

Native Americans and the Criminal Justice System: Chthonic Law

By Jason Gauthier

Introduction

Native American People within North America, there are levels of disparity that are synonymous with racial prejudice and inequality within the races. There are Cultural differences that lead to different understandings of equality within society that promotes ethnocentric values and systemic racism. We also see that statistically there are differences between what we perceive as an individualistic cause to what causes disproportionate amounts of people within the Criminal Justice System and a collective understanding what becomes a “Social Problem” within Western Society. There are many ways to discuss crime, on an individual, Sociological and Critical/Conflict level. Each of these is independent of each other and has validity in their own way, but I believe that *Aboriginal Sociology* may have a perspective that can be implemented in a new understanding of our Criminal Justice System.

These are ideological misconceptions of otherness and the role of social norms and values attached to the implementation of imperial laws upon a colonized people. As we explore the cultural differences between different cultures we begin to disassociate own ideas

and begin to celebrate their differences and learn what is considered to be “beneficial” to both societies and start to accept and integrate new, more efficient ways of living together in harmonious ways. Some of these differences are based on ethnocentric views of what the relationship to the community and the environment that we live in, but historically we can observe the benefits to certain understandings that are cross-cultural that have benefited the relationship between the races that live in disharmony.

In the CJS, we have seen that this has been used as a way to subjugate and segregate the people that originally lived within North America. The process of colonization dictates through the criminal justice system what is to be deemed as normal as far as the Ideology, the Prosecution and the enforcement of values that hold very little value to the cultural and cognitive understandings of First Nation People. Colonization is a process where the ideals of a population are eroded and re-instilled with a model of ideology that can be recreated into one that follows an acceptable pattern that promotes the understanding of the majority.

This is based on the hegemonic discourse, one that causes conflict with racial understanding and ends up marginalizing First Nation People and consequently causing the disproportionate number of incarcerated Native Americans. As we try to identify the causes and ultimately the solutions, we can attempt to reify this conceptual analysis by looking critically at the differences in spiritual and cultural understanding the differentiations of ideologies between First nation People and White Culture. I believe there to be three major identifiable differences: Understandings of Community as opposed to individualistic

understandings, Ideals of Justice as opposed to conflict resolution and lastly, the idea of healing as opposed to punitive approaches.

Collectivism vs. Individualism

Collective understandings of First Nations people have always been seen to promote ideas of harmony within their community. When there are Maslowian physiological needs that needed to be met, we saw that the community not only took on the charge of making sure those needs were being met, but took on a idea of “generalized reciprocity” where there was no understanding of intrinsic or profit in exchanges of goods or services.

“Although restorative justice principles served as the foundation for many Native American legal systems, contemporary tribal courts rely heavily on the laws and standards they received from European settlers. This trend is now being reversed as tribal courts have begun to rediscover their restorative roots and share them with non-Indians. In this article, a framework is developed for understanding the transformation of Native American legal systems from primarily restoration based to those that are more retribution oriented. A case study of the Navajo restorative justice system is presented to illustrate the framework, followed by a discussion of the future of restorative justice in Native American communities.” (Rumann, 2004: p208-211)

When we look at the individual perspective of the free-market system, we identify the individual as naturally attaining as much wealth as possible without consequence to the community it resides in. We have seen a disconnect with the land and the use of pollutants that have caused global problems with our society that have in turn cause “external” problems within corporations. As this relates to the Criminal Justice system, we see that the ideology of First Nation people is one that promotes the idea of communities taking responsibility for individual act within their communities. “The criminal justice system has become a vehicle for the continued persecution of native peoples. This racism not only permeates the criminal

injustice system, but also underlies every American's lack of action on the issue." (Freng, 2007: p21-37) If there is an issue with alcoholism within a community, there is a communal understanding of changes that have to make in order to create solutions to the social issues. When one person has a problem with a communal understanding of responsibility of the entire community, and each individual is important to the common goal of the community. The understandings as they permeate into white ethnocentric culture have been seen as not promoting the competitive structure for the attainment of wealth. The argument in industrialized society is "why do we need to give something away for nothing?" and the response by First Nation communities has been, "because there is a need".

Justice vs. Conflict Resolution

As we analyze how we view the way in which we view crime and punishment we look at the way we can understand how people are punished within the ethnocentric views of Western civilization. When the solution to problems within society is based on reciprocation and punitive understandings of justice, we see that we dehumanize the offender for not following the norms of a society that has many systemic inequalities built into the system. "On average, 1 in 25 adult American Indians is under the jurisdiction of the nation's criminal justice system – more than twice the number of White adults in the system." (Holsinger, 2006: p331-337) In a First Nations approach to Justice, we see that the sickness of one must be healed in order to heal the entire community. If one is sick, all are sick. This is why healing is one of the important understandings of Native American traditions. If we can cure the underlying problem within the community then there will be no need to steal, hurt others, or commit crime.

“The incarceration rate of Native Americans is 19% higher than the national rate. The U.S. Commission on Civil Rights attributes this higher rate to differential treatment by the criminal justice system, lack of access to adequate counsel and racial profiling. Law enforcement agents arrest American Indians and Alaskan Natives at twice the rate of the greater U.S. population for violent and property crimes. On average, American Indians receive longer sentences than non-Indians for crimes. They also tend to serve longer time in prison for their sentences than non-Native Americans.” (Clark, 2005: p22-31)

Retribution is the main driving force behind the CJS within Canada and the USA at this time, with causes disproportionate amounts of First Nation people incarcerated.

Healing vs. Punitive

Lastly, if we look at the idea that putting someone in jail and take away their access to the rest of society and their understanding of Freedom, we cause the individual great distress and put them into a position where they are unable to cope within society when they are released from custody, and increase their likelihood to re-offend, thus not taking into consideration the long term effects of said incarceration.

“The American native crime victimization rate is twice that of non-Indians. National crime victimization surveys reveal that whites perpetrate 57% of the violent crimes committed against American Indians. 80% of sexual assaults against Native Americans are perpetrated by whites.” (Theriot, 2007: p83-97)

Within the native community, healing and justice circles, help the offender to gain an understanding his roles and responsibly within his own community. As he is made aware of this he begins to take responsibility and is able to function again within his community. If there is a understanding that he committed the crime to survive within his community, it can be solved by gaining the resources for that individual so that he needs not commit crime in order to survive.

Conclusion

In order to look at the differences between the way crime is seen within our society and why there is such a disparity between both cultures we must look at the fundamental differences between the structures of their belief systems.

"Spiritual wellness and spiritual healing is paramount to the very survival of the indigenous nations," he said. "There are efforts to prohibit and impede the spiritual access. Corporations cannot be allowed to prohibit access and to destroy and pollute and desecrate the sacred lands."(Toward Freedom, 2003: p1)

As we identify these differences we must have some mediation and compromise in order to create a better parity with our societies, and within the Criminal Justice System.

References

Droske, Timothy (2008) *CORRECTING NATIVE AMERICAN SENTENCING DISPARITY POST-BOOKER* Marquette Law Review;, Vol. 91 Issue 3, p723-813, 91p

Theriot, Matthew T (2007) Native American Youth Gangs: Linking Culture, History and Theory for Improved Understanding, Prevention and Intervention. *Journal of Ethnicity in Criminal Justice*; Vol. 5 Issue 4, p83-97, 15p

Freng, Adrienne (2007) *American Indians in the News: A Media Portrayal in Crime Articles*. *American Indian Culture & Research Journal*; Vol. 31 Issue 1, p21-37, 17p

Holsinger, Alexander M. Lowenkamp, Christopher T. Latessa, Edward J.(2006) Exploring the validity of the Level of Service Inventory-Revised with Native American offenders.*Journal of Criminal Justice*;, Vol. 34 Issue 3, p331-337, 7p

Clark, M. Wesley (2005) *Enforcing Criminal Law on Native American Lands*. *FBI Law Enforcement Bulletin*, Vol. 74 Issue 4, p22-31, 10p, 1 chart, 1 diagram, 2 color

Rumann, Celia M. Sands, Jon M. (2004) *Lost in Incarceration: The Native American Advisory Group's Suggested Treatment for Sex Offenders*. *Federal Sentencing Reporter*, Vol. 16 Issue 3, p208-211, 4p

Journal of Contemporary Criminal Justice (1998), Vol. 14, No. 1, 42-57 (1998) DOI: 10.1177/1043986298014001004 SAGE Publications
<http://ccj.sagepub.com/cgi/content/refs/14/1/42>

Global Research, April 7, 2008 *Racism in America: UN Report points to "stark racial disparities" in U.S. institutions, including its criminal justice system*,
<http://www.globalresearch.ca/index.php?context=va&aid=8584>

Toward Freedom Online Magazine, October 6, 2003. "Behind Bars: Native Incarceration rates increase."
<http://www.towardfreedom.com/2001/aug01/nativeprison.htm>

www.spokane.net/news-story.asp?date=070300&ID=s821704&cat+section.Tribal_news

March 31, 2008 *Native Americans and the criminal justice system*
http://sentencing.typepad.com/sentencing_law_and_policy/2008/03/native-american.html