

# Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

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## WHOSE CRIMINAL JUSTICE SYSTEM? NEW CONCEPTIONS OF INDIGENOUS JUSTICE

*Honourable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation*

*Editor's Note: The Honorable Robert Yazzie is the former Chief Justice of the Navajo Nation, 1992 – 2003 and is a sought after speaker and author on issues of Navajo peacemaking and traditional law. Chief Yazzie continues his illustrious career devoted to education and discussion of Indigenous justice and governance. In March 2014, Chief Yazzie spoke about moving Indigenous adjudication forward to the Aboriginal Law Speakers Series organized by the Aboriginal Law Students' Association, Faculty of Law, University of Alberta.*

I accepted the gracious invitation to speak to you about my take on the theme “Aboriginals and the Criminal Justice System” because I have found, over the years, that an invitation to speak with students is an opportunity to focus on issues that are important to me as an Indian jurist. I am going to offer a new approach to criminal justice today and to do so I will take you on a small trip to look at aboriginal or indigenous peoples in “the” criminal justice system. My question is, “*Whose* criminal justice system” are we talking about? *Whose* criminal justice system should we be talking about? *Whose* notions of crime, criminality and the rectification of wrong should we be using? Our trip will take us to the past, the present and, hopefully, the future.

What do we mean when we say “the” criminal justice system in relation to aboriginal or indigenous peoples? There is a unitary system in Canada, with a national criminal code that is applied in the provinces. The United States has a pluralistic criminal justice system where the States are legally dominant, there is limited recognition of tribal criminal jurisdiction over some people and the

federal government generally occupies a small niche. It is somewhat larger, with federal criminal jurisdiction over “major” crimes and an erratic system of selective prosecution of crimes in Indian areas. Why is that?

The first part of our journey today is to the origin of indigenous justice systems to trace the differences we see in Canada and the U.S. On August 6, 1555, following Spanish entry into the area we know as the Americas and efforts to solidify dominance there, Holy Roman Emperor Charles V, sitting as king, issued a decree that “ordered and commanded” that “the good laws and customs of Indians,” including their “usages and customs,” must “be kept and executed.” That decree was incorporated in later issuances in 1542 and in a codification of decrees for the Americas in 1680. The various ways it was honored in state practice over the centuries makes it a principle of customary international law, and it is enshrined in provisions of the *Declaration on the Rights of Indigenous Peoples*.

It is all very fine to have imperial recognition of the “good laws of Indians,” but who enforces them? The Spanish experimented with a national Indian

court in Mexico that was controlled by the viceroy or royal governor. It was somewhat successful in accommodating Indian culture but, at the end of the day, it was not an “Indian” institution in a meaningful sense. Spanish law had a “two republics” approach to governance whereby Indians had their own institutions of governance (with versions in the New Mexico Pueblos that can still be seen today), but we know little about how Indian courts worked in Mexico. There are indications that the Spanish settlers thought that the Indian judges were too tough on “ordinary Indians,” if you can believe that, given maltreatment of Indians in the historic record. Spanish law recognized Indian legal pluralism (as we call it today).

What about the English? We know that a book called “Tears of the Indians” was published in 1656. It was a translation of an account of Spanish cruelty to Indians that was popular because its anonymous author recommended that Cromwell do the same to the Irish. English colonization brought with it a means of social control by appointing cooperative indigenous leaders in a system we know as “native or village courts.” The historical record of tribal courts in the United States does not tell us whether the English native or village court was the model, but it is likely that it was. English colonization of North America differed because Canada adopted a unitary model of “one law for all” and subjected Indians, Inuit and Metis to non-native legal systems and the independent United States allowed Indian courts with limited jurisdiction. The Secretary of the Interior established an administrative court system within the Bureau of Indian Affairs in the Courts of Indian Offenses of 1883, and independent tribal courts were recognized in the *Indian Reorganization Act* of 1934. The American Great White Father restricted local authority in the *Indian Civil Rights Act* of 1968 that imposed most of the U.S. *Bill of Rights* on Indian courts and limited their criminal sentencing authority. That cutback was solidified by the U.S. Supreme Court when it ruled that Indian nations could have no criminal jurisdiction over either non-Indians or Indians from

other tribes (a policy that Congress somewhat reversed when it came to jurisdiction over nonmember Indians).

So, where are we today? While there are a few experimental nods to tribal courts in Canada and some encouragement of mediation-based programs, the unitary criminal justice system of Canada still prevails. Result? Overcrowded jails and prisons and a prevailing sense of injustice in indigenous Canada. The picture in the United States is reflected in U.S. Justice Department statistical surveys that purport to show rampant crime in Indian Country and massive victimization of native women in sexual assaults and domestic violence and the fact is that there is an uncaring central government that would rather issue reports full of platitudes (such as one delivered to the Senate Committee on Indian Affairs in February) than address the problem.

Going to the present, it is my hope that my judicial system, the Courts of the Navajo Nation, can be a model for change, but we are far from being there. I will tell you where we are now then discuss possibilities.

The Navajo Nation judicial system began in 1892 when the Bureau of Indian Affairs imposed a federal Navajo Court of Indian Offenses. The Navajo agency superintendent appointed Navajo judges whom he deemed to be sufficiently pliable to control but the system seemed to work well. Periodic snapshots in reports through the 1930s found that while the Navajo Court of Indian Offenses was under non-Navajo federal control, they functioned with a large degree of autonomy and applied customary practices and procedure. Change came following World War Two when Navajo veterans returned with new ideas. One of them was that Navajos should elect their judges, and when a maturing Navajo Tribal Council voted to elect judges the Commissioner of Indian Affairs reminded them that he controlled judges, the Council finally created the Courts of the Navajo Nation that came into being in 1959.

The decade those courts were created is important because the fifties were the time of a termination policy to wind up Indian tribes and encourage State

jurisdiction in Indian Country. The Navajo Tribal Council wanted its new court system to look so much like a State court that the feds would not allow Arizona and New Mexico to come in. Chief Justice Murray Lincoln got help from the University of New Mexico Law School and non-Navajo lawyers to adopt court rules based on federal civil and criminal rules and the system that was put in place was a non-Navajo one—at least in the sense of whose rules of the game were applied. The *Indian Civil Rights Act* of 1968 reinforced judicial dominance and there were growing pains as a maturing Navajo Nation court system clashed with a political council.

The early 1980s gave some distance from fear of State intrusion and a maturing Navajo Nation judicial system offered flexibility, so in 1980 Chairman Peter MacDonald gave a challenge to Chief Justice Nelson McCabe to look into the possibilities of traditional Navajo justice. MacDonald declared that the Navajo Nation court system had gone down the path of Anglo law too far and decreed that traditional Navajo law must be incorporated into the court system.

There were several outstanding Navajo judge leaders at the time, and two of them were the Honorable Homer Bluehouse, who sat in the Chinle judicial district, and newly-appointed district judge Tom Tso, who sat in Window Rock. Chief Justice Nelson McCabe instituted MacDonald’s instructions. Bluehouse contributed a Navajo traditionalist perspective to the reforms, and Tso took his experience with the DNA-People’s Legal Services legal aid program and presidency in the new Navajo Bar Association to give them a western law balance.

Tso, Bluehouse and McCabe pioneered ways of applying traditional Navajo law, then called “Navajo common law,” in written judicial decisions in English and a felicitous re-discovery of a method of traditional Navajo justice in communities led to the formation of Navajo peacemaking; originally called the Peacemaker Court. Those two initiatives gave a lot of energy to the court system and that was followed by a court reorganization in 1985. It is said

that there was an informal consensus that the new Supreme Court of the Navajo Nation would always have a traditionalist justice, a law school graduate and a trial judge promoted to the high court. The first chief justice was the Hon. Tom Tso, a trial judge; the law school graduate was the Hon. Raymond D. Austin and the traditionalist was the Hon. Homer Bluehouse.

Chief Justice Tso found federal funding for the peacemaking system and fully integrated it into the judicial system. Together the judges elaborated a mature system of Navajo common law jurisprudence, and there were other reforms by way of detailed court rules to address common cases and new court rules and finally a code to address the scourge of domestic violence.

Tom Tso retired at the end of 1990 and I came to office as chief justice in 1991. I found a solid judicial system when I took the chief justice chair and I promoted Navajo common law development, peacemaking and dealing with domestic violence as priorities. Looking back, I think that what I contributed was a maturing of Navajo Nation law through studies, legal writing and lecturing. I get some criticism for it, but one of my policies was that the Navajo Nation Supreme Court would respond to invitations to hear appeals in law schools and federal Indian bar meetings. Given my law school education, I started exploring traditional law thinking in law review articles, book chapters and academic publications. I responded to interest by academics who came to visit by inviting them to contribute to our system.

The judges instituted rules to address domestic violence in 1992, and mine was the first and only court in the United States to adopt such rules. The drug court fad began in earnest under Attorney General Janet Reno during the Clinton Administration, and we of the Navajo Nation system insisted that it had to be modified before we would use it, so work with others in the Indian justice community led to the creation of “wellness courts.” Our wellness court plan utilized Navajo peacemakers to assist accused drug- and alcohol-dependent criminal defendants by bringing their families

in to development treatment plans that were supervised by the Navajo judges. An analysis of how that system worked led to published research that showed that Navajo peacemaking, viewed as a ceremony, was an effective means of addressing alcohol dependence.

Another feature of my administration was, and is, giving reality therapy to the outside world. I have repeatedly told the U.S. Congress and the U.S. Justice Department that lovely competitive “demonstration” grants for justice programs must not be used as a substitute for adequate funding and that it was, and is, time for the United States to live up to its trust and treaty obligations to assure justice in Navajo Indian Country by adequately funding Navajo Nation police, courts, probation, corrections and peacemaking programs.

There was a parallel development in 2000 when the Navajo Nation Council, likely in response to litigation over jail overcrowding and poor conditions, decriminalized about 65 offenses by providing there would be no jail time or fine for them. Sentencing provisions substituted Navajo peacemaking as a preferred criminal justice procedure and provided for traditional *nalyeeh* for crime victims, but my call for reforms was not heeded. I announced to the world, in a popular publication, that the criminal code revision called on us to abolish our jails and substitute community justice for adjudication, but that did not happen. The Navajo Nation legislature did not have the will to put those reforms in place, and of course any expectation that the federal government would fund jail and justice reforms was a foolish one.

Where are we today—in the Navajo Nation and in North America? As far as the Navajo Nation is concerned, we have negative messages. The police tell us we have a high crime rate and elevated levels of violence against women. The Navajo Nation prosecution system has collapsed and the police are too few in numbers to patrol vast expanses of land with small populations. The judges cannot apply accepted sentencing options for a lack of jail space or community diversion resources. The United States intrudes to

prosecute felony-level crimes when a given offense makes it to the front page of the papers, top of the fold, but there is no meaningful interaction to assess the urgency of a given offense and the proper way to address it. There is little local control of felony prosecutions in the federal system and that denies the human right of meaningful consent by participation.

The situation in Canada? While I’m not entirely up to date, I sense that The Queen does a poor job of handling victimization or offending in both First Nations communities or urban areas with significant indigenous populations, and the monsters of substance abuse (largely alcohol), poverty and inequality in economic opportunity are devastating both rural and urban indigenous communities. The “one law for all” model is not working.

So, you may say, “Chief Justice Yazzie, since we invited you to speak to us on criminal justice ‘because of your significant contributions to and hard work in the area of Aboriginal law,’” what can you offer us?

I offer things I am thinking about. The current Chief Justice of the Navajo Nation, the Hon. Herb Yazzie, came into office with a good vision. It was that since the Courts of the Navajo Nation were innovative in choosing traditional Navajo common law as the law of preference, articulating it in judicial decisions and statutes, and since the implementation of Navajo peacemaking showed the utility of traditional justice procedure, wasn’t it time to scrap the court rules and procedures modeled on the American model and come up with something “Navajo.” The enthusiasm of the organized bar (most of whom are non-Navajo law school graduate attorneys) was underwhelming and the project stalled. I will be foolish enough to take the challenge up myself.

Where do we start? I see thinking about three areas as a beginning. They are (1) traditional adjudication concepts that are embodied in the *Navajo Code of Judicial Conduct* adopted in 1991; (2) an examination of concepts of traditional healing as an alternative to western procedure and sentencing options;

and (3) consideration of approaches to community, wellness or other “problem-solving” courts of adjudication.

The American Bar Association adopted its *Model Code of Judicial Conduct* in 1990 and our bar suggested that the Navajo Nation judges should endorse and adopt it. When they first met they concluded that while it was all very nice to have a code of judicial ethics, couldn't they come up with a Navajo code of ethics, based on traditional Navajo conceptions of the role of justice leaders? Our judicial conference formed a committee to study the question and a tradition-based *Navajo Code of Judicial Ethics* was adopted shortly after I became chief justice. Our code is substantially the model code, with one big difference: While some provisions were tweaked to meet traditional Navajo expectations or modified for our situation, Canon One is unique to us.

Canon One simply provides that “A Navajo Nation judge shall promote Navajo justice principle.” The opening paragraph states: “A Navajo judge should always decide and rule between the Four Sacred Mountains. That means that judges, as Navajos, should apply Navajo concepts and procedures of justice, including the principles of maintaining harmony, establishing order, respecting freedom, and talking things out in free discussion.” Those four aspects of justice are at the core of Navajo justice thinking, and of course we are elaborating them in practice. When the Navajo Nation Judicial Conference met to review the draft the judges got bogged down over what it means to “rule between the Four Sacred Mountains,” a traditional concept full of meaning, and the code might not have been adopted but for the intervention of one judge who observed that the phrase was philosophical one, akin to a biblical parable.

The Navajo justice principle is illustrated by eight “considerations” for implementation, and they are so important that I will read them to you as written:

1. *Harmony*: Injustice, in the sense of evil or wrongdoing, is the result of disharmony. One of the goals of justice is to return people and their community to

harmony in the resolution of a dispute. The judge must promote harmony between litigants, achieve harmony through assuring reasonable restitution to victims, and foster harmony by providing the means for offenders or wrongdoers to return to their communities. That is achieved through free discussion, conciliation, consensus, and guidance from the judge.

2. *Order*: Navajo justice is concerned with order, which is related to the principle of harmony. Court procedures and judicial decisions should be keyed to an orderly resolution of disputes.

3. *Judicial Attitudes*: A judge should behave to everybody as if they were his or her relatives. This value requires judges, as *Hozhoji' Naat'aah* (leaders), to treat everyone equally and fairly. Navajos believe in equality and horizontal, person-to-person relationships as a part of their concept of justice. Obligations towards relatives extend to everyone, because that is a means of not only stressing personal equality, but creating solidarity.

4. *Coercion*: Given the Navajo value of fundamental equality, it is wrong to use coercion against another. While judges have the duty of making decisions for others, that should be done with patience, courtesy, and without aggression. A judge should patiently listen to all proper and relevant evidence, as well as the reasonable and well presented arguments of parties or their counsel.

5. *Humility*: Navajo judges are successors of the traditional *hozhoji' Naat'aah* (peace chief), because they are chosen for their individual qualities. As such, they are only slightly higher than the others, and respect for their decisions depends on their personal integrity. Humility is the personal value which prompts people to respect judges for their decisions, and not their position.

6. *Fair Play*: The procedure of Navajo justice is people talking out their problems for a consensual resolution of them. A judge should encourage free discussion of the problem before the court, within the limits of reasonable rules of procedure and evidence. A judge should not encourage or permit aggressive behavior, including badgering of witnesses, rudeness, the

infliction of intentional humiliation or embarrassment, or any other conduct that obstructs the right to a full and fair hearing.

7. *Leadership and Guidance*: Navajo leadership stresses obligations to others, and creates high duties to consider the overall good of the community. The honor and respect given to leaders is based upon an acceptance of their leadership qualities, and a duty to respect those who guide. While often judges are called upon to use the adjudication process to declare a winner and a loser, or inflict punishment upon an individual, Navajo common law encourages problem-solving and discussion to achieve harmony and underlying problems. The judge should have wisdom and knowledge to recommend plans, solutions, and resolutions to the parties before the court.

A judge should always act with dignity and impartiality, to assure that parties have their day in court and an orderly and fair proceeding. A judge should exercise patience, and use the authority of the court to decide cases in an atmosphere of reason, rather than contention. The court should immediately intervene to control inappropriate behavior, aggressive tactics, or any conduct which takes away from a fair hearing of the full case, and takes away from the respect due another human being.

8. *Restitution*: The Navajo common law of wrongs and crimes was primarily concerned with restitution (*nalyeeh*) not punishment. A judge should provide full restitution or reparation to injured parties, particularly in criminal cases. In addition, a judge should encourage appropriate apologies to those who have been wronged, and urge forgiveness for wrongdoers who admit fault and promise good behavior in the future.

That is the first part of my three-pronged approach to a new way of looking at indigenous justice. It is different from my past advocacy for Navajo peacemaking because, this time, I am using ethics standards developed for indigenous judges in adjudication to suggest new approaches. Much of this approach depends on indigenous conceptions of the role of a justice leader and you will note

that references to western legal standards apply, if at all, in a passing way. The focus is on individual dignity and fair procedure overseen by those who are steeped in traditional notions of justice.

The second part of this approach deals with traditional healing. There are at least nine considerations from traditional healing but there first needs to be an introduction to the concept of “healing.” There are forms of western justice and forms of western medicine. Western medicine is largely preoccupied with a healing agent (i.e. a physician) working on the body of a patient who is injured or ill, using knowledge of herbs or chemicals (medications) to cure an illness or salve a wound or to treat a wound or break. Western medicine is largely concerned with using medications or mending techniques to deal with illness or injury. Some of western medicine deals with the mind, to be sure, but for the most part it does not. It is a highly-specialized field, dominated by learned professionals and guided by science in modern times.

There are other forms of healing (as opposed to medical “curing”) that deal with the mind and spirit, and in modern times holistic medicine has pushed for a place at the table and there are a wide variety of treatments that are becoming both popular and accepted. Establishment medicine, and government, have somewhat opened the door to traditional “alternatives,” and there is now room for indigenous medicine and healing. The focus here is “healing” in the sense of helping individuals deal with the spiritual side of injury, by crime or some other insult, and the ethics standards I have already related deal with making people whole or healing. It speaks, in one sense, to the kind of “restoration” that restorative justice addresses.

One review of the elements of healing that were used for an approach to Navajo therapeutic jurisprudence identifies nine elements of healing that are used in Navajo peacemaking practice. They are:

1. Identifying or “naming” an illness, as with the Navajo practice of identifying “things that get in the way of life” or *nayee* so that if one can identify and talk out what that happens to be, how the dysfunction

acts and how to describe it, one can get control of it by knowing and “naming” it.

2. Navajo traditional justice relies on a “talking out” principle so there is group discussion of a given problem and it can be “talked out” by way of getting to the nature of a given problem, identifying who got hurt and how, and how the injury affects people. If you can talk out the nature of the hurt then solutions should present themselves.

3. Western medicine works “on” patients when healing allows those who ill an opportunity to identify and name the ailment for themselves, talk about it and relate how they feel about it. That allows injured people the space to relate how they feel and ask for help in dealing with their situation. It gives them an opportunity to participate in their own healing.

4. One of the identifying features of illness is a sense of being alone and one healing technique is giving people who are hurt a sense of relationships so they will know they have a support group or relatives. One of the more common responses to a complaint of illness is friends saying, “I am with you.” Offending, in the Navajo way of thinking, is individuals “acting as if they had no relatives,” and when relationships are stressed that comes out. Does the behavior of an offender fit that description? If so, how can that behavior be identified and rectified? There is a form of shaming in identifying the impacts of one’s behavior and a surrounding “family” can help identify both the nature of the wrong and the way to deal with it.

5. Solidarity, or a sense of being with others and supported by them, is a transformative and healing event and it helps people deal with hurt withing the broader context of relationships and related-ness.

6. Healing discourse and procedure promotes respect for self and others so that a good sense of self-identity and worth that arises from engendering respect is a healing process.

7. Attaining a sense of time and place in one’s past and one’s history is important, so helping people place themselves within a given culture, and connecting with its rich history to acceptit and be accepted

by it is an aspect of healing.

8. There are ways to prompt introspection and examination of self to prompt honesty and even “confession” so that there can be admissions of responsibility and commitment to dealing with repair of an injury.

9. Control is an aspect of healing, meaning that people who have a sense that they have identified a problem, and its causes, can validate who they are, take control of their own problems and work with others to resolve them.

The aspects of healing can be coupled with the attributes of judicial ethics to create a belief system that avoids the western paradigm of an authority figure applying abstract “rules” to a problem to find an outcome. This approach flatly declares that “law” is not a bunch of rules of commands of some distant “sovereign” to be applied in an emotionless and unfeeling manner. It is not a far-off legislature using political process to make grand and senseless decisions for others (as with mandatory sentencing). It is not a justice method that requires learning, degrees or reaching for a code book or case report for guidance to make a decision. It is an integrated system of discursive decision-making.

Despite that, this is not “mediation.” Mediation attempts to obtain a consensual result and in fact mediation, as good as it is, has not gained widespread acceptance. Navajo peacemaking is not widely accepted. There is a Navajo tradition, expressed in a plea to an offender’s relative to “take him by the ear” or use family pressure to resolve a problem or insult, and there is a longstanding Navajo tradition, often spoken of by former Associate Justice Homer Bluehouse when he was a trial judge, that Navajos look to their judges to “lecture” an offender. That means using wisdom in experience that judges possess to correct those who have deviated from common values. We are indeed talking about adjudication and about a traditional form of “adjudication” in modern times.

If you accept these principles of Navajo leadership and respectful protocols then the question of what a modern indigenous institution to implement them

follows. What would an indigenous court of adjudication look like? I will return to a few western “models” and some indigenous experience to suggest what it might look like.

The British village court model is the country justice court, staffed by an indigenous actor but overseen by a non-native supervisor. That is the model that was also transplanted in the United States it is the foundation for provincial courts in Canada. It is actually not a bad model to the extent that ordinary people can administer simple codes, but the more there are attempts to professionalize the justice, magistrate or provincial court, the most distant from the populace it gets. We are not satisfied with rule-based justice and want relationship- and value-based institutions.

The Navajo Nation peacemaking model attempts to make the process a popular one but there is a lot of confusion about where it fits within a western-styled judicial system. The Navajo Nation version of a drug or wellness court approximates national U.S. experiments with “problem-solving” courts. The main difference is that State models are staffed with professional law school graduate judges and that is not what we are looking for. We want aboriginal or indigenous judges and we do not necessarily want them to be law school graduates. One of the realities in the Navajo Nation system is that Navajo law school graduates are not applying to be judges and despite numbers of them, only one Navajo Nation trial judge is a law school graduate. She prefers customary discourse and practice in her court. Where can we look for ideas?

We do not necessarily want to fully replicate a structure from the non-native world. Despite that, The Center for Court Innovation, a public-private venture in New York City, sets out principles for the “community court” concept that may be of use. There are six and they are:

#### 1. Restoring the community

There has been a lot of heat but little light in the restorative justice movement to define the word “restore,” but it is appropriate to identify the need to take a new look at our communities and involve them in justice planning. Community

members are both the service community *and* the source of leadership for a community-based method of adjudication based on traditional ethics and healing principles.

#### 2. Bridging the gap between communities and courts

Why is there a “gap”? There is still a problem in the United States that off-reserve, the actors in the local courts (most of whom are elected in the western United States) are not of the community, and on reservation or reserve, they are not necessarily of community. We want a “court” to be a community institution and not a distant and frightening body.

#### 3. Knitting together a fractured criminal justice system

That is vital. Police are not directly responsive to prosecution, reservation prosecution is a bureaucracy independent of local control or participation and non-aboriginal prosecution is largely hostile and indifferent to local needs. The criminal justice system is still the overbearing one based on principles of “trail, nail and jail” “bad people” and it is not based on a consensual and healing approach. Indian country cannot, and will not, depend on distant actors whose method it is to invade, punish and ignore actual need and healing.

#### 4. Helping offenders deal with problems that lead to crime

Most “offenders” in Indian country are relatives. The Navajo custom that Judge Homer Bluehouse articulated of a judge “lecturing” an offender is a counseling model, and that is what is wanted. Punishment as such does not help people. Giving families means of dealing with their offending relatives in a meaningful way is the goal of this principle.

#### 5. Providing the courts with better information

That is vague and it does not necessarily mean information from outside sources. It means getting better information from the community to me, and that is a bilateral and “talking out” process that is more in accord with our traditions.

#### 6. Building a physical courthouse that reflects these ambitions

That is only a dream. We have two new courthouses in the Navajo Nation

that satisfy this desire, with others in the planning stage, but most communities will need to use what they have and achieve their own ambitions as they can.

There is not sufficient time today to present this plan in more detail, but I can summarize what it is I am after: I went to law school to get tools to serve my Navajo people. Many of them are useful by way of being able to identify issues to be resolved and *some* legal principles to apply. Fundamental, due process and human rights principles are particularly important. My legal training helps me identify traditional relationships and the ceremonial values that bind families and communities together as vibrant institutions and that is the thrust of this approach. Note that the Navajo ethics principles are largely about self-identity and respectful relationships rather than the model of a powerful and distant actor who is commanded from the distance by an impersonal legislative body. We can get no meaningful answers from legal positivism and the bossy and commanding structures we inherited from colonialism.

As my traditional Navajo legal thinking evolved I began to see that traditional indigenous justice is based on talking out problems and planning and that such is at the core of notions of healing. Respectful interaction with people otherwise classified as “victim” or as “perpetrator” yields new perspectives. A study of how well or not our Navajo Nation version of a drug or wellness court yielded the important insight that the traditional justice methods we used to address alcohol-related problems were in fact a “ceremony” and that it works. Where are the justice ceremonies in the western systems? *Aden*—they ain’t there.

RJ Simpson’s delightful invitation letter brought me here because I wanted an opportunity to gather my thoughts about the current state of criminal justice systems and I must report that the systems we of the Indian court community inherited are not working. I do not see our State and federal court systems in the United States working because they are not staffed by indigenous actors; they do not respond to indigenous communities in any meaningful way and they do not focus

on healing. They are not “community” institutions. I can say that there are many places in American Indian Country that verge on anarchy, in the sense of there being no law, and the police model has long been recognized as a failure in both rural and urban indigenous communities.

We look to the *Declaration on the Rights of Indigenous Peoples* and it tells us of the right of indigenous communities to organize in accordance with traditional and customary expectations, the duty to accommodate effective participation of communities and the requirement to provide effective remedies for those whose rights are infringed or denied. The United States and Canada give lip service to those human rights principles but we can make them work.

I doubt very much whether The Queen or the Great White Father will come forward to respond to our justice needs in a meaningful way, but we do not need to be bitter about it. I am not going to advise you to give up your law school studies or to ignore what you are learning because you are getting valuable tools and acquiring skills that are needed in your own communities. I worked hard for my American legal education and I value it. I combine it with the values I learned in my communities to focus what I have learned for the good of my own people.

To sum up: I shared the traditional justice thinking embodied in our Navajo Nation judicial ethics code because we Navajo judges put a lot of effort into it by way of thinking out our identities as judges and the processes that flow from them. I found some of the main principles of indigenous healing because you must consider them in your attempts to think out criminal justice. I took ideas from the American problem-solving and community court literature because they help me focus on a plan for community institutions staffed by indigenous actors who are of community.

These are only a few ideas and notions I put together to respond to the challenge to speak to the theme of “Aboriginals and the Criminal Justice System” because the time for complaining about what we don’t have is over and it is time for you to help us all develop meaningful criminal justice

planning for the future. You are of many communities and backgrounds and your talents reflect who you are as members of them. They look to you to get the knowledge and skills for problem-solving at home. You may serve in distant national or provincial capitals or you may do your lawyering at home. Whichever you serve you can become more aware of the values and principles I shared with you in the context of your own customs and traditions. *Whose criminal justice solutions are we talking about?* Well, given that the recognition decree Holy Roman Emperor Charles V promulgated on August 6, 1555 recognized the “good laws and customs of Indians” or ordered that they “be kept and executed,” and given that the recognition is a firm principle of international law reflected in the *Declaration on the Rights of Indigenous Peoples*, that would be our indigenous laws and systems, wouldn’t it? Return to your homes with good feelings and in good health, and give my special regards to all my relatives.

## Spirit Matters: Aboriginal People and the *Corrections and Conditional Release Act*

*Editor’s Note: a Special Report on Aboriginal Corrections by the Office of the Correctional Investigator revealed a dramatic increase of Aboriginal Peoples in federal prison. The report found there was almost 40 per cent increase in the incarceration of Aboriginal people between 2001-2002 and 2010-2011. The report calls for the implementation of 10 specific recommendations including the creation of a Deputy Commission for Aboriginal Corrections. Following are selections from the executive highlights of the Report.\**

### Executive Summary

i. *The Corrections and Conditional Release Act* (CCRA) makes specific reference to the unique needs and circumstances of Aboriginal Canadians in federal corrections. The Act provides for special provisions (Sections 81 and 84), which are intended to ameliorate over-representation of Aboriginal people in federal penitentiaries and address long-standing differential outcomes for Aboriginal offenders.

ii. It has been 20 years since the CCRA came into force, and the Office of the Correctional Investigator (OCI) believes that a systematic investigation of Sections 81 and 84 of the Act is both timely and important. ...

iii. Section 81 of the CCRA was intended to give CSC the capacity to enter into agreements with Aboriginal communities for the care and custody of offenders who would otherwise be held in a CSC facility. It was conceived to enable a degree of Aboriginal control, or at least participation in, an offender’s sentence, from the point of sentencing to warrant expiry. Section

81 further allows Aboriginal communities to have a key role in delivering programs within correctional institutions and to those offenders accepted under a Section 81 agreement (Aboriginal Healing Lodges or Healing Centres).

iv. The investigation found that, as of March 2012, there were only 68 Section 81 bed spaces in Canada and no Section 81 agreements in British Columbia, Ontario, and Atlantic Canada or in the North. Until September 2011, there were no Section 81 Healing Lodge spaces available for Aboriginal women.

v. One of the major factors that inhibit existing Section 81 Healing Lodges from operating at full capacity and new Healing Lodges from being developed is the requirement that they limit their intake to minimum security offenders or, in rare cases, to “low risk” medium security offenders. ...

vi. In addition to the four Section 81 Healing Lodges, CSC has established four Healing Lodges operated as CSC minimum-security institutions (with the exception of the Healing Lodge for

women that accepts both minimum and some medium security inmates). ...

vii. Section 81 Healing Lodges operate on five-year contribution agreement cycles and enjoy no sense of permanency. ...

viii. We found that the discrepancy in funding between Section 81 Healing Lodges and those operated by CSC is substantial. In 2009-2010, the allocation of funding to the four CSC- operated Healing Lodges totalled \$21,555,037, while the amount allocated to Section 81 Healing Lodges was just \$4,819,479. Chronic under-funding of Section 81 Healing Lodges means that they are unable to provide comparable CSC wages or unionized job security. ...

ix. Another factor inhibiting the success and expansion of Section 81 Healing Lodges has been community acceptance. Just as in many non-Aboriginal communities, not every Aboriginal community is willing to have offenders housed in their midst or take on the responsibility for their management.

x. CSC did not originally intend to operate its Healing Lodges in competition with Section 81 facilities, but rather saw itself as providing an intermediate step that would ultimately result in the transfer of those facilities to community control under Section 81. As the investigation notes, however, negotiations to facilitate transfer of CSC Healing Lodges to First Nation control appear to have been abandoned. Most negotiations never moved beyond preliminary stages. ...

xi. The intent of Section 84 was to enhance the information provided to the Parole Board of Canada and to enable Aboriginal communities to propose conditions for offenders wanting to be released into their communities. It was not intended to be a lengthy or onerous process, yet that is exactly what it has become: cumbersome, time-consuming and misunderstood. ...

xii. The Supreme Court of Canada in *R. v. Gladue* (1995) and, more recently, in a March 2012 decision (*R. v. Ipeelee*) compelled judges to use a different method of analysis in determining a suitable sentence for Aboriginal offenders by paying particular attention to the unique circumstances of Aboriginal people and their social histories. These are commonly

referred to as *Gladue* principles or factors. CSC has incorporated *Gladue* principles in its policy framework, requiring it to consider Aboriginal social history when making decisions affecting the retained rights and liberties of Aboriginal offenders. Although the *Gladue* decision refers to sentencing considerations, it is reasonable to conclude that Section 81 facilities would be consistent with the Supreme Court's view of providing a culturally appropriate option for federally sentenced Aboriginal people. Notwithstanding, we find that *Gladue* principles are not well-understood within CSC and are unevenly applied.

xiii. Today, 21% of the federal inmate population claims Aboriginal ancestry. The gap between Aboriginal and non-Aboriginal offenders continues to widen on nearly every indicator of correctional performance: Aboriginal offenders serve disproportionately more of their sentence behind bars before first release; Aboriginal offenders are under-represented in community supervision populations and over-represented in maximum security institutions; Aboriginal offenders are more likely to return to prison on revocation of parole; Aboriginal offenders are disproportionately involved in institutional security incidents, use of force interventions, segregation placements and self-injurious behaviour. ...

xiv. The investigation found a number of barriers in CSC's implementation of Sections 81 and 84. These barriers inadvertently perpetuate conditions that further disadvantage and/or discriminate against Aboriginal offenders in federal corrections, leading to differential outcomes:

1. Restricted access to Section 81 facilities and opportunities outside CSC's Prairie and Quebec regions.
2. Under-resourcing and temporary funding arrangements for Aboriginal-controlled Healing Lodges leading to financial insecurity and lack of permanency.
3. Significant differences in salaries and working conditions between facilities owned and operated by CSC versus Section 81 arrangements.
4. Restricted eligibility criteria that

effectively exclude most Aboriginal offenders from consideration of placement in a Section 81 Healing Lodge.

5. Unreasonably delayed development and implementation of specific policy supports and standards to negotiate and establish an operational framework to support robust, timely and coordinated implementation of Section 81 and 84 arrangements.

6. Limited understanding and awareness within CSC of Aboriginal peoples, cultures, spirituality and approaches to healing.

7. Limited understanding and inadequate consideration and application of *Gladue* factors in correctional decision-making affecting the interests of Aboriginal offenders.

8. Funding and contractual limitations imposed by CSC that impede Elders from providing quality support, guidance and ceremony and placing the Service's *Continuum of Care Model* for Aboriginal offenders in jeopardy.

9. Inadequate response to the urban reality and demographics of Aboriginal offenders, most of whom will not return to a traditional First Nations reserve.

10. CSC's senior management table lacks a Deputy Commissioner with focused and singular responsibility for progress in Aboriginal Corrections.

The OCI concludes that CSC has not met Parliament's intent with respect to provisions set out in Sections 81 and 84 of the CCRA. CSC has not fully or sufficiently committed itself to implementing key legal provisions intended to address systemic disadvantage.

xv. It is understood that CSC does not control who is sent to prison by the courts. However, 20 years after enactment of the CCRA, the CSC has failed to make the kind of systemic, policy and resource changes that are required in law to address factors within its control that would help mitigate the chronic over-representation of Aboriginal people in federal penitentiaries  
\*The full report of Spirit Matters can be found at [www.oci-bec.gc.ca](http://www.oci-bec.gc.ca)

