Indigenous North American Jurisprudence

PAT LAUDERDALE*

ABSTRACT

This article explores differences between indigenous North American and contemporary Western perspectives on jurisprudence. It examines the impact of state law arising from a paradigm of control and standardization of behavior and contrasts it with indigenous “law” which reflected an emphasis on nature, diversity, and freedom. The research here suggests that political organization is a central variable affecting particular types of punishment and forms of law. The study raises central issues regarding the roles of criminal and civil law as well as different forms of sanctioning. The article proposes an agenda for future research explicating indigenous civil law which can be examined in a variety of specific social contexts varying in scale, complexity, degree of formalization, and historical and comparative setting.

Sociologists usually study law by examining its relationship to basic sociological variables such as class, gender, age, and race, or to social institutions such as the economy, family, education, religion, and polity. A focus upon an indigenous perspective is noteworthy primarily because of its absence, especially in regard to research on jurisprudence (Oliverio and Lauderdale, 1990). Modern jurisprudence in the United States focuses upon nonindigenous perspectives on law, nature, and punishment with a preponderance of criminal sanctions.

This paper proposes an alternative research agenda based on indigenous North American jurisprudence with its emphasis on civil sanctions and the diffusion rather than the consolidation of political power. First, the current law and order paradigm emerging from the separation of people and nature continues to focus upon repressive punishment in a manner that exacerbates inequality and injustice. Second, the rediscovery of civil sanctions and civil law with their emphasis on restitution as a means for addressing some of the underlying sources of inequality and injustice is examined. Third, it is suggested that civil law, if it is based on indigenous jurisprudence with its respect for diversity, will be useful in understanding the changing roles of kinship, individual responsibility, group rights, time, and nature. Civil refers to processes that attempt to restore relationships rather than permanently separate or

* School of Justice Studies, Arizona State University, Tempe, AZ 85287-0403, U.S.A.
stigmatize. The sociological approach employed here examines law, nature, and punishment from different levels of analysis and degrees of abstraction.

Law and Order versus Law-ways

Despite the cultural diversity among North American Indian Nations, there was a commonality in the use of civil rather than criminal sanctions. The common ground of indigenous jurisprudence stems from the respect for all life forms rather than the modern separation of humans from nature.

From a sociological perspective, modern jurisprudence, the study of law and legal philosophy and the use of its ideas in law to regulate conduct, differs significantly from law-ways, the “law” of indigenous North Americans (compare Whitt, 1995; Medicine, 1993; Black, 1976, 1993; Deloria, 1992; Garland, 1990; Friedman, 1985; Luhmann, 1985; Inverarity, Lauderdale, and Feld, 1983; Unger, 1976). Even recent laws that intend to protect the environment are usually shortsighted and fragmented.

One of the reasons that law in modern societies is fundamentally different than the law of many North American indigenous people is because the jurisprudence created by the modern nation-state assumes that law and nature should be separated. A common feature of diverse indigenous cultures, however, was that law and nature were bound together; indigenous nations were comprised of peoples who shared a common culture, heritage, language, geography, political system, desire for common interaction, and indigenous jurisprudence. Law was not considered to be contained within the realm of nation-state structures, autonomous from other social institutions, interpreted only by legal specialists.

For most North American Indians law was accessible to everyone since the oral tradition allowed it to be carried around as part of them rather than confined to legal institutions and inaccessible experts who largely control the language as well as the cost of using the law (Deloria and Lytle, 1983; Monture-Okanee, 1993; see also Reid, 1970, p. 70). North American Indian law-ways based on oral traditions have continued to preserve much of the diversity embedded in the cultures of many North American Indians (Deloria, 1973; Monture-Okanee, 1993).

The recent call for cultural diversity being implemented in part through recent laws is a conundrum (Goldberg, 1993, p. 220). Corporate culture of the modern state, for example, now acts as if it has discovered diversity, yet it is only a rediscovery and is typically practiced in a bureaucratic manner, rather than in indigenous forms where diversity, especially respect for the diversity of nature, was inherent (Fitzpatrick, 1992; also for a broader comparative analysis of diversity, see Lauderdale and Cruit, 1993). The modern state attempts to control and dominate nature and then defines this process as progress. Rather than learning the diverse lessons of nature, the modern linear, univariate plan is one of controlling and dominating nature—whether