepts by simply translating them into English. English speakers do the same to Navajos, as they lay out their synthetic understandings in English and Navajos are left saying “*shi cago*” (sounds like “Chicago” - phonetic), or “It’s over my head.” We are talking about frames of reference in language, and the proper context of things.

Navajo ritual and healing knowledge is also sacred knowledge. Parts of it, as related in the “stories,” *Hajine’ Bahane’*, or sacred scripture, cannot be related out loud at certain times of year, because ritual knowledge is power,<sup>175</sup> and it must be used in a proper way.<sup>176</sup> Ritual knowledge is also property,<sup>177</sup> and it normally cannot be shared without proper compensation.

Over my many years of studying different Indian cultures, I have learned that the fundamental problem is one of epistemology. Or, as Chief Justice Robert Yazzie (and others) put it, think of epistemology -the way we “see” and understand things or the way we “know” things- as a crystal. A rock crystal

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<sup>174</sup> *Id.* at 13.

<sup>175</sup> Navajos say -in English- that “knowledge is power.” We are talking about power in the sense of being able to invoke some very powerful forces, so care is required.

<sup>176</sup> A Cree friend once said that it is very dangerous for non-Indians to possess a medicine bundle (e.g. museums) because it is similar to a nuclear reactor, and can you imagine the result of a child having access to the controls of a reactor.

<sup>177</sup> BERARD HAILE, O.F.M., PROPERTY CONCEPTS OF THE NAVAJO INDIANS 29, 38 (1968).

has several different sides, and we can think of each side as an aspect of knowledge or a different way of knowing and seeing things. There is no one way of “knowing,” and complete knowledge is impossible unless you can see (and experience) all sides of the crystal. Navajo “crystal gazers” *can* see into the future, because they have the ability to see all sides or aspects of things.

Another paradigm is the Navajo basket. It is made with twelve layers of coils that radiate out from the center in a sun-wise direction; they follow the clockwise path of the sun.<sup>178</sup> Each layer represents a level or depth of knowledge, with the most surface or superficial level of knowledge at the rim of the basket, and the deepest or most esoteric level at the center.<sup>179</sup> Going clockwise from the rim to the center, each level along that path is a deeper level of knowledge and understanding.

Using that model, there are several ways to “know” traditional Navajo healing. One can know it in the way a medicine man or practitioner knows it, in the Navajo language and in the “Navajo way” of knowing. That would be several coils deep, in an area of esoteric knowledge most Navajos and we of western thinking do not or cannot attain.

We can, however, approach Navajo healing from a “synthetic” angle, abstracting elements of Navajo healing and its lessons to apply to a theory of Navajo therapeutic jurisprudence. We can respect Navajo sensitivities and fears and we will “get it wrong” by observing the most recent developments in a growing partnership between Navajos and non-Navajos who jointly try to learn things Navajo for a better understanding of that culture, and for contributions to western culture. Rather than attempt a description of sacred esoteric knowledge, which belongs in its own context, I will try to avoid the difficulties of cross-cultural understandings and of course avoid another Indian pet peeve, “New Age” enthusiasts who try to take Indian knowledge out of

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<sup>178</sup> MAUREEN TRUELLE SCHWARZ, *MOLDED IN THE IMAGE OF CHANGING WOMAN: NAVAJO VIEWS ON THE HUMAN BODY AND PERSONHOOD* 39 (1997).

<sup>179</sup> *Id.*

its proper context and misuse sacred knowledge and paraphernalia.

A theory of Navajo therapeutic jurisprudence builds upon the research reviewed above, and also upon a comprehensive approach to the study of Navajo healing, *The Navajo Healing Project*.<sup>180</sup>

It is a group of Navajo and non-Navajo researchers who are partnering with Navajo healers and patients to undertake a comprehensive study of Navajo healing.<sup>181</sup> There are four teams in the project, each with an ethnographer and interpreter, and the teams work in four regions of the Navajo Nation.<sup>182</sup> The project recruited traditional healers in each region through networks which are familiar to the interpreters, and contacts with the Dine' Spiritual and Cultural Association, the Native American Church of Navajoland, the Native American Church of North America, and the Navajo Christian community.<sup>183</sup> The teams combined an ethnographic approach with formal diagnostic interviews done by clinicians familiar with treating Navajos and interpreters trained in social work or mental health services.<sup>184</sup>

The project wanted to study interactions in three indigenous forms of religious healing, along with the "nature of the therapeutic process in each healing form."<sup>185</sup> Going to the forms of religious healing,<sup>186</sup> all three traditions have a shared criterion of success in healing, namely that a healer, in caring for a patient, "must talk to them so they understand."<sup>187</sup> The

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<sup>180</sup> See generally THEME ISSUE: RITUAL HEALING IN NAVAJO SOCIETY, 14 MED. ANTHROPOLOGY Q. (Thomas J. Csordas, Guest Editor, December 2000).

<sup>181</sup> Thomas J. Csordas, *The Navajo Healing Project*, 14 MED. ANTHROPOLOGY Q. 463 (2000).

<sup>182</sup> *Id.* at 467.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 471.

<sup>186</sup> Traditional Navajo practice, Native American Church, and charismatic Christian denominations.

<sup>187</sup> *Id.* at 471-72. I have often been admonished by Navajos, when preparing to speak to the Navajo Nation Council or a committee as a lawyer, that I must "talk to them so they understand." The admonition has always been



emphasis upon “talking” fits with Navajo conceptions of the preeminence of language and thought,<sup>188</sup> and the three healing traditions have distinct philosophies and therapeutic principles in their specific approaches to healing.<sup>189</sup> To address the nature of the therapeutic process in each form, the project sought to state the experiences of participants using a four-part model of therapeutic process “that specifies a person’s disposition toward his or her problem and its resolution, the person’s experience of the sacred within the healing process, the elaboration of alternatives with respect to emotion, thought, and behavior, and the actualization of change attributed to the healing process as it is integrated into the person’s life.”<sup>190</sup> The product was five studies of Navajo healing, including identity and healing in the three Navajo religious traditions,<sup>191</sup> a contemporary Navajo spiritual synthesis based on the life of one multicultural Navajo woman,<sup>192</sup> alcohol abuse “and the ethos of power” in Navajo healing,<sup>193</sup> the role of diagnosis in Navajo healing,<sup>194</sup> and

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mysterious to me (“What does that mean?”), and I attempted to respond by learning plain English speaking and writing. I have been accused of “dumbing down” Navajo philosophy or law in the process, but I call it communication and education.

<sup>188</sup> See GARY WITHERSPOON, *LANGUAGE AND ART IN THE NAVAJO UNIVERSE* (1977) (analyzing the Navajo language, which is a very sophisticated tongue).

<sup>189</sup> Csordas, *supra* note 181.

<sup>190</sup> *Id.* (citations omitted).

<sup>191</sup> Elizabeth L. Lewton & Victoria Bydone, *Identity and Healing in Three Navajo Religious Traditions: Sa'ah Naaghai Bik'eh Hozho*, 14 MED. ANTHROPOLOGY Q. 463 (2000). I do not have the proper font to properly write Navajo, so the sound prompts in the original text cannot be reproduced here.

<sup>192</sup> David H. Begay & Nancy C. Maryboy, *The Whole Universe is My Cathedral: A Contemporary Navajo Spiritual Synthesis*, 14 MED. ANTHROPOLOGY Q. 498 (2000).

<sup>193</sup> John F. Garrity, *Jesus, Peyote, and the Holy People: Alcohol Abuse and the Ethos of Power in Navajo Healing*, 14 MED. ANTHROPOLOGY Q. 521 (2000).

<sup>194</sup> Derek Milne & Wilson Howard, *Rethinking the Role of Diagnosis in Navajo Religious Healing*, 14 MED. ANTHROPOLOGY Q. 543 (2000).

depressive illness in Navajo healing.<sup>195</sup> Each subject will be treated separately here.

As a general matter, the Navajo Healing Project addresses the four components of the Navajo "health care system" - traditional Navajo healing, Navajo Christian healing, Navajo Native American Church healing, and western or biomedical healing.<sup>196</sup> There are three kinds of Navajo religious healing: First, that done by a *hatahli*<sup>197</sup> or "medicine man," using chants and sand paintings, or the work of a diagnostician, who uses hand-trembling, crystal-gazing, or coal gazing to diagnose illness.<sup>198</sup> That is "traditional" Navajo healing. The second religious school of Navajo healing is Native American Church ("NAC") healing, which is done by a road man, who performs prayers at an earthen altar or fireplace<sup>199</sup> and administers sacramental Peyote.<sup>200</sup> The third Navajo religious method of healing is Christian, primarily done by an independent Navajo Pentecostal preacher, who uses revival meetings and the laying on of hands, or Catholic Charismatic prayer groups, which integrate Navajo and Roman Catholic practices.<sup>201</sup> Unlike usual American religious practice, the boundaries between the three approaches are not fixed - Navajos recognize each as distinct religious traditions, but the boundaries between them are often ignored in everyday life.<sup>202</sup>

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<sup>195</sup> Michael Storck et al., *Depressive Illness and Navajo Healing*, 14 MED. ANTHROPOLOGY Q. 571 (2000).

<sup>196</sup> Csordas, *supra* note 181, at 464-65 (including an illustration of the four modalities).

<sup>197</sup> Again, a phonetic version of writing Navajo is used in place of the original for the lack of a proper font. There are many different methods of writing Navajo to attempt to capture its unique sounds, inflections, and accents.

<sup>198</sup> Csordas, *supra* note 181, at 464.

<sup>199</sup> This is not a "fireplace" in the usual English sense. It refers to an earth containment for a wood fire on a floor or on the ground.

<sup>200</sup> Csordas, *supra*, note 181, at 464. I capitalize the word "peyote" in keeping with NAC thought that it is holy and a spiritual being.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* I have known several individual Indians who do not feel restricted by "membership" in a given formal religion. They may practice the traditional

The three religious healing traditions use different philosophies and methods, and yet Navajos being Navajo, they pursue a common goal.<sup>203</sup> The emergence of the three traditions is prompted by Navajo history and the recent fragmentation of Navajo families because of many economic, social and health problems.<sup>204</sup> Another sign of rapid change in a little over a century of intensive Navajo contact with the American culture and government is the existence of cultural and linguistic gaps between generations,<sup>205</sup> where members of generations have difficulties communicating with each other. I have noted this in several Indian communities, where young people do not speak their native language or know their culture's traditions. Many young people want to learn, but there is a gap caused by older people who have been beaten into the "white way is the right way" thinking. They are ashamed of their culture, possess the traditional language and values, but deem their children or grandchildren unworthy of knowing them.<sup>206</sup> Thus, the three Navajo religious healing traditions have risen within a context of change, fragmentation, and cultural disconnection.<sup>207</sup>

One of the keys to approaching the three religious traditions is to examine processes of self-orientation, which means cultural themes of self, illness and healing.<sup>208</sup> Lewton and Bydone examined those processes using the Navajo synthetic principle of *sa'ah naaghai bik'eh hozho* ("SNBH"), which states that "the conditions for health and well-being are harmony within and connection to the physical/spiritual world."<sup>209</sup> They argue

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religion or approach to spirituality of their ancestors, belong to a Native American Church group, and practice or follow a Western Catholic or Protestant church. Would the members of the major American denominations have such tolerance and flexibility?

<sup>203</sup> Lewton & Bydone, *supra* note 191.

<sup>204</sup> *Id.* at 477.

<sup>205</sup> *Id.*

<sup>206</sup> As traditionalists have explained, one must be worthy of acquiring traditional knowledge by showing a sincere desire to learn it, and a commitment to the learning process.

<sup>207</sup> Lewton & Bydone, *supra* note 191, at 477.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 477-78.

that each religious tradition uses the Navajo principle of SNBH in its own context, and each teaches the importance of maintaining proper family relationships and knowing one's given spiritual and cultural history.<sup>210</sup> All three think that healing is an "affective engagement with other people and with the spiritual world through emotional expression and/or the use of kinship terms."<sup>211</sup> The given approach to SNBH in each healing tradition establishes and reinforces a sense of connection, which is integral to the therapeutic process.<sup>212</sup>

To define SNBH in practice, Lewton and Bydone sought "self-reflective commentaries on illness, health, and healing" from patients inside and outside the ritual context.<sup>213</sup> When they did that, themes of Navajo concepts of self and emotion, and their relevance to the therapeutic setting, began to emerge.<sup>214</sup> Studies of the constructions of self and identity have moved away from seeing "self" as an entity and move toward seeing the self as an orientational process.<sup>215</sup> Thus, "self" "is understood as a conjunction between culturally constituted milieu, situational specificity, and embodied experience."<sup>216</sup> Culture provides certain basic orientations that structure the behavioral environment of the self, and they provide a framework for location and action, an ability for moral appraisal, a sense of continuity, and patterns for relating to other beings in the environment - a "behavioral environment."<sup>217</sup>

As was outlined when discussing the concept of healing, above, illness and healing are a cultural construct. We must look at healing in context, and that context is how we view the various aspects of the life crisis. Unfortunately, the anthropological discourse seems as fuzzy and vague as the Jungian one, but I see these authors trying to tell us that healing has to do with the

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<sup>210</sup> *Id.* at 478.

<sup>211</sup> *Id.*

<sup>212</sup> Lewton & Bydone, *supra* note 191, at 478.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Lewton & Bydone, *supra* note 191, at 478-79.

individual's orientation -away from and then back to- the basic concepts of a given society. This will be important if we are to take anything from a Navajo therapeutic jurisprudence. If shame and the shame affect are the cause of violence, then we need to know that by which shame is measured. While we debate over the "sociopath," who is said to ignore or disregard the norms of society, those to whom we give that label obviously are reacting to the norms of society. Otherwise, they would not feel guilt or shame, and they would not react when inner shame is challenged or exposed. Therefore, we need to look at basic constructs in our thinking to see where people get off the path and how they can be led back again to willing compliance with those constructs.

The fundamental Navajo construct is SNBH, which is the key concept of Navajo philosophy and something we need to know to understand the whole of Navajo thinking.<sup>218</sup> There are different linguistic translations: "according to the ideal may restoration be achieved;" "in old age walking the trail of beauty;" and "long life and happiness."<sup>219</sup> These translations are abstractions and Lewton and Bydone sought to look at SNBH as a cultural principle through the experience of it and its expression among Navajos.<sup>220</sup>

Many tourists to the Southwest have seen SNBH in commercial tourist sandpaintings and not recognized it as a keystone of Navajo philosophy. It is most often represented in a sandpainting of two animal-like figures who are known popularly as "Mother Earth" and "Father Sky."<sup>221</sup> "Mother Earth" is represented as a being with a globe-circle core in Her center, from which radiate (in the four sacred directions) essential plants, including corn, sage, squash, and "tobacco."<sup>222</sup> "Father Sky" is

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<sup>218</sup> *Id.* at 479.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> As I write, I have in front of me an illustration of SNBH in graphic form, available at <http://www.geocities.com/wbegody1/> (last visited October 24, 2002).

<sup>222</sup> This can be tobacco in the sense it is generally known, which is a plant used by Indians for ceremonial purposes, or other plants used for the ceremonial smoking purposes. It is unfortunate that Indian gifts, such as

also an animal figure, with the Sun and Moon in His middle, and stars around the main trunk of His body. He also has the symbol for zigzag lightning across the arms and chest, an elemental force which can be seen frequently in Navajoland during the thunderstorm season. Most illustrations of the two show the male "Father Sky" figure with both His arm and leg over the arm and leg of the female "Mother Earth" figure. Given that Navajo sandpainting symbols are sacred, one way to take away the "sacred" for secular use is to slightly misrepresent an actual sand painting when it is drawn again. The correct representation is one having an arm over the other's arm, and a leg beneath the other's leg. In one illustration, Father Sky has his right arm over Mother Earth's left arm, and Mother Earth has her left leg over Father Sky's right leg. Mother Earth appears on her own right. My understanding of SNBH, as shown in this kind of illustration, is that all reality is divided into female and male aspects. The female aspect is on one's right, and the male aspect is one's left. The female characteristic has to do with the earth and all it has, hence "Mother Earth." She nourishes and sustains us and She is a nurturing Being. Father Sky has the mysterious elements of worlds beyond us, including The Sun (a male Being), the Moon (a male grandfather), and the stars. Father Sky has powerful (and feared) zigzag lightning, which is a force of Itself. Male and female, earth and sky, and all the elements are interrelated and interdependent. They depend upon each other and cannot exist without each other. One cannot have its own being and essence without the existence of the other.

Returning to Lewton and Bydone's explanation of SNBH, they say that the idea that health and well-being are associated with balance or harmony between the individual and his or her environment is common among many American Indians.<sup>223</sup> In

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tobacco and certain medicinal drugs, have become vices and a plague, given misuse by their recipients. See JACK WEATHERFORD, *INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD* 197 (1988) ("the drug connection").

<sup>223</sup> Lewton & Bydone, *supra*, note 191, at 479. They use the term "Native American," which is generally accepted among academics and educated Indians, while I use the term "Indian." I do so because I use the name I hear

the Navajo conception, SNBH “encompasses complex ideas about the spatiotemporal environment, spiritual beings, and people’s relationships with these elements. Harmony and balance requires the establishment and maintenance of proper relationships guided by principles such as respect, reverence, kindness, and cooperation.”<sup>224</sup> When looking at “self,” that self is oriented within that environment and guided by those values.<sup>225</sup> Thus, a correct orientation with those elements is a “kind of” precondition for receiving what is good in life, and that is the basis for healing and well being.<sup>226</sup> As vague as the terms “harmony” and “order” may seem to the western mind, they can be achieved by “an emphasis on relatedness.”<sup>227</sup> That is defined in Navajo kinship concepts.

Generally speaking, Navajo kinship is matrilineal, where an individual is “of” his or her mother’s clan, “born for” the father’s, and one’s lineage is also traced through the clans of the person’s maternal grandmothers on either side. Given that kinship structure (which can vary among groups, including the basic western model of the nuclear family, with kinship established by blood lines through both parents), the question is how its units relate to each other. Navajo kinship relations operate using the principle of *k’e*, which refers to “‘affective action and solidarity, encompassing such elements as love, compassion, kindness, friendliness, generosity, and peacefulness.’”<sup>228</sup>

I will take the reader on another little side trip here, because *k’e* is such an important concept. It is difficult to translate. First, it is “affective” or emotional. In that, it is not simply a state of mind, but a habit. It is an almost instinctual way of reacting in relationships which are developed through conditioning and acculturation. This would be a positive script in

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people calling themselves; aside from their self-identification with a given tribal group.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Lewton & Bydone, *supra* note 191, at 479-80.

Nathanson's model, where individuals are conditioned to react in moderate ways in the compass of shame. Rather than behave in an intense and violent or self-destructive manner within that compass, individuals with the proper affective scripts will react in other ways. Affect is connected to solidarity, which is a sense of belonging to a group and reacting with that group. One's rights and privileges are defined by the relationship with the group. The general American-European response to the group is one of individualism, where the thrust is demands for freedom *from* the group; defined as the modern state. In contrast, Navajo individualism (which can be said to be more prone to concepts of liberty and freedom than western thought) is exercised in the context of the group, so that freedom is not the lodestar. It is, as Justice Raymond D. Austin of the Navajo Nation Supreme Court has so often said, "Freedom with responsibility." The affective inner sense of solidarity, which is a Nathanson-script, is expressed in the emotions we know as love, compassion, kindness, friendliness, generosity, and peacefulness. That is important, because if one of the goals of restorative justice and therapeutic jurisprudence is affect modulation for more positive scripts, or habits, then we need to focus upon notions of affective solidarity with society and the habitual exercise of positive emotions. The Navajo lesson for this is that Navajos have a worldview and philosophy which is precisely designed to prompt and nurture those positive emotional scripts. At times, it might seem that Navajos have lost their traditional outlook, and that is reflected in the description of crime and violence outlined above. However, Lewton and Bydone have seen the SNBH principle in patients in traditional, NAC and Christian healing, which means that it is an achievable goal.

The maintenance and restoration of relationships requires affective (emotional) action, as outlined in the *k'e* concept.<sup>229</sup> Thus, SNBH is not simply an abstract idea but "a principle that is encoded and transmitted in ways of speaking and behaving," and a key to healing is recognizing the disruption and restoration of

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<sup>229</sup> *Id.* at 480.



relationships as an aspect of distress and healing.<sup>230</sup> The loss of a relationship or distancing from it is illness, and restoration is a form of healing.

Traditional Navajo religion is ancient, and it consists of specific diagnostic, curative, and restorative practices which are implemented by gifted or trained specialists.<sup>231</sup> There are dozens of ceremonies, from short hour-long prayers to nine-night chants or "sings," and involve praying and singing, herbal medicines (including emetics), bathing with yucca soap, sandpainting, consecration of a hogan,<sup>232</sup> and the offering of corn pollen.<sup>233</sup>

Navajo concepts of well being, and thus of illness, are connected with the idea of having relatives. "Disrupted or disoriented relationships, particularly within one's family, are often a central component of distress."<sup>234</sup> Traditional Navajo healers know something is wrong when patients say, "I have no relatives" or "I don't know who my relatives are."<sup>235</sup> Navajo healing involves the patient's relatives, who most often make the arrangements for the healing ceremony, and who attend it. "The prayers and support of the family are central in the efficacy of the ceremony, and all participants are thought to benefit from the involvement of kin."<sup>236</sup>

Another important aspect of traditional Navajo ceremonial healing is connecting the patient with the past, and with the history and origins of the Navajo people.<sup>237</sup> The basis of Navajo healing ceremonies is various parts of *Hajine' Bahane'*, the creation and journey narrative, where individuals are ceremonially transported into events of the past to experience them. That is something like putting a patient into a time

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<sup>230</sup> *Id.* at 481.

<sup>231</sup> *Id.*

<sup>232</sup> A hogan (ho-WAN) is a multi-sided structure, usually made of log, which was previously the primary architectural form for a home, but today, it is usually used as a ceremonial structure.

<sup>233</sup> Lewton & Bydone, *supra* note 191, at 481.

<sup>234</sup> *Id.* at 482.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 482-83.

<sup>237</sup> *Id.* at 483.

machine, where that person becomes a part of the divine narrative, experiences the formative events of the world, and interacts with the spirit beings, life forces, monsters, heroes, and people of the past.<sup>238</sup> “Patients often describe the most meaningful or significant aspect of the ceremony as the part wherein the patient is systematically associated with supernatural beings.”<sup>239</sup> They are also “relatives.” The lesson for patients in this process is: “you have relatives out there.”<sup>240</sup>

Another aspect of the behavioral environment is geography, because the creation accounts happened where Navajos still live.<sup>241</sup> The healing ceremonies reconnect the patient with his or her traditional homeland, thus reinforcing the concept of solidarity for healing.<sup>242</sup>

The Native American Church is a (comparatively modern) pan-tribal religion, which has ceremonies where participants ingest the Peyote cactus.<sup>243</sup> The ceremonies are conducted at meetings to address a particular illness or problem, or to restore or maintain health.<sup>244</sup> They last from sundown to sunup,<sup>245</sup> and are often held on three-day weekends following or preceding a national holiday. They are usually held in a tipi or a Navajo hogan.<sup>246</sup> A roadman presides over the ceremony, and uses spontaneous prayers and discourse to lead it.<sup>247</sup>

NAC healing ceremonies also rely upon identity, as with traditional Navajo ceremonies, but participants identify

<sup>238</sup> This is based upon discussions with Philmer Bluehouse of the Dine' Medicine Man's Association. See also Lewton & Bydone, *supra* note 191, at 483-84.

<sup>239</sup> *Id.* at 483.

<sup>240</sup> *Id.* at 484.

<sup>241</sup> *Id.*; see also Griffin-Pierce, *supra* note 164 (study of geography and well being).

<sup>242</sup> See Lewton & Bydone, *supra* note 191, at 484.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* While the tipi is a northern plains structure and not part of Navajo tradition, you can usually tell when a NAC ceremony is to be held by the presence of a tipi in the Navajo landscape.

<sup>247</sup> Lewton & Bydone, *supra* note 191, at 484.

themselves not just as Navajos, but as members of a pan-tribal movement which is loosely organized and stresses the common bond of all Indians rather than cultural differences.<sup>248</sup> The NAC is a “‘religion of the oppressed’” which serves the needs of Indians who live under “‘conditions of domination, expropriation, exploitation, and dole.’”<sup>249</sup> The NAC stresses a sense of intertribal community and a sense of broader community in its ceremonies.<sup>250</sup>

Ceremonial Peyote is a means of direct communication with God, and it is “a power in its own right, and a cure of unique potency for spiritual and physical disease.”<sup>251</sup> The atmosphere of the ceremony supports patients in fellowship and forgiveness, and the ceremony is spontaneous, with emotional prayers and even crying.<sup>252</sup> Participants often use kinship terms to refer to God, and in the Navajo context that shows the use of SNBH.<sup>253</sup> The ceremonies give participants a sense of context and belonging through origin stories, history, and teachings, and Peyote helps patients get insight into their distress as they relate their problems.<sup>254</sup> The NAC stresses good family relations, and proper relations are a condition of well-being.<sup>255</sup>

Pentecostal Christianity is relatively recent in the Navajo Nation, and the first widespread expansion of it happened in the 1950s through camp meetings held by traveling evangelists.<sup>256</sup> Today, there are many independent Pentecostal churches, with Navajo pastors, which are located in remote areas of the Navajo Nation and attended by rural Navajos.<sup>257</sup> Pentecostal Christianity

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<sup>248</sup> *Id.* at 485.

<sup>249</sup> *Id.* (quoting David F. Aberle’s comprehensive studies of the Native American Church).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 486.

<sup>252</sup> Lewton & Bydone, *supra* note 191, at 486. This is also common in sweat lodge ceremonies, a Plains Indian tradition that is also a pan-Indian healing ceremony.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 487.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 488.

<sup>257</sup> Lewton & Bydone, *supra* note 191, at 488.

responds to language loss and the persecution of Navajo speakers in boarding school to destroy the “native” in Indians, and Navajos who become Pentecostals are required to dispose of their traditional Navajo or Native American Church paraphernalia.<sup>258</sup> The Pentecostal theme is that the Christian God is more powerful than traditional or Native American Church spiritual beings - the Christian God is transcendent and not restricted to a particular geographic location, but provides protection everywhere (not just within the Navajo Four Sacred Mountains).<sup>259</sup> According to Pentecostals, it is beneficial to send one’s children to a distant mission school, even out of state, and members can get a job in any part of the country.<sup>260</sup>

Services are held in a variety of settings, including churches, homes, camps and tents.<sup>261</sup> They include singing, Bible reading, the giving of testimony, and saying healing prayers.<sup>262</sup> A minister or evangelist may identify or heal an adherent’s problems using “discernment,” the laying on of hands, anointment with oil, reading from the Bible, or offering counsel. Often, other members of the congregation participate in the healing prayers, because prayer from the congregation is preferable to prayer by the minister.<sup>263</sup> Services do not follow a prescribed ritual, and they are marked by the spontaneity of divinely inspired prayer.<sup>264</sup>

Pentecostals believe that God uses fellow Christians “as vessels through which to heal,” and that shows the Christian manifestation of SNBH.<sup>265</sup> Fellowship is central, and its opposite leads to sickness: “‘Fear, along with bitterness and jealousy, can cause a lot of negative feelings, family conflicts, sickness, and

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* Just as NAC tipis are a common sight along the Navajo Nation’s roads and highways, there are frequent camp meetings during summers, with signs along the road indicating when a meeting will be held.

<sup>262</sup> Lewton & Bydone, *supra* note 191, at 488.

<sup>263</sup> *Id.* at 489.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

hurt. This lack of fellowship is the opposite of the Christian way.”<sup>266</sup> Christian living also requires proper relations - with God and with fellow Christians.<sup>267</sup>

While traditional Navajo healing processes rely upon family, and Native American Church ceremonies stress both family and pan-Indianism, the Pentecostal churches recognize that Navajos may be physically or emotionally separated from their families.<sup>268</sup> Adherents get a “new family” - a “Christian family” - to take care of such losses.<sup>269</sup> It offers cooperation, support, and fellowship.<sup>270</sup> The Pentecostal faith stresses confession and forgiveness (as does the NAC), and there is a Christian emphasis on adopting a new, Christian, identity through being “born again.”<sup>271</sup>

One interesting contrast with general American religious practice is the fact that Navajo Pentecostal Christianity is not homogenous, and while some Navajo Christians “adopt entirely new identities,” many do not reject traditional culture, and they are less exclusionary in approaches to the other religions.<sup>272</sup> Navajo Pentecostal Christianity also uses kinship terms to relate to God and His Children.<sup>273</sup>

The three traditions share many of the same elements, expressed by the Navajo concept of SNBH or relationships, and

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<sup>266</sup> *Id.* (quoting an individual Navajo). Jealousy is an often-discussed problem among Navajos, and while it is common, Navajo tradition defines *hozho* partly by reference to jealousy as a *nayee* or monster.

<sup>267</sup> Lewton & Bydone, *supra* note 191, at 489.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 490.

<sup>272</sup> Lewton & Bydone, *supra* note 191, at 491. This is difficult to assess. The current president of the Navajo Nation, Kelsey Begaye, for example, is a fundamentalist Christian by his own admission. However, he speaks to Navajo tradition and supports tradition-based governmental policies. There are some conflicts raised by fundamentalist Christians in Navajo peacemaking, which is largely based upon Navajo oral traditions, and the response is that a Christian minister can also be a Navajo peacemaker, using Christian peacemaking traditions.

<sup>273</sup> *Id.*

the three have orientations and ways of relating.<sup>274</sup> The phrases “I have no relatives” (as illness) and the Navajo phrase, “walk in beauty,” resonate with all three.<sup>275</sup> Identity is a central component to healing as all three traditions strive to “walk in beauty.”<sup>276</sup>

David H. Begay and Nancy C. Maryboy, Navajos of the Dine’ College in Tsaile, Navajo Nation (Arizona), address the three major spiritual healing ways using Navajo discourse and examine them in a case study of a Navajo woman with a non-Navajo Indian mother (Mississippi Choctaw), who became a Catholic nun and yet followed traditional Navajo healing traditions and Native American Church ways, in addition to adherence to the Catholic faith.<sup>277</sup>

Begay and Maryboy intentionally utilized a Navajo methodology in their approach, using the Navajo cosmology of the Four Sacred directions. They applied two aspects of the Navajo paradigm, namely the four stages of life (birth, adolescence, middle age and old age)<sup>278</sup> and the Four Directions. They traced the life of Sister Grace, or *Asdzaan Jobaa’ii* (“Woman of Compassion”), through her life stages, using the paradigm to assign each of Sister Grace’s healing ways to the Directions.

Sister Grace drew strength from the traditions in her life. Although she was educated as a Catholic nun, she learned she could return to the Native American tradition, which is in the East.<sup>279</sup> While Navajos are matrilineal, Sister Grace took more from her Navajo paternal side,<sup>280</sup> and participated in Navajo

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<sup>274</sup> *Id.* at 492.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Begay & Maryboy, *supra* note 192. I believe that the anonymous subject was most likely Sister Gloria Davis, who passed into the spirit world recently. Sister Gloria believed that there is no conflict between Catholic teachings and traditional Navajo spirituality, and I am sorry that I (as a Catholic) was unable to meet with her to discuss her views before her passing.

<sup>278</sup> *Id.* at 500.

<sup>279</sup> *Id.* at 507.

<sup>280</sup> *Id.*

healing ceremonies upon her return to the Navajo Nation after many years of study elsewhere. She also used a Catholic healing perspective, represented as the South in the model.<sup>281</sup> Both traditional Navajo belief and that of the Catholic Church stress fear -yii yaa! in Navajo- but Sister Grace learned the loving ways of the Catholic tradition, as taught by Pope John XXIII and (more progressive) elements of the modern Catholic Church.<sup>282</sup> She also turned to the Native American Church, the West in the model.<sup>283</sup> Its diagnostic methods helped her reconcile yii yaa! in Navajo belief, and united her with her Choctaw past, through divination.<sup>284</sup> When confronted with the apparent conflict between Catholicism and participation in Native American Church ceremonies, she replied, "NAC is not a church." "It is a spiritual way of life. There is no set doctrine." "It is very broad based and can be used for any purpose. It is conducted through prayer and through use of peyote." "All our Native American ceremonies are for healing." "Prayers are directed straight to God."<sup>285</sup> Finally, Sister Grace turned to the medical interpretation as the North direction of the model.<sup>286</sup> She received western therapy, and through it she was able to reconcile the seeming contradictions of her vocation, her past, and her adherence to many beliefs. As one of her psychiatrists put it, her recovery was "most related to a reassessment and reintegration of her sense of who she is in the world."<sup>287</sup>

The authors conclude that Sister Grace was born into a spiritual and psychological synthesis, with three healing traditions.<sup>288</sup> She was able to reconcile and synthesize her background through different religious and healing traditions to achieve a sense of self-identity. The lesson of this study is that not only is identity important for healing, but one's identity

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<sup>281</sup> *Id.* at 510.

<sup>282</sup> Begay & Maryboy, *supra* note 192, at 511-12.

<sup>283</sup> *Id.* at 512.

<sup>284</sup> *Id.* at 513-14.

<sup>285</sup> *Id.* at 512-13 (quotations in the original) (citation omitted).

<sup>286</sup> *Id.* at 514.

<sup>287</sup> Begay & Maryboy, *supra* note 192, at 515.

<sup>288</sup> *Id.*

should be honest and fit who one really is. Sister Grace explained that while the Catholic Church is an institution, which she loyally followed as a nun, the indigenous healing traditions are not institutions—they are spiritual ways of life. One of the dilemmas of western therapeutic jurisprudence is precisely the role of spirituality in healing. We usually think of “spirituality” in the western sense of exclusive adherence to a church, faith or sect, and mandatory separation of church and state in government programs makes it difficult -if not impossible- to require or even to offer the spiritual and religious components of healing to “clients.” Sister Grace teaches us that such is possible as individuals, and that we can indeed reconcile centuries of religious conflicts and cultural mixes in a personal quest for spirituality and healing.

John F. Garrity addresses a prominent Navajo problem, alcohol and drug dependence, within the framework of “power;” particularly the new “power” offered by the Native American Church and Pentecostal Christianity in Navajoland.<sup>289</sup> The Native American Church and Navajo Pentecostal churches are more actively involved in the treatment of alcohol and substance abuse than the Navajo tradition, and that is partly due to the fact that the NAC and Pentecostalism are revitalizational and millenarian in their origins.<sup>290</sup> Modern Indian religions and social movements are generally revitalizational, nativistic, and crisis oriented.<sup>291</sup> Social suffering leads to discourses of healing.<sup>292</sup>

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<sup>289</sup> Garrity, *supra* note 193.

<sup>290</sup> *Id.* at 521.

<sup>291</sup> *Id.* See the main text for references to the literature. “Revitalization” refers to the situation of a distinct group of people who are under pressure from another society who turn to traditional ways to solve their problems rather than accept the dominant society’s methods. “Nativism” is a related phenomenon, where a group under pressure actively rejects the dominant group’s ways, sometimes violently. Crisis orientation comes precisely from the state of crisis caused by domination by a majority group, and it can be said that such is the history of Navajos and the reason they *are* Navajos (given conflicts with Pueblos, Apaches, Utes, the Spanish, Mexicans and *Bilagaanaas* or Americans).

<sup>292</sup> *Id.* at 522.



Navajo society is responding to three distinct crises of history: Confinement at a concentration camp at Bosque Redondo in eastern New Mexico Territory in the 1860s, livestock reduction and the destruction of the traditional Navajo grazing economy, and the most recent crisis - widespread alcohol and substance abuse.<sup>293</sup> These crises, and particularly the last, contribute to the rise in the Native American Church and Pentecostal Christianity.<sup>294</sup> Another contributing factor is changes in the Navajo economy and society caused by the transition from a pastoral society to a wage-labor economy.<sup>295</sup> Modern developments have disrupted traditional kinship methods, patterns of wealth, and living patterns, and decreased Navajo participation in traditional religious ceremonies.<sup>296</sup>

That relates to patterns of Navajo alcohol consumption and abuse. Navajos generally agree that alcohol use has disrupted kinship networks and patterns of wealth (although there may be a change in attitudes toward alcohol as a source of prestige, from something that gives status to an evil).<sup>297</sup> There have been decreases in the utilization of traditional Navajo ceremonies, and also a decline in the Navajo language.<sup>298</sup> Although there are serious concerns about tradition, language and cultural loss, the actual situation may be one of cultural change rather than cultural loss.<sup>299</sup>

One of the problems with alcohol and substance abuse is that there is no traditional Navajo healing ceremony for that kind of problem.<sup>300</sup> While Navajos with alcohol and substance abuse afflictions suffer depression and anxiety, they often express their

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<sup>293</sup> *Id.* at 523.

<sup>294</sup> Garrity, *supra* note 193, at 523.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 523-24.

<sup>298</sup> *Id.* at 524.

<sup>299</sup> Garrity, *supra* note 193, at 524.

<sup>300</sup> *Id.* But see Frances N. Ferguson, *Participation in Traditional Ceremonies by Navajos With Drinking Problems*, in *NAVAJO RELIGION AND CULTURE: SELECTED VIEWS* 157, 162 (1982) (pointing out that Navajos with drinking problems frequently utilize the Blessingway Ceremony to "straighten out their lives").

situation as being “out of control” or “controlled by something.”<sup>301</sup> Many Navajos have not been able to turn to their traditional healing means of relief because of a decline in ceremonies, and some Navajos do not get much out of traditional ceremonies because of language loss and associated communication and understanding problems.<sup>302</sup>

That contributes to the appeal of the Native American Church and Pentecostal Christianity. Their methods seem to have greater efficacy because they synthesize cultural, linguistic, symbolic, ritual and social elements from traditional orientation and adapt them to the contemporary Navajo social milieu.<sup>303</sup> The Native American Church is innovative. It is a recently introduced belief system, which has adapted itself from original Christian-syncretic origins to a faith that has incorporated many elements of Navajo belief and practice.<sup>304</sup> In sum, the NAC has found a therapeutic niche in addressing alcohol and substance abuse.<sup>305</sup>

The Pentecostal Christian movement “explicitly” engages alcohol and substance abuse problems, substituting Christian Scripture for traditional origin accounts.<sup>306</sup> The movement has been successful, in contrast to other Christian denominations, because of a practice of actively recruiting Navajo ministers.<sup>307</sup> The sect has grown to the extent that it is now a bona fide Navajo religious tradition of its own.<sup>308</sup> It stresses the preeminence of home and family, and to that extent, it addresses a sense of loss.<sup>309</sup> Given the dissolution and fragmentation of Navajo family and clan systems, Pentecostal Christianity provides new communities, new moralities, new forms of power, and new

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<sup>301</sup> Garrity, *supra* note 193, at 525.

<sup>302</sup> *Id.* at 526-27.

<sup>303</sup> *Id.* at 527.

<sup>304</sup> *See id.*

<sup>305</sup> *Id.* at 528.

<sup>306</sup> Garrity, *supra* note 193, at 528.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 529.

<sup>309</sup> *Id.*

forms of control as therapies, in contrast to “the absence of a sense of community.”<sup>310</sup>

The Native American Church has a “power”-based message of hope, transformation, and a sense of “power” over alcohol.<sup>311</sup> Peyote, used as a sacrament, gives an opportunity for self-understanding through ritualized introspection and self-examination.<sup>312</sup> The NAC incorporates power into its ideology and stresses “the peyote road,” which requires abstinence from alcohol and drugs, self-reliance, and devotion to one’s family.<sup>313</sup> Ceremonies use counsel and prayers by the road man and his wife [*sic.* - women can be road men] and the members present, and a discussion of the patients’ problem, often in the form of confession.<sup>314</sup>

Power is highly elaborated in Pentecostal Christian healing, and it is popular because it “explicitly” engages drug and alcohol abuse.<sup>315</sup> People choose Christianity because of the kind of power it offers.<sup>316</sup> Its discourse is a “conversional” one,

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<sup>310</sup> *Id.*

<sup>311</sup> Garrity, *supra* note 193, at 529.

<sup>312</sup> *Id.* Peyote is very controversial. It was illegal in the Navajo Nation until fairly recent times, and now one of the political issues (given estimates that a majority of Navajos follow or practice the “Peyote Way”) is legal adherence to internal NAC discipline. The NAC in its many forms and organizations nationally is one of the most widely-persecuted religions in the United States. Many alcohol counselors, who advocate abstinence from all chemical substances, are horrified at the idea that one can use Peyote to escape alcohol. They see it as a controlled substance which it is under federal and state law rather than a Sacrament with healing powers.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 530. One of the problems with utilizing traditional Indian methods is that they often do not translate well into the state system, e.g. confession. While we might prize confession as a healing tool in courts, there are distinct dangers in using it. See Robert N. Strassfeld, *Robert McNamara and the Art and Law of Confession: A Simple Desultory Phillippic (Or How I Was Robert McNamara’d Into Submission)*, 47 DUKE L.J. 491 (1997). I have written a similar disenchantment piece about drug courts in *Drug Court and the Dark Side of the Force* (unpublished manuscript 1999) (on file with author) (comparing an observed drug court session to Communist Chinese brainwashing).

<sup>315</sup> Garrity, *supra* note 193, at 531.

<sup>316</sup> *Id.* at 532.

because it offers a new lifestyle following a highly emotional and transformative event, i.e. being born again.<sup>317</sup> It offers alcohol and drug-dependent Navajos a moral identity and a new social network, where those things had been previously missing.<sup>318</sup>

The problem is that while the NAC and Pentecostal healing traditions offer “power” (over alcohol or drugs) as a central part of their healing discourse, we don’t quite know what “power” means in the Navajo way.<sup>319</sup> It appears that control is the pivotal nature of power, and “sin” for Navajos means “lacking control.”<sup>320</sup> The rise of the NAC and Pentecostalism is based upon the power they provide, and they address the problem of fragmentation of Navajo society.<sup>321</sup> Power is an important Navajo concept, and means of control through power is part of the traditional, Native American Church and Christian Pentecostal traditions.<sup>322</sup>

I will offer some of my own views about “power,” because I have often encountered the concept while talking with Indians. Again, many Indian cultures are animist, with the belief that we are not alone (as humans) and that there is an interdependence with the animal, mineral, vegetable and Spirit worlds. Navajos place a high value on order and things being in their proper place, because life is very dangerous indeed. Right living is not a matter of choosing good over evil, as in the western conceptualization of the way to the afterlife, but the choice of a mid-path between good and evil. Too much “good” is excess, as is too much “evil.” Excess leads to illness by getting off the path. There is a “main stalk” between good and evil, using a stalk of corn as a metaphor, with the middle path being in the center of the stalk. To achieve that state of balance in a mid-point between extremes one requires “power.” That means self-control and “power” over one’s self in a secular

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 533.

<sup>319</sup> *See id.* at 538 n.9, for linguistic discussions of the meaning of “power” in Navajo.

<sup>320</sup> Garrity, *supra* note 193, at 535.

<sup>321</sup> *Id.* at 535-36.

<sup>322</sup> *Id.* at 536.

sense, but “power” is also achieved through prayer and communicating with spirit beings or spirit helpers.<sup>323</sup> Given that they are part of the cosmos, their aid can be enlisted or compelled through prayer. That assistance gives one “power” over self and the environment, and the ability to live in the good way.<sup>324</sup>

While we know that there are both Navajo diagnosticians and medicine men, the emphasis thus far has been on healing ceremonies, with little discussion of diagnosis. Derek Milne and Wilson Howard fill that void in their description of Navajo diagnosis methods.<sup>325</sup> Diagnosis, in the Navajo way, is a patient-centered process.<sup>326</sup> It gives meaning to illness through narrative.<sup>327</sup> It is a healing process that works because a patient is allowed to give meaning to an illness through narrative in a social context.<sup>328</sup> In other words, healing comes from the opportunity for the patient to talk about and talk out the illness.

Diagnosis is essential in most healing systems, and Navajo religion centers on healing and emphasizes the importance of causal origins of a disease. In Navajo medicine, diseases are referred to by their causal agents.<sup>329</sup> A diagnostician is consulted to ascertain the origin of a malady, because if it is not known, the illness cannot be properly treated.<sup>330</sup> In Navajo thinking, illness is caused by exposure to things that can cause “infection,” and “contamination” is also used (to refer to contact with the powerful forces that can cause illness).<sup>331</sup> Once diagnosed, the patient can go to a healer or medicine man for a ceremony to

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<sup>323</sup> To the majority of the Indians, there is no satisfactory term in English to describe what the supernaturals or natural spirit forces are or to name them properly.

<sup>324</sup> See, GLADYS A. REICHARD, *PRAYER: THE COMPULSIVE WORD* (1944). Charlie Top Sky, a Cree elder, used to tell me “Always do things in the *good* way.” I had difficulty understanding what he meant when using my rational side. It is understandable in an intuitive way.

<sup>325</sup> Milne & Howard, *supra* note 194.

<sup>326</sup> *Id.* at 543.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 545.

<sup>330</sup> Milne & Howard, *supra* note 194, at 545.

<sup>331</sup> *Id.*

effect a cure.<sup>332</sup> Ceremonies can address specific illness and life problems; they can be prophylactic; they may be intended to ameliorate the cause of suffering; or they can be used to enhance health, the quality of social relationships, or produce financial well being.<sup>333</sup>

The Holy People (*Diyin Dine'e*) are manifestations of natural elements (e.g. wind, water, or lightning), powerful animals (e.g. Bear, Eagle, or Snake), and figures or beings from the "Navajo origin story cycle."<sup>334</sup> They are sacred, but the Holy People can cause illness in humans.<sup>335</sup> Ceremonies address the illness caused by contacts with Them by invoking Them.<sup>336</sup> The divination rite is designed to elicit the cause(s) of illness for proper ceremonial treatment related to those causes.<sup>337</sup> Traditionally, there are three methods of divination: stargazing (looking at the stars through a crystal), listening (a diagnosis based on hearing pertinent information), and hand trembling, the most frequently used method.<sup>338</sup> Hand trembling involves a trance state and it is a remnant of the hunter-gatherer shamanic tradition.<sup>339</sup>

There are also Native American Church methods of diagnosis, which see "self as perceptible object" and seek very specific information about the nature of an illness (in contrast to hand trembling, which may elicit only very general information).<sup>340</sup> There is a NAC form of divination, "coal

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<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 546.

<sup>335</sup> Milne & Howard, *supra* note 194, at 546. There is no element of intent by the Holy People in this. That is, they are very powerful, and they do not necessarily intend to cause harm to humans, the Five-Fingered People. You do not attract the attention of a powerful being, because of the harm he, she, or it can do. That is why "contamination" is an appropriate term in English.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 548.

<sup>339</sup> *Id.* at 547-48. In contrast, Navajo healing ceremonies do not involve a trance state, and they are not "shamanic." It is incorrect to refer to Navajo medicine men as "shamans."

<sup>340</sup> Milne & Howard, *supra* note 194, at 548, 551.

gazing,” where the diagnostician uses coal embers to divine the cause of illness.<sup>341</sup> Native American Church diagnosis methods are similar to, yet distinct from, traditional Navajo approaches. That is, Native American Church doctrine attributes illness and misfortune to individual behavior, and places more emphasis upon morality and personal responsibility.<sup>342</sup>

Milne and Howard and their associates conducted a case study of a Navajo healer (who followed the NAC way while identifying herself as a Navajo traditionalist).<sup>343</sup> She saw personal misbehavior as the cause of illness, and stressed the importance of confession for diagnosis.<sup>344</sup> The NAC puts more emphasis on confession, in keeping with its person-centered philosophy, and confession can be difficult for Navajos.<sup>345</sup> While confession is generally an aboriginal psychiatric technique,<sup>346</sup> its use or intensity varies among belief systems. Intention is also a critical factor in NAC diagnosis, probing the intention of the patient in doing a certain act to find the cause of illness.<sup>347</sup>

While the diagnostician stressed the importance of and need for confession in her view of the process, the particular patient put it in different terms - “telling my story.”<sup>348</sup> “Confession” is an English term which carries severe connotations in many Christian traditions, and I think that the patient’s way of putting it better emphasizes the narrative nature of healing. Some patients may see their fault (and thus their ailment) in a guilt-laden way. It is easier to tell one’s story than

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<sup>341</sup> *Id.* When I worked with the Navajo Housing Authority, I handled a dispute with the U.S. Department of Housing and Urban Development over having both central heating and wood stoves in Navajo homes. HUD disallowed the stoves as a cost consideration, and despite the fact that the HUD regulations of the time would have allowed the stoves as an option, it took a religious freedom claim to get them. I did not mention why Navajos wanted wood stoves, but I knew the reason.

<sup>342</sup> *Id.* at 552.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Milne & Howard, *supra* note 194, at 557.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 558.

<sup>348</sup> *Id.* at 559.

“confess,” a process that attributes moral fault, and something we do not readily do. One must first tell the story, and then accept its implications in further discussion.

Milne and Howard conclude that diagnosis is both active and collaborative, where the illness is put in a social context, with feedback and collective input.<sup>349</sup> Native American Church diagnosis stresses social misbehavior, but it does so observing the Navajo ideal of social autonomy,<sup>350</sup> and respect for the individual.<sup>351</sup> The act of understanding the nature of and narrating one’s illness impacts health, and suggests the potential for language in healing.<sup>352</sup> It is more than a ritual - it is the means by which an individual can come to terms with illness using Navajo cultural boundaries.<sup>353</sup> Milne and Howard show us how the process involves and engages the individual so that he or she can “own” the illness and deal with it in a meaningful way through narrative, venting, and interaction with a diagnostician to handle the ailment by “naming” it.<sup>354</sup>

The last study of the Navajo Healing Project addresses a problem that is a central, yet difficult, for therapeutic jurisprudence - depressive illness.<sup>355</sup> A great deal of the article is about discussions of depression in western psychiatric literature, the validity of western, “non-etilogic” diagnosis methods, and

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<sup>349</sup> *Id.* at 563.

<sup>350</sup> The Navajo maxim is, “It’s up to him,” and “social autonomy” means freedom.

<sup>351</sup> Milne & Howard, *supra* note 194, at 563.

<sup>352</sup> *Id.* at 564.

<sup>353</sup> *Id.* at 565.

<sup>354</sup> In an article which addressed the link between depression and poverty, one patient was helped with depression in treatments that did not include psychopharmaceutical intervention: “In part, it was a cognitive shift. Miranda described Wendy as ‘clearly’ having depression, but this had not been clear to Wendy even when she suffered extreme symptoms. The labeling of her complaint was an essential step toward her recovery from it. What can be named and described can be contained: the word ‘depression’ separated Wendy’s illness from her personality.” Andrew Solomon, *A Cure for Poverty: What If You Could Help End People’s Economic Problems By Treating Their Depression?*, N.Y. TIMES MAG., May 6, 2001, Sec. 8, 112, 116.

<sup>355</sup> Storck et al., *supra* note 195.



the utility of such tests versus interview methods which may “stigmatize” or which may be off-putting to Navajo patients. While those discussions are useful, I will get to the thrust of the study.

The issue it addressed was the experience of Navajo patients in Navajo religious healing who were diagnosed as having depression in the western clinical sense.<sup>356</sup> Patients who had undergone one of the various forms of Navajo religious healing described above were given the “non-etiological” tests and a psychological review, consisting of a structured interview.<sup>357</sup> The team selected three patients for intensive follow-up interviews. Tests diagnosed the three patients as having depression, and the interviews showed that the traditional healing methods they chose (including healing in all the traditions discussed) had a positive impact upon their depression.

In drawing conclusions from the process, the team found that Navajo spiritual healing involves the integration of physical, mental and spiritual aspects.<sup>358</sup> The team found that the patient ascription of illness in healing provided the means for observing processes of therapeutic change.<sup>359</sup> The healing processes the three patients used treated the patient rather than the disorder or the symptoms.<sup>360</sup> This is in accord with the “whole person” concept of indigenous thought. There is an interplay among anxiety, somatic distress, cognitions, and social efficacy, as shown by the narratives of the three patients.<sup>361</sup> They used the signals of the aspects of their distress to guide them to a healer, and through their therapeutic processes they “seemed to experience a transformed sense of meaning about their symptoms that helped them put their distress, and perhaps their lives as a whole, into a richer grid of personal and social meaning.”<sup>362</sup> The healing paths chosen by the patients helped guide them out of

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<sup>356</sup> *Id.* at 572.

<sup>357</sup> *Id.* at 577.

<sup>358</sup> *Id.* at 587. This is the “whole person” approach I mentioned above.

<sup>359</sup> *Id.*

<sup>360</sup> Storck et al., *supra* note 195, at 589.

<sup>361</sup> *Id.* at 590.

<sup>362</sup> *Id.*

their distress, and there were common elements in the patients' experiences: "(1) their 'idiom of distress' was recognizable by the healer; (2) somatic, cognitive, and spiritual issues were seen as interrelated; (3) their illness/distress was linked to variables in their life stories; (4) the tools for regaining health/harmony were latent within them; (5) their problems were addressed in a personalized fashion; and, (6) healing was facilitated in a community/family context."<sup>363</sup> If there is a difference in depressive symptoms among Navajos, as distinguished from others, it is that there are cultural attributions and interpretations of depressing life situations, and cultural patterns of reordering and reintegrating the lives of distressed people.<sup>364</sup>

Based upon these findings, we can now attempt an approach to a Navajo therapeutic jurisprudence. There are three options for the Navajo Nation judicial system to use these findings: the court can order Navajos into treatment using the therapies; it can more consciously recommend such treatments; or it can consider the traditional Navajo justice method - Navajo peacemaking - as both a healing method in itself and a conduit to spiritual healing.

It is not likely that the Navajo Nation courts will order Navajos to seek spiritual healing. This has been discussed by the justices and judges informally and there is a general consensus that it would be "wrong," for example, to order a Navajo to see a medicine man or have a ceremony done. Aside from the usual separation of church and state considerations, such an order is not deemed proper in light of Navajo perceptions of religion, and it is likely that it would violate the "it's up to him" maxim of Navajo individualism. It is also likely that Navajo families are already using spiritual healing interventions with their own family members. Some written peacemaking agreements now commit individual Navajos to traditional healing (usually in terms of a pledge to "have a ceremony done").

The Navajo judges could, after examining the character of the three spiritual healing traditions, consider recommending

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<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

them. Judges already order defendants into western therapies such as drug and alcohol treatment or counseling, anger management programs, and other treatment-based services, but they might be more sensitive when ascertaining individual healing tradition preferences and suggesting them. The judges can also use court probation officers and peacemakers for that purpose.

The primary lessons to be drawn from the foregoing review of Navajo spiritual healing methods, as applied to the traditional Navajo "ceremonial" justice method, are that Navajo peacemaking is a healing method in itself, and its court-annexed procedures could be more intimately linked with the three major spiritual healing traditions, as it is already done with western ones. For example, the Navajo Nation courts have a drug court program which has already formed useful partnerships with community treatment and counseling programs.

A few years ago, Philmer Bluehouse and I co-authored an article that described *Hozhooji Naat'aanii* or Navajo peacemaking as "The Navajo justice and harmony ceremony."<sup>365</sup> I recall my hesitance using the word "ceremony" at the time, and I asked Phil (who is Navajo) whether it was appropriate to refer to what happens in peacemaking as a "ceremony." He assured me it was.

Looking at the process more closely, we know that one distinguishing feature of our species is that humans are the ceremonial animal.<sup>366</sup> We formalize our behavior towards others ("overt behavior") in "the presence of sacred objects," and that leads us to the field of ritual.<sup>367</sup> Ritual creates "a strong sense of tribal or congregational unity, or rightness and security,"<sup>368</sup> and a rite is a reiteration of sentiments or feelings towards "first and last things," or a disciplined rehearsal of "right attitudes."<sup>369</sup> We perform rituals in ceremonies. This is familiar to western jurisprudence. The courts have all the trappings of ritual, with

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<sup>365</sup> Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

<sup>366</sup> SUSANE K. LANGER, *PHILOSOPHY IN A NEW KEY* (1942).

<sup>367</sup> *Id.* at 153.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

special dress for judges, and certain ceremonials to reinforce the dignity of the court as the representative of the state. In place of "the presence of sacred objects," we have the flags, elevated benches, gavels, and the bar which separates the commonfolk from the elite. The "sacredness" of the objects relies initially upon the force of patriotism, but from the days of the earliest courts of Europe, that "sacredness" is achieved through symbols of power. However, the focus should indeed be upon "first and last things" and a "rehearsal of right attitudes," because the goal of therapeutic jurisprudence should be fostering "a strong sense of tribal or congregational unity, or rightness and security." As we have seen from the review of Navajo healing above, promoting states of solidarity, identity, place, and relationships is part of the healing art. Navajo peacemaking is a means of achieving those goals.

The Second International Conference on Therapeutic Jurisprudence prompted me to undertake a study of Navajo healing; a field I avoided before because of my ignorance of Navajo religious traditions and my feeling that they were not an appropriate field of study for me as a non-Navajo. I am well aware that Navajo religion is sacred. I have a great deal of respect for Navajo religion in its own context, but preparing for the conference made me overcome my reluctance to read up in the field.

Having reviewed the literature, I see that it is quite appropriate, as Phil said, to refer to peacemaking as a "ceremony," and that leads to a discussion of Navajo peacemaking as healing for a further extension of Navajo therapeutic jurisprudence.

## VII. NAVAJO PEACEMAKING AS HEALING

The Courts of the Navajo Nation revived the traditional Navajo justice method, *Hozhoji Naat'aanii* or Navajo

peacemaking, in 1982.<sup>370</sup> Following approximately ten years of infancy and dormancy, peacemaking has grown and expanded since its founding, largely due to obtaining funding for the program and relying on the leadership of Navajos who made the process truly “Navajo.” That is, peacemaking was originally established as a court annexed program of mediation and arbitration along general American lines, and it was not until there was funding to fully operate the program that it began to take on its current Navajo flavor. The courts obtained Bureau of Indian Affairs funding in 1991 to hire a program director and peacemaker liaisons (who are community organizers and court staffers that assist peacemaking) and the Judicial Branch later obtained Navajo Nation general fund monies for continuous operation.

In essence, the Judicial Branch identified the traditional Navajo institution which supported peacemaking (community civil leaders called *naat'aanii* and now peacemakers), and as the program developed, the Branch started identifying the norms and values which guide the process, as well as traditional dispute resolution procedures.

The peacemaking process is fairly straightforward: A judge can refer an individual criminal or civil case into peacemaking, or members of the public can select it as a remedy of choice (most cases are self-help, walk-in requests by individual Navajos and their families). A staff peacemaker liaison selects a peacemaker to work on a given case, and the parties are notified of a peacemaking session. The process<sup>371</sup> entails fixing the parties' minds to the seriousness of the ceremony through prayer; allowing the participants to put facts on the table and vent about them; guidance and teaching (based on traditional values) by the peacemaker; and a consensual process of reaching a decision

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<sup>370</sup> For a discussion of the history of that revival, see James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1985).

<sup>371</sup> See *id.* for description.

about what to do about the situation to “make good” for a wrong and plan a means of avoiding the situation in the future.<sup>372</sup>

Some of the elements of Navajo healing as they are found in peacemaking include:

- Identifying or “naming” the cause of the dispute by identifying the *nayee* or “monster” that caused the illness (in the sense of the dispute itself), and talking out what it is, how it acts, and how to deal with it;
- “Talking out” the nature of the problem in terms of the action, who got hurt, and how it affected people;
- Allowing those who are ill an opportunity to identify and name their ailment for themselves, talk about it and relate how they feel about it;
- Giving a sense of relationships so that people know that they have relatives, assuring the person who offended and “acted as if he had no relations” that he indeed had relations with the person who was hurt, that person’s relatives, his relatives, who although shamed are “family” and are ready to help;
- Promoting the solidarity that is needed within the “offender’s” family, the “victim’s” family, and the group as a family within the context of Navajo values and belief systems, to overcome illness - the hurt and the context of the hurt;
- Promoting respect for self and others, that is an essential element of healing in the notion of self-identity;
- Connecting with the past, one’s history, and one’s culture through the teachings of the peacemaker;

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<sup>372</sup> See, McCold, *supra* note 29, for an analysis of Navajo peacemaking, and its adherence to the “core model” of dispute resolution he articulates.

- Prompting introspection by all involved, with “confession” in the humble admission of fault and responsibility;
- Giving everyone in the process a sense of control through the opportunity to speak and tell their story, and the sense of personal validation that comes from a sense of oneness and fellowship that develops during the process.

To focus more closely on the healing nature of peacemaking, it is important to address the nature of “offending” in Navajo thought and some of the psychosocial problems we see in peacemaking. Navajos believe that each person has a “soul” or “wind” within,<sup>373</sup> no matter what the source or origin of that life force may be. Do Navajos attribute guilt to such a soul?

It may be all well enough to say that a culprit’s mind is ‘twisted’, or ‘pink’, and ‘full of meanness’, because the ‘soul within him’ prompts him to commit rape, murder, theft, and like offenses against a tribesman. But relatives by blood and clan ties might well retort: ‘Who knows’? One can, perhaps, determine that after the offender’s death, but in lifetime? No. Here we have a case, say of murder. We, the relatives of the slain, accuse so and so by name of the crime. His ‘soul’ may be mean, but the deed is an actual fact. That requires either life for life, or a satisfactory compensation. In matter of fact, that is the very attitude which Navaho society took. No theorizing on wind souls satisfied the family and clan, if injury was done to them. The penalty was always exacted.<sup>374</sup>

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<sup>373</sup> BERARD HAILE, O.F.M., SOUL CONCEPTS OF THE NAVAJO 83 (1943).

<sup>374</sup> *Id.* at 83-84 (punctuation in original).

Haile goes on to explain that a crime was a social wrong, "involving no personal guilt."<sup>375</sup> "So long as the offender paid the penalty society was satisfied, and no ceremonial of the native religious system required the offender to expiate any wrong done."<sup>376</sup> Punishment, or consequences, follow wrongdoing, and the maxim is, "He took a chance."<sup>377</sup> Wrongdoing for selfish ends (or within the compass of shame) brings with it the notion of acceptance of the consequences.

Therefore, while an offense might be the cause of a later illness for the offender, there is no moral fault in and of itself. Navajos do not believe that an offender is a "bad person" or that there are any personal attributes to be used to brand an offender. Navajos do not think of "sociopaths." An offense, is an offense, is an offense - someone is hurt and something must be done about it.

Navajos believe in personal and divine etiologies for mental illness, much as indicated above.<sup>378</sup> Mental illness can be the product of exposure to or contamination by powerful beings,<sup>379</sup> but there is also a particular kind of mental illness, called "crazy violence," which creates unusual problems.<sup>380</sup> It is the "most prevalent" type of Navajo psychopathology, and it is called "crazy violence" or "crazy drunken violence" in English, although Navajos refer to it as "going crazy" or "being drunk."<sup>381</sup> Navajos do not see it as a mental illness, but as a "natural" consequence of drunkenness, and it is dismissed as "typical Indian drunkenness."<sup>382</sup> This is a troubling phenomenon

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<sup>375</sup> *Id.* at 84.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 86.

<sup>378</sup> Bert Kaplan & Dale Johnson, *The Social Meaning of Navaho Psychopathology and Psychotherapy*, in *MAGIC, FAITH AND HEALING* 203, 207-10 (1974).

<sup>379</sup> *Id.* at 210-16.

<sup>380</sup> *Id.* at 216.

<sup>381</sup> *Id.*

<sup>382</sup> Kaplan & Johnson, *supra* note 378, at 217-18. The problem with the latter stereotype is that it gives a "time out" for alcohol-related violence which should not be tolerated.



because “[t]he violent behavior seems to occur with complete awareness and consciousness. The individual ‘wants’ to do what he is doing, and he will brook no interference either from others or from his own rational controls.”<sup>383</sup> It is senseless, because the individual “embraces his illness,” knows he is acting “crazy,” but does not care, instead aligning himself with his “worst” side.<sup>384</sup> After that, when arrested, the individual is ready to suffer and accept the consequences of his actions under the law.<sup>385</sup> This is an attack on normal social arrangements, where the individual accepts his role as a deviant and identifies with his illness.<sup>386</sup> The difficulty with this acceptance is very difficult to treat through spiritual healing processes. “Crazy violence” is distinct from the normal Navajo illness-cure complex, and there are no specific ceremonies for it.<sup>387</sup>

However, Kaplan and Johnson examined the foundations of Navajo curing ceremonies and found that they work because of two processes: the first is suggestion, where the purification procedure convinces the patient that the “bad stuff” has vanished - to the extent the patient accepts the ceremony, the causes of the difficulties are gone.<sup>388</sup> Second, the healing process prompts a reaffirmation of the solidarity of the community, and all of reality (“the whole pantheon of Navaho deities”), with the patient.<sup>389</sup> “The ceremony surrounds him with concern and good will and serves as a kind of reintegration of the social group, with the sick person not only a solid part of it but at its very center.”<sup>390</sup> I add something else: Naming the illness is vital. Naming the patient’s problem is a symbol, and “naming the scourge is an essential step in healing and identifies the healer as one with the ‘power to establish order’ within the disordered context of illness.”<sup>391</sup>

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<sup>383</sup> Kaplan & Johnson, *supra* note 378, at 217-18.

<sup>384</sup> *Id.* at 218.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 219.

<sup>387</sup> *Id.* at 226.

<sup>388</sup> Kaplan & Johnson, *supra* note 378, at 228.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> Waldram, *supra* note 54, at 605 (citation omitted).

Chief Justice Yazzie and I have previously suggested this when we pointed out that when you find a *navayee* monster, or “the things that get in the way of a person living his life,” you sneak up on it, watch it carefully, observe its habits and ways, and name it so you can destroy or overcome it.<sup>392</sup>

Returning to the discussion of “crazy violence,” we know that it is a common and prominent problem in the Navajo Nation, and yet it appears to be so recent in origin that traditional spiritual healing is not generally used for it. It is alcohol-related, and we have already seen that there is no specific Navajo ceremony for alcohol and substance abuse treatment. Is there a new way Navajos can look at it?

I think that it has a lot to do with the introduction of alcohol to the Navajo Nation in comparatively recent times, the acquisition of the heavy drinking culture from when the region was first settled in numbers by non-Navajos (i.e. with the building of the Santa Fe Railroad in the 1880s), and the disruption of Navajo gender relations resulting in family disruption. Modern economics, coupled with the introduction of authoritarianism, abuse to attain personal power and control over others, and the scourges of domestic violence, child abuse and the use of punitive means to condition children, poor attitudes about women, and other factors, surely must have created “crazy violence.”<sup>393</sup> It is something new - but is it?

Revisiting the theories of Dr. Gilligan, Dr. Nathanson, and others, about shame, “crazy violence” is certainly an extreme example of the “hurt other” direction on the compass of shame. It is associated with “hurt self,” which is also a manifestation of the problem.<sup>394</sup>

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<sup>392</sup> Yazzie & Zion, *supra* note 27, at 69 (“To slay or weaken a monster, you must know its name, ways and habits.”).

<sup>393</sup> See James W. Zion & Elsie B. Zion, *Hazho' Sokee'-Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 207 (1993), for a description of the forces which disrupted Navajo gender relations and created a climate for domestic violence and other social ills.

<sup>394</sup> See Levy et al., *supra* note 63 (explaining that suicide frequently follows when a perpetrator commits a homicide).

The problem, then, is affect modulation. How does Navajo peacemaking address it? Peacemaking provides a context for an individual's behavior to measure his or her actions. The "talking out process," where Navajos gather in a group, invokes healing methods. The thrust of the process is important, because Navajos punish the *action* and not the *actor*.<sup>395</sup> The opening prayer tells traditionalist Navajos that the Holy People are being summoned to be present and to take part in the process even if that person (or a non-Navajo) does not believe in the Holy People, prayer is still an effective means of indicating that a ritual or ceremony is about to begin (where sacred objects will be displayed or the subject matter is serious) and their commitment to it is expected. I think that can be done even with the "secular ceremonies" therapeutic jurisprudence is developing. The "venting" process is a means for people to "name" the ailment or wrong by factually describing it, and it is also the way people can say how they feel about it. It is the time to explain the consequences of an act and its impact upon people. People will also identify their relationships with each other so that everyone can understand the serious consequences of harm within a relationship. The peacemaker's "lecture," most often based upon the same Navajo creation scripture that is used in traditional Navajo healing ceremonies (or similar lore from the Native American Church or Christianity), establishes the parameters to measure conduct. The lecture also gives the participants a "way out" for an offender. The Navajo concept of a "way out" is important. A "way out" is built into Navajo baskets, rugs, and other art to state the "law" that there should always be a way out. Nothing should be confined. Life is dynamic and changing, so there is always a "way out" in any paradigm.<sup>396</sup> The same holds true for illness in the form of a harm or injury done to another. There is no fixed table of pains and penalties and no sentencing

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<sup>395</sup> JOHN LADD, *STRUCTURE OF A MORAL CODE* 287 (1954) ("The main consideration is a utilitarian one; namely, to prevent a recurrence and to rectify the situation rather than the agent. If the criminal promises to reform - 'so we just let him go. So they won't punish him.' Punishment is only the last resort.") (citation omitted).

<sup>396</sup> For a discussion of "the way out" see SCHWARZ, *supra* note 178.

guideline because, since we don't punish the actor, decisions must be made about the action, its nature and extent, what to do about it, and what needs to be done to compensate for it. There is no fixed path to punishment or sentencing guideline, as in American criminal procedure. The talking out of a dispute is plastic and relational. It gives a means to solve problems as practical things. What harm was done? How can that harm be repaired? What needs to be done in terms of a commitment to ensure the harm will not occur again in the future? There is a "way out," not in terms of letting an offender escape the consequences of his or her action, but a means of addressing the problem and restoring the relationship of those in the group. If there was no healthy relationship in the first place, then there is a way out to establish future solidarity within the group through the process. There is a Navajo term to describe the result - *hozho nahasdlii*. It means something like, "now that we have done these things and we have established relationships within the Four Sacred Mountains (i.e. the Navajo world view), we are in right relations again." Another translation, used by peacemakers, is that things are "good again."

An important parallel between healing techniques and peacemaking is the fact that offenders, as individuals with an "illness," have an opportunity to explain and examine themselves in a setting that is relatively nonjudgmental. Healing requires freedom of self-expression and a certain amount of "space" to do that. Obviously, social sanctions are part of peacemaking, and yet, given the presence of relatives and the absence of overt sanctions (punishment), peacemaking is not as threatening as a courtroom setting, a meeting with a probation officer, or even a court-mandated counseling or treatment session. Even those of us who are accustomed to the informal drug court session may need to make a leap of faith in realizing that justice as healing (or healing as justice) may require a very different setting where both offender and offended are patients who can heal within a healing ceremony that usually is not viewed as one. The idea is that if an offense is a symptom of illness, there needs to be a "time out" from dealing with the offense as one, with a healing discussion of

the action rather than the actor. The difficulties with this, given our current thinking and the politics of crime, are obvious.

Peacemaking is also useful because it can be utilized to get people to commit to future action. That can be in the form of participation in a western healing process, such as alcohol treatment (in response to the primary Navajo Nation problem), anger management, counseling, or some other approach, or a commitment for people to "have a ceremony done." We frequently see that in the written agreements people make in peacemaking or in the peacemaker's report on the conclusion of the peacemaking session. When an individual recognizes that there are troublesome things in the mind as the result of a dispute, then it is natural to think of seeking traditional healing (in one of the three major healing modalities), or for relatives to suggest that a certain ceremony is appropriate.

In sum, we now realize that Navajo peacemaking mirrors Navajo spiritual healing techniques and it can be said to be another form of Navajo spiritual healing on its own. In addition, this research gives us some clues on not only how to better look at peacemaking techniques, but how they can be adapted to ceremonial practice to integrate ceremonies into the final agreements of parties.

### VIII. COERCION

One of the dilemmas of therapeutic jurisprudence is the role of coercion in the healing process. The literature suggests that some kind of coercion is necessary to deal with people who are addicted to drugs or alcohol.<sup>397</sup> Coercion is deplored in Navajo thought. At its extreme it is a form of witchcraft, as when someone uses (evil) prayers to summon a Powerful Being to do harm to another. Navajo thought highly prizes individualism and individual autonomy in personal action while putting constraints upon individual action - "It's up to him," but there is

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<sup>397</sup> See, e.g., Boldt, *supra* note 5; Sally L. Satel, M.D., *Drug Treatment: The Case for Coercion*, 3 NAT'L DRUG CT. INST. REV. 1 (2000).

“freedom with responsibility.” Navajos say of an offender “he acts as if he had no relatives.”

The use of coercion, in revenge, is known to Navajo history, and certainly, when relatives vent in peacemaking, there is “coercion” in the form of family and clan disapproval and the force of social sanctions. However, while blaming, accusations, and accompanying emotional expressions of hurt and outrage are part of peacemaking, overall the thinking is to blame the action and not the actor, and to leave a “way out” for a consensual resolution of the underlying problem.

Here, again, we see the problem of state participation in healing processes. The state is an outside force, and it can be a “monster” in the sense of something that impedes healing, or it can be a supportive force. How do we get people to commit to healing processes? Can commitment be the product of state coercion? Or, should we trust non-coercive processes? We do not know the answers to these questions.<sup>398</sup> As we jointly explore the concept of justice as healing, perhaps we will be better able to address this problem.

At end, Navajo peacemaking began as simply a tradition-based form of dispute resolution. As it grew, Navajos began to articulate what it is and how it works from a Navajo perspective. Finally, we can see that modern Navajo peacemaking, which is based upon many of the traditions and beliefs discussed above, is in fact a healing ceremony. It is one that largely rejects coercion in favor of a consensual way of solving problems.

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<sup>398</sup> We may, however, look for approaches in counseling. See, e.g., Brian Jory & Debra Anderson, *Intimate Justice: Confronting Issues of Accountability, Respect, and Freedom in Treatment for Abuse and Violence*, 23 J. MARITAL & FAM. THERAPY 399 (1997). In the fascinating and growing literature of non-state dispute resolution, see, for example, Bruce L. Benson, *Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion*, 9 J. LIBERTARIAN STUD. 25 (1990).

## IX. CONCLUSION: THE HERO TWINS REVISITED

The obvious question posed by this analysis is whether or not Navajo paradigms of healing have any relevance in non-Navajo settings. To one extent, Navajo healing is so uniquely tied to its context in Navajo society that it is impossible to replicate. To another, Navajos being human (just as non-Navajos are also "Five Fingered People"), simply point the way to some very human processes. Among them are a well-defined set of values, established in Creation Scripture; recognition of the importance of family, clan, and community - including community with the Holy People; the identification of illness as having no relatives (the same definition as an "offender"); and the means for individuals to name their ailment or monster, express themselves, establish their identities, and find a "way out" of illness in solidarity with others.

Are these concepts so alien to those of the dominant society? I suggest that they are not. If we can avoid disputes and resentments (including fears of domination) by the use of some of the fundamental terms and base values of western society, it is possible to establish a framework for human behavior. We already distinguish between *malum in se* and *malum prohibidum* crimes, and we need to reach societal agreements about what is "bad in itself." Drs. Gilligan and Nathanson point the way to the key to our therapeutic jurisprudence issue when they define and identify shame as the cause of violence, and Dr. Nathanson points out that we need to conceive means of "affect modulation" to deal with offenders, or more importantly, prevent violence in the first place.

I am a humanist, and therefore an optimist.<sup>399</sup> Just as we can negotiate cures for ailments, we can negotiate cures for the problems of society. I suggest that the Navajo healing models, as

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<sup>399</sup> Do we believe that humanity is essentially good, or that it is essentially evil? Punitive methods in law often appear to arise from an assumption that people are just no good, whereas therapeutic jurisprudence at least assumes that people can be treated to make them better or at least competent individuals.

expressed in a western-English manner that would puzzle a medicine man, give some guidance on how to proceed.

The Twins are Monster Slayer and Born-for-Water. Monster Slayer is an aggressive figure, who used force to slay or weaken the Monsters who ravaged the Five Fingered People. Born-for-Water is the metaphor for a more gentle and nurturing warrior, who aided Monster Slayer in subtle ways, but Monster Slayer could not be who he was without his brother. This is a metaphor for all of us: Monster Slayer was strong and aggressive, but he could negotiate with the monsters. Born-for-Water had the gentle qualities which were required so that the monsters could be confronted. Therapeutic jurisprudence will thrive from its own western and aggressive approach to problems, but it needs the lessons of indigenous thought to find the right path. There was a time when humankind was able to deal with its problems without police, jails, and suppression, prior to the rise of the state. The state is collapsing; or - perhaps at best - learning that it cannot be all things for everyone. It does some things well, but it cannot reach into the soul in the dark night that lashes out come the day, when it must face its shame, or hide its shame in fear of being uncovered. When that shame is uncovered, the compass guides its way to the path of destruction of one sort or another. Perhaps western therapeutic jurisprudence is Monster Slayer; perhaps indigenous therapeutic jurisprudence is Born-for-Water. Perhaps the two, possessing different kinds of sacred knowledge, can pair as The Twins, and slay or tame the monsters - those things that get in the way of living a successful life.