

Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

The Navajo Response to Crime

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Editor's Note: The following is a speech delivered by Chief Justice Yazzie at the National Symposium on Sentencing: The Judicial Response to Crime at the American Judicature Society in San Diego, California on November 2-3, 1997.

Indians, Ant Hills and Stereotypes

A few years ago, I did a presentation on traditional Navajo justice to judges from five western states. After the talk, two state judges went outside. One said to the other, "What did you think of Chief Justice Yazzie's description of Navajo common law?" The other judge laughed and replied, "He didn't mention staking people to ant hills!" Obviously the judges saw too many Western movies.

Unfortunately, there is a popular stereotype that Indian justice is rough justice; that Indians used punishments such as staking people to ant hills, running them through a gauntlet of people armed with clubs, or stringing an offender (usually shown in the movies as a White offender) up in the sun to bake. That is an unfortunate stereotype. One of the reasons I want to speak at this important conference is that people such as myself, as Indian leaders, need to do more to educate the general American public about Indian ways.

The main issue posed for this conference is, "What is the judicial role in sentencing?" This session is designed to address restorative and reparative principles. "Restorative" is defined to mean "the process for renewing damaged personal and community relationships." "Reparative" is defined to mean "the process of making things right for those affected by an offender's behavior." In other words, *how* can we help victims? We use only one word for both ideas: peacemaking. The Navajo term is *Hozhooji Naat'aanii*, and while it is difficult to completely translate its concepts into English, I will simply translate it as "talking things out in a good way."

Given that the overall topic of this conference is sentencing, I will focus on how we use peacemaking in sentencing or to handle a case. There is a copy of the *Uniform Sentencing Policy* the Navajo Nation Judicial Conference adopted in August 1994 in your conference materials. We believe that the policy is unique, because it incorporates restorative and reparative justice concepts.

We know that it is unique because it incorporates traditional Navajo concepts on how to respond to crime. I will describe the policy's concepts of "talking things out," the "traditional probation officer," and how we use Navajo peacemaking before charges are filed, at the time of plea, prior to sentencing, and after sentencing.

"Talking Things Out"

The traditional Navajo response to crime is *not* staking the offender to an ant hill. It is to talk the problem out with respect. In traditional Navajo society, everyone was equal. There was no strong "chief" who heard a dispute and made a decision for others. In fact, the idea of someone with power and authority making decisions for others is entirely contrary to Navajo morals. We believe in a high degree of freedom, but we call it "freedom with responsibility" (in the words of our Associate Justice Raymond D. Austin).

What is an offender? It is someone who shows little regard for right relationships. That person has little respect for others. Navajos say of such a person, "He acts as if he has no relatives." So, what do you do

when someone acts as if they have no relatives? You bring in the relatives! Victim rights is an important issue. What do you do about them? There too, you bring in the relatives.

Vincent Craig, our chief probation officer, once told me a story. He said that an oral history came down to him that in the old days, many young women became pregnant while herding sheep. The woman's family would then approach the man's family to talk out a settlement. That is what I mean by bringing in the relatives.

Didn't Navajos have any kind of civil leadership? Certainly. Our traditional leader is a *naat'aanii*. That refers to someone who speaks well, plans well, and bears himself or herself well. Another stereotype is that Indian men are strong, dominant leaders. Navajo women were *naat'aanii* too. They still are. A *naat'aanii* is not a "chief." A *naat'aanii* isn't just an advisor. A *naat'aanii* is someone who is considered so wise in his or her community that people listen. Today, we call a *naat'aanii* a peacemaker. We have over 250 of them in 110 local communities called "chapters."

When someone has [a] problem, we can appoint a peacemaker to handle it. The peacemaker uses the "talking out" process to address it. Who is invited to attend the discussions? The victim and his or her family. The offender and his or her family. Friends, neighbors and anyone else who is involved in the matter or affected by it will be invited to attend or can attend.

The procedure is fairly simple. First, there is a traditional prayer to put people in the right frame of mind for the talking out. Often, a peacemaker will choose an elder to say it. Then, everyone has their say about what happened. They also have their say about how *they feel* about what happened. We like to say that the most important piece of paper in the procedure is the tissue, and emotions are on the table. Opinion evidence is freely allowed, within the bounds of saying things in a respectful way. After all that is done, there is "the lecture." That means that it is time for the peacemaker to do some teaching. The peacemaker will relate parts of the *Hajine Bahane*, our creation lore, and apply it to the problem. The old "stories" are actually a form of precedent which everyone respects. That, by the way, is why peacemaking is not "mediation." Most mediators are also called "neutrals," which means they don't express an opinion about the problem they are handling. Peacemakers have very definite opinions about what they hear while talking things out.

Finally, based upon the prayer, venting, discussion, and knowledge of the traditional way of doing things, the people themselves usually reach a consensus decision about what to do. Planning is actually a central Navajo justice concept, and the people plan a very practical resolution to the problem. Today, we put it in writing and the parties sign it.

In one recent case out of our Crownpoint court, a woman was charged with threatening and the illegal discharge of a firearm because she went to her nephew's house, threatened to shoot his dogs, and shot off a gun near the dogs. She was found guilty after a trial. She then asked Judge Loretta Morris if she could go into peacemaking. When the judge said "yes," fifteen family members got together and reached a resolution. All fifteen signed the agreement and asked the judge to *dismiss* the charge after a cooling off and reconciliation period. The judge agreed and ordered dismissal of the charges if it appeared that the peacemaking decision was still working after thirty days. That shows how creative the process can be.

"The Traditional Probation Officer"

Our sentencing policy uses the concept of "traditional probation officer." Let me explain it this way: In the Navajo way of thinking, when someone "acts as if they had no relatives," relatives have certain responsibilities. It is shameful to have a relative who acts out against others. That hurts *your* relationships with others. So, you assume responsibility for your relative's actions. The same holds true of victims. If my relative is hurt, I have a responsibility to step in and help.

There is an action verb in our policy which is important to understand. It is *nalyeeh*. You can translate it in a couple of different ways. It can be translated as "restitution" or "reparation." Articles on indigenous traditional law often use that translation. However, those are nouns, aren't they? I said an action verb. The other translation is that it is a demand to be made whole. It is also a demand to enter into a respectful discussion of the hurt. The aim of *nalyeeh* is not punishment or the correction of a person. That would

violate the Navajo maxim, "It's up to him." Instead, the aim is correction of the *action*. It is to cure the harm caused by bad conduct.

There will be a negotiation of the amount of *nalyeeh*, but that can be symbolic only. Recently, we got a call from a Colorado probation officer. He interviewed a young Navajo woman who was the victim of a sex offense and asked her what she wanted. She said, "Six horses." He called us to ask us what she was talking about. She was demanding *nalyeeh*, and six horses were the symbol of her injury and what she felt her honor required. The negotiation is the talking out process I outlined. At the end, the relationship of the parties is the most important topic of discussion, but there is often a payment to seal the successful conclusion of the problem and make the victim whole.

The offender's relatives play a very important part in *nalyeeh*. It is they who actually pay the money, horses, or goods. Once they have done that, they will keep an eye on the offender to make certain he or she will not offend again. Our policy provides for a peace bond, signed by relatives, for the same purpose.

In one case, where a non-Indian court intervened and disrupted the negotiations, the families of three young men who raped a young Navajo woman were about to transfer twentyone head of cows to the victim's family. A state court had jurisdiction, and it refused to enforce the agreement. The woman was shamed by not having a public symbol of her innocence delivered to her home and she got nothing. If the traditional arrangement had been followed, the young men would have been kept on very strict probation by their own families. (I do not know what finally happened.)

In sum, we want the families of offenders to take responsibility for their relative and the families of victims to speak with the victim. In a situation where a victim is afraid to face the perpetrator, it is the victim's relatives who can do the talking.

There is something else important about the traditional probation officer concept. In 1892, Western courts were imposed on Navajos. That told Navajos they were not competent to solve their own problems. The other aspect of the traditional probation officer concept is that we want communities to reassume their proper role in resolving community problems.

Peacemaking in the Criminal Justice System

Our sentencing policy provides for peacemaking before a charge is filed, after one is filed, before sentencing, and after sentencing. This is how it works:

Many courts have diversion programs in the prosecutor's office where someone will be sent into some form of community justice in place of filing charges. Most often, deferred prosecution is used as the incentive. We had a demonstration program in our Chinle court where we diverted DWI [drinking while impaired] cases into peacemaking, and it was very successful. We found that the talking out process works to change attitudes about drinking and driving. Our judges can also divert into peacemaking at the time of plea.

I think we have a good way to address victim's rights by using peacemaking to recommend a sentence. The victim can participate or not (but often they do). The parties can then reach a consensus about a sentence and recommend it to the judge. I want to stress that when I say "consensus," everyone has to agree. What, you might say, if the victim is coerced? That is why we have the victim's relatives attend. Does that give the defendant a slim chance of a favorable outcome? His or her relatives get to speak too. Also, our peacemaker with an opinion will have some influence on the decision. While peacemakers do not make a decision or impose one, they have an important say about how things should be concluded.

Why would you use peacemaking after a sentence has been imposed? Most courts use the suspended imposition of sentence, suspended execution of sentence, or probation to try to get defendants into treatment programs, pay restitution, or do community service. Sometimes that works, and sometimes it doesn't. However, we all know about the defendant who attends the alcohol or counseling program only because there is a possible jail sentence hanging out there. You know how they look: Arms folded; angry stare; the barriers are up. In peacemaking, you can make a defendant *want* to go into alcohol treatment or counseling.

In one peacemaking involving domestic violence, the defendant was full of denial; he made light of his actions; and he blamed his wife for the whole thing. It was the man's *sister* who straightened him out, showed him his alcohol problem, and told him to stop making excuses for his *own* actions. See how relatives get the job done?

There is a fifth use of peacemaking I haven't mentioned. The Navajo Nation is 25,000 square miles big. It is bigger than nine states of the U.S. It's something like the Texan who said that it took him three days to drive across his ranch. A Navajo replied, "Yeah, I once had a truck like that too." We don't have enough police to patrol that large an area. In fact, most Indian nations have a police force only half the size of a normal rural police force.

Most of our peacemaking cases are walk-ins where the people themselves bring the case. Rather than call the police, many people call a peacemaker. People are using peacemaking for family squabbles, alcohol-related behavior, family violence, and even such controversial things as sex offenses. It works.

Conclusion

This is how Navajos respond to crime. We found that we *can* use traditional methods in a modern court system. We are ahead of the curve when it comes to restorative or reparative justice. We call it peacemaking. The final point I want to make is this: Peacemaking is also good horse sense. (I like that Anglo expression, because we Navajos *love* horses.) We see that our ancestors were pretty smart. They had human dynamics figured out and knew psychology long before Freud. Peacemaking simply taps the wisdom of our communities, involves them in the process, and responds to their needs. It makes offenders look at themselves and at the consequences of their actions. Many victim assistance programs forget that victims have families, and they are one of the best resources to help. That's the Navajo response to crime in a nutshell.