Commentary

Making the Invisible Visible: Historical Perspective

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INTRODUCTION

The panel entitled, "Making the Invisible Visible: Historical Perspectives," featured two presentations. Dean Rennard Strickland gave the first presentation, entitled, *The Genocidal Impulse in American Law: Native Peoples and the Contemporary Struggle for Survival.* Strickland's presentation dealt with the historical impact of federal policies on Native Americans and the resulting tension between Indians and non-Indians in today's society. Professor Eric Yamamoto spoke on *Race Apologies*, which discussed the ways in which racial groups redress historical wrongs by one group upon another. Specifically, Professor Yamamoto discussed the Truth and Reconciliation Commission of the new South African government under Nelson Mandela.

I. HOW THE PAPERS FUNCTION IN RELATION TO EACH OTHER

At first glance, I wondered what an article on a South African Commission had to do with the American Indian experience in the United States. I asked myself how Professor Yamamoto's discussion of interracial justice had any useful relation to Professor Strickland's discussion of the contemporary struggle of American Indians.

In making that inquiry, I was reminded of a lecture I had heard in the summer of 1993 while teaching at the Pre-Law Summer Institute in

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Albuquerque, New Mexico. PLSI, as it is fondly referred to by the law students, is a program for American Indians from all over the country who are entering law school. The program, directed by Sam Deloria, provides the Indian pre-law students with a two-month exposure to what will occur in the three years ahead. During the summer I taught at the Institute, Chief Justice Robert Yazzie of the Navajo Nation, an alum of the program and of the UNM Law School, spoke to the class about Navajo justice. He was preparing an article entitled, *Life Comes from It: Navajo Justice Concepts*.[1] It was my pleasure to hear him speak on his Nation's judicial system, which he described as "horizontal."[2]

During his talk, he told us that "[N]avajo justice uses K'e to achieve restorative justice."[3] He said that the Navajo clan systems foster deep, learned emotional feelings which they call K'e. The term, he said, means a wide range of deeply-felt emotions which creates solidarity of the individual with his or her clan.

According to Chief Justice Yazzie, when a dispute arises the Navajos use a procedure called "talking things out." Every person concerned with or affected by the dispute or problem receives notice of a gathering to talk things out. At the gathering, everyone has the opportunity to be heard.

Chief Justice Yazzie continued by saying that, as a Navajo, if his relative is hurt, that concerns him; if his relative hurts another, he is likewise responsible to the injured person. If something happens in his community, it also affects him. He has a right to know what happened and to participate in discussions on resolving the problem. As a Navajo, he is within the zone of a dispute involving a relative. Chief Justice Yazzie further explained that in the horizontal system, the zone of a dispute is wider than in the typical adversarial system, because problems between people also affect their relatives. The typical legal dispute forum, on the other hand, contemplates a dispute solely between the parties involved in the lawsuit.

In reviewing the two articles, I thought, in a somewhat "Pollyanna-ish" way, that perhaps we should adopt the Lakota view that we are all related, and that we should incorporate some of the restorative aspects of the Navajo's K'e. I wanted a simple solution that would be useful for many people in solving disputes. In adopting the approach of the Sioux Nations, if we consider the

1. Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

2. *Id.* at 180.

3. Yazzie, *supra* note 1, at 182.

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entire world a family, it may be easier to restore balance. The "Pollyanna-ish" aspect of that approach is that it may be overly simplistic and naive. However, it occurred to me that the South African approach of interracial justice could benefit not only American Indians, but also other groups in the United States. That approach seemed similar to the Navajo concept of K'e.

In that respect, the papers complement each other. Professor Strickland provides a snapshot of the injustices committed historically and, in the name of the law, against American Indians. The legal history of American Natives is unsettling. It is difficult to reconcile such mistreatment. Professor Yamamoto provides a possible process for reconciliation, a way to address that history.

Although Professor Yamamoto's article creates some ambivalence for me, it nevertheless provides me with a process that caters to my optimism. I refer to it as my "Room 222 mentality." For those of you who are unfamiliar with Room 222, it was a television show in the late 60s about a high school class comprised of students from most of the racial groups. I say "most" because I don't recall that an American Indian student was among them. But then, we American Indians are a political group, and not a racial group, as footnoted in *Morton v. Mancari*.[4]

Ironically, I attended a high school that was multi-racial in an almost perfectly proportionate manner to the City of Milwaukee at that time. West Division was approximately 50% Caucasian students, 40% Black students, 4% Hispanic, 4% Asian, 1% American Indian and 1% Other. Anyway, my high school experience has forever colored my view of the world. My high school yearbook features an interracial couple as the homecoming King and Queen. That experience supports my optimism that racial harmony is possible. I have this belief, or maybe hope, that we can reach a Room 222 type of world where we live in multiracial harmony.

My "Room 222 mentality" notwithstanding, the pessimist in me questions the viability of interracial justice in this country. Is reconciliation between Whites and Blacks possible in a country where a murder trial of a black, albeit famous, defendant and two white victims is the "tip of the iceberg" in the glacier that is the black/white racial division? Is reconciliation possible where American Indians are vilified for objecting to such "trivial" matters as the "tomahawk chop" or the use of the word "redskin" as a team name? If we cannot reconcile on the simple matters, how do we reconcile the more complex issues?

4. 417 U.S. 535, 553 n.24 (1974).

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My ambivalence stems from those questions, while I am also drawn to aspects of the process. I am struck by the simplistic act of storytelling as part of the reconciliation process because storytelling is one of the pillars of my own culture and my own spirituality. I grew up in a family that worshiped in the Native American Church. Because my mother attended a boarding school as a child, she sent me to the Lutheran Church in town, where I was eventually confirmed and "Lutheranized." In those days, my parents could not afford to pay a sitter, so I accompanied them when they attended the all-night services of the Native American Church (NAC). The NAC members, as a way to humble themselves to the Creator, would sit on the ground or floor, depending on whether the service was held inside a tepee or a house, and worship until dawn.

What is reminiscent of that time for me is the storytelling. Worshipers frequently would stand when speaking to the congregation. Stories were told in complete honesty in lengthy orations of great pain and tears. Although looking down or closing one's eyes was the proper practice, as a child I would sneak a direct look at the face of the speaker. However, I had begun utilizing "assimilated norms" at an early age. That is, I adopted many "Lutheranized" behaviors, such as looking directly into the face of the speaker, which was not the norm of my Indian existence. Yet, when I did look directly at the person, despite the prohibitions, I could see that person's sincerity and faith. It is no wonder that the storyteller healed in the process. It is no wonder that the people who acknowledged wrongdoings and misdeeds healed themselves in the process.

Sincerity was a common denominator among all the speakers. The tepee or house became a communal confessional. The songs and the fireplace, as in any religion, provided an additional means for solace. The goal was to reach a spiritual peacefulness by dawn, and in most instances, people achieved the goal. The individuals who participated did so with a commitment to resolve their pain or to make amends for their wrongdoings. Nothing—adultery, abuse of alcohol, grief, illness—was beyond resolution for those who participated. The basis for possible resolution lay in the inherent desire of the participants to redress wrongs.

Is such a restorative process possible for Indians and non-Indians or Whites and Blacks in the United States? My concern is that what draws me to the concept described by Professor Yamamoto is my own cultural perspective. My own set of values directly relate to my native culture. Both scholars seem to see a need for such a process.

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II. HOW THE PAPERS FUNCTION IN RELATION TO THE THEME OF THE PANEL, "MAKING THE INVISIBLE VISIBLE: HISTORICAL PERSPECTIVES"

Both papers provide a historical perspective of interracial injustice, and both scholars agree that some interracial healing must occur. Yet what neither paper examines, due to time and the subject matter of this panel, is the necessity of a cultural framework from which to begin. That is, it is important to note how someone with my cultural background can be drawn to the restorative justice model, as exemplified by the interracial justice model. Consider the cultural backgrounds of Professor Yamamoto, a Japanese American, and Dean Strickland, a Native American. In addition, consider the cultural background of President Nelson Mandela, a Black South African, and Chief Justice Yazzie, a Navajo. A cultural backdrop, with a value system encroached in a return to a healed state, is a prerequisite to the successful process of healing interracial injustices.

Obviously, Professor Yamamoto's recitation of DeKlerk's "apology" is an example of what occurs without that backdrop. In the United States, we have Justice Scalia, who views restorative justice as the most troubling aspect of affirmative action. In the words of David Boling, "In Scalia's cold logic, restorative justice implies 'racial debt' which requires a debtor-creditor relationship, but to have such a relationship likewise necessitates the existence of a debtor, which is absent to Scalia."[5] Boling quotes Scalia as saying, "I owe no man anything, nor he me, because of the blood that flows in our veins." Boling's article sums up Scalia's view of affirmative action in the following quote: "The affirmative action system . . . is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say . . . it is racist. . . . From racist principles flow racist results."[6]

Justice Clarence Thomas also opposes affirmative action measures, although he previously chaired the Equal Employment Opportunity Commission (EEOC). Justice Thomas does not believe that using preferences will correct the past wrongs inflicted upon oppressed groups, such as those groups described by Professor Strickland. In a 1987 commentary, while chair of the EEOC, Justice Thomas stated:

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5. David Boling, *The Jurisprudential Approach of Justice Antonin Scalia: Methodology over Result*, 44 ARK. L. REV. 1143, 1152 (1991).

6. *Id.* at 1153.

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> I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context.[7]

Thus, my criticism of the papers is the absence of a discussion about the necessity for a cultural backdrop recognizing values that exemplify, as with the Lakota, that we are all related. With the Navajo, when something occurs within the community, the individual is also affected. However, such a discussion would probably require a paper in and of itself.

By "cultural backdrop," I refer to the need for a culture which recognizes the importance of acknowledgment and making amends. For example, the tenets of those belonging to Alcoholics Anonymous use a 12-step process which includes acknowledging certain deeds and making amends for them. One's religious affiliation may also include such beliefs. It does not require a racial affiliation, but rather a desire for an affiliation of people willing to accept admissions and apologies as a reconciliation effort.

Yet, I am concerned about the stance of DeKlerk and of Justices Scalia and Thomas. I grieve for them. I grieve for them because their behavior and views affect me, affect my community, affect my children and grandchildren. Their lack of clan perspective is harmful in that they are unable to understand the importance and necessity of interracial justice on native and racial communities. That brings me to my final discussion point.

III. HOW THE PAPERS FUNCTION IN RELATION TO THE SYMPOSIUM THEME

The Journal of Gender, Race & Justice symposium literature states that "the symposium features papers and presentations that explore issues related to how our identities, both actual and perceived, affect our abilities to obtain justice under our legal system." I believe that both papers excellently raised the discussion of those issues. Both papers discussed our identities, whether a Mandela or a DeKlerk or a DeLoria or a Scalia, and how those identities affect our abilities to obtain justice under our legal systems.

I say "legal systems" due to my role as Chief Justice of my nation's Supreme Court. In fashioning rules and procedures for the Ho-Chunk Court

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7. Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987).

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System, I find this panel to be a proposal for change for all legal systems. For those of us in the Ho-Chunk Court System, the challenge is to incorporate our cultural backdrop, the Ho-Chunk values and traditions, with the Anglo system of law, which Chief Justice Yazzie calls the "vertical system."[8]

Perhaps the symposium's theme, which questions "Who Can Get Justice in the United States?," as well as the issues presented in the papers, is the challenge for all of us.

8. Yazzie, *supra* note 1, at 177.

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