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WHERE SHOULD TRIBAL JUSTICE BEGIN AND END?

TRIBAL JUSTICE ISSUES

Prepared for

APPROACHING THE YEAR 2000:

THE CHANGES, THE CHALLENGES, AND THE CHOICES

FOR TODAY'S CRIMINAL JUSTICE SYSTEM

BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE

Atlanta, Georgia

NCJRS

FEB 8 1996

November 30, 1995

ACQUISITIONS

by

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Where *should* tribal justice begin and end? How can we better control and prevent violent crime and drug abuse? What relevance does "futuristic" criminal justice technology have for Indian nation justice systems? Those are some of the questions asked in my invitation to address this panel on Indian nation justice at the U.S. Justice Department's Bureau of Justice Assistance conference.

I will use the word "begin" in an historical sense and in a Navajo sense. We can look at the Navajo Nation justice system in terms of its beginning in 1892. That is, the beginning of our modern system of western adjudication and codes. As a Navajo, I also always "begin" in the sense of going back to the beginning of the Navajo People and of Navajo justice. I will address both.

Modern Indian courts began in 1883, when the Commissioner of Indian Affairs created the first Courts of Indian Offenses. They were much like the justice courts so familiar to Americans, with two differences: the judges were Indians, and the code of law applied in the Courts of Indian Offenses was designed to destroy traditional Indian law. There were the usual justice court offenses, such as disorderly conduct or assault, but it was also a crime to carry on traditional practices. They included seeing a medicine man, and *being* a medicine man. It was a crime to have more than one wife; make a traditional gift in marriage; do traditional probate practices; or to dance or go to a religious ceremony.

For historical reasons we have not yet discovered, the Bureau of Indian Affairs did not introduce the Court of Indian Offenses to the Navajo Nation until 1892. What did Navajos think of adjudication, western style? What did they think of making their traditional practices offenses? We don't really know, but we *do* know that by the early 1900s, Navajo judges were doing things their own way; as they always did. Reports from the late 1930s and the early 1940s show that court proceedings were more like town meetings, where everyone had a say about the case. Members of

the jury would get into arguments with police officers on the stand, and members of the audience would jump in on the discussions. Did it work? The reports, prepared by non-Navajos, show that it did. The community meeting style of court hearing fit Navajo expectations, and everyone present would work out the offense before the court. Often, the judgment would require the payment of restitution to a victim (usually in the form of goods or livestock), and formal charges would be dismissed. One of our retired judges tells the story of when he went before the court as a child in the late 1920s: he and a brother were out rounding up horses, and someone else's horse "just happened" to come along with the herd. The boy's grandmother was charged with horse theft. When her case came to trial, the community gathered to talk about the event. The judgment of the court, based on discussions where everyone participated was "not guilty," provided that the woman return the horse.

What did the Bureau of Indian Affairs superintendents think of this system? They praised it, saying that the Navajo judges handled cases better than they could when applying the Bureau of Indian Affairs criminal code. The reports of court operations, based on observations by non-Indians, also approved. Everyone recognized that the system worked.

In 1934, Congress passed the legislation which is the foundation for modern tribal courts; established and maintained by Indian nations and not the B.I.A. The Indian Reorganization Act, in its recognition of the "existing" powers of Indian nations, recognized the power to establish and maintain justice systems. The Navajo Nation decided to keep its existing B.I.A. Court of Indian Offenses, because it worked for Navajos.

There were major changes following World War Two. Returning Navajo veterans, who saw a bit of the outside world, began demanding more "modern" methods of justice. In the 1950s, which

we now call the "Period of Termination" in Indian policy, the states surrounding the Navajo Nation threatened to assert their criminal and civil jurisdiction. The Navajo Nation Council reacted by creating the Courts of the Navajo Nation in 1959. Given the fear of takeover by the states, the Council created a justice system which looked exactly like a state system. The Council thought that if the Navajo Nation courts looked like and operated like state courts, no one would find a need to take over.

That was fine as far as it went. Navajos took over their own system, and as it grew, legal observers again liked what they saw. One writer said that the Navajo Nation courts are the "crown jewel" of all American tribal courts. Another said that ours is the "flagship" Indian judicial system. Despite the fact that Navajos adapted to western adjudication, police, judges and all the trappings of the American legal system, there were problems. Navajos began to ask, "What about our own traditional justice methods? We're Navajos; shouldn't we act like Navajos?" In response to public demand, the Navajo judges began using traditional law in written opinions (in English), and they brought traditional Navajo justice methods into the system. We call it "peacemaking." It is a justice method where a community leader (called a *naat'aanii*) brings the parties together to "talk out" the dispute. Navajos believe that it is odd to have a stranger sit in judgment over you. They feel that the people with the dispute are the judges. Accordingly, they select wise community leaders to gather together everyone concerned with the problem to come to a group agreement about what should be done. This is non-coercive justice, because Navajos do not believe in power, force and punishment. Does it work? Is it possible to have a justice system without judges or lawyers but with only respected community advisors? Since the revival of traditional Navajo peacemaking in 1982, we find that the people themselves are saying "it works." Most of the cases in peacemaking are

those where the people themselves choose it. We have a modern criminal justice system, but victims are bypassing the police and prosecutors in favor of peacemaking. We have the best domestic violence law in the United States (and many people tell us that), yet Navajos are bypassing its remedies in favor of peacemaking.

We have another problem: the western criminal justice system has collapsed. The Navajo Nation is larger than nine states of the U.S.; bigger than Ireland and almost as big as the State of South Carolina. Criminal justice systems are expensive. On a given night, only one Navajo Police patrol car will cover an area as big as many counties of the American West. There are not enough prosecutors or public defenders. Even when someone pleads guilty or is found guilty of an offense, we only have jail space for about 70 prisoners at a time just now. That is a problem, because (for example) we have an average of 3,500 DWI or DUI cases a year. With a 90% conviction rate (which, by the way, is normal for most courts), there obviously isn't enough space to jail everyone. We have minimum mandatory sentences for DWI, but we don't have the space for that many prisoners. We see the same problem with child welfare programs. We have severe child abuse and neglect problems, mostly related to parents dumping children to be free to go out drinking. (Here, I want to put in a little plug for the U.S. Department of Justice: its research publications are very useful in our program research, particularly the research which shows that children who are abused or neglected are equally likely to enter the cycle of violence.)

We have all the emerging social and criminal problems seen around the United States: gangs, domestic violence, alcohol-related crimes against persons or drunk driving, child abuse and neglect and the rest of it. We don't have sufficient resources to deal with them, using western adjudication. Yes, we try diversion programs, but with recent federal budget cutbacks in Indian

Country and rising demands coupled with falling Navajo Nation revenues, we cannot keep up. We have seventeen probation and parole officers to deal with over twenty thousand criminal cases per year. How do we respond?

I have a philosophy as the Chief Justice of the Navajo Nation, and my job is to lead our justice system. How do I deal with the collapse of our western-style justice system? I reply, "We must use Navajo thinking to deal with these problems." What do I mean by that?

How does a Navajo see a social problem? We have a word for it, and that word is *nayéé'*. The literal translation is "monster," referring to a narrative from our Navajo version of creation. However, it also means something much deeper: it means "that which gets in the way of a successful life." When we take a close look at the cases we see in our criminal justice system, what do we find? All kinds of *nayéé'*, or things that are getting in the way of the successful lives of many. We have Navajos who have lost their language and culture. Studies show that those are the parents who are more likely to physically or sexually abuse their children. We have Navajos who are unemployed or who are having difficulty coping. When they drink, they are the ones who beat their spouse or companion or who assault others. We have people who are in deep depression -a *nayee* our language specifically recognizes- and who commit suicide under the influence of alcohol. Many of them commit suicide on the highways, drunk behind a wheel. We see the barriers each day of the week, and we see what gets in the way of these people enjoying a successful life.

How do you deal with psychological "monsters" in a court case? Here's what happens in a DWI case: the judge asks, "Do you have a drinking problem?" Of course, the defendant denies it. We don't have facilities to do alcohol dependence testing and few treatment programs. What happens in a domestic violence case? The defendant says, "It was *her* fault?" Or, "It's traditional

to beat your wife." Sometimes, in child sex abuse cases, we will hear a defendant say that it is "traditional" to have sex with a step-child, or "traditional" to have sex with a young woman who has just reached puberty. What are these answers we hear from defendants? They are excuses. They are usually *false* excuses, but we hear them anyway. How can we, as judges, respond? Do we lecture those kinds of defendants? They don't often listen. Do we have a probation officer work with them? Do we send them to a western-style alcohol treatment program? We've tried that, and it doesn't work well. Despite the fact our referral programs are overburdened, people who are possessed by the monsters of depression, despair and denial just don't listen. Who *will* they listen to? Here is what we found:

Thanks to a pilot project funded by the U.S. Department of Health and Human Services, we started sending DWI cases into peacemaking. There, the drunk driver can give all his excuses and tell everyone he doesn't have a drinking problem. Who is there to listen? Usually the defendant's spouse, parents, children and other relatives. The peacemaking session is conducted by a community leader who usually knows the defendant from childhood. Do *those* DWI defendants get away with it? We find that they don't. Peacemaking is proving to be very useful to get problem drinkers, often young men with cocky attitudes, into successful treatment programs. This time, they listen and cooperate, because their family looks over their shoulder.

What about abusers; batterers; wife-beaters? How does peacemaking work on them? Again, the excuses of "It's *her* fault" or "it's traditional to beat your wife" are aired in peacemaking sessions. Who listens to the excuses? The abuser's spouse, parents, in-laws, children and everyone who knows what is *really* going on. Do you think it is "traditional" for a Navajo man to beat his wife? Many men are finding out, directly from the women, that it is *not* traditional and it is in fact against Navajo

tradition to abuse a woman.

And what about the sex offenders? An Indian Health Service psychiatrist tells us, and experts in the field of treating sex offenders agree, that peacemaking is a successful means of dealing with sex offenders. Aside from the fact that the process is successful in getting past the psychological barriers I mentioned, a child's relatives are brought in to learn of the harm done to a child and set up family protection systems for the future. There is a short article on Navajo peacemaking in the September issue of California Lawyer which gives us a glimpse into how it works: A young Navajo woman was brought into peacemaking because she was causing trouble in her community. During the process of "talking things out," she said that she was acting out because she was trying to deal with her drinking. Then, she related that she had also been sexually abused by a relative. The young woman's family listened in shock, but they were glad to find out what was *really* going on. That made it possible for them to deal with the problem. The magazine story says that the family members smiled as they thanked the peacemaker for helping them get to the bottom of things.

The theme for this panel asks "Where should tribal justice begin and end?" I already told you about the historical beginning of our system, and I gave you a little bit of a glimpse into our Navajo traditional beginnings. We begin with Navajo justice thinking. We return to our language, our traditions, our traditional system of leadership and our ways of doing things. This kind of beginning shows the source of our thinking. We don't focus on punishing people; we get to the bottom of problems by talking things out. We avoid punishment so we can get defendants to talk about what is inside them so we can find the *nayee* inside. We return justice authority to the people. Is peacemaking expensive? We do maintain a court program to operate it, but the people pay for the

services of peacemakers. They are there on a day-to-day basis in all our communities.

One problem we see in Indian Country is a problem throughout the United States: when modern justice systems with police, prosecutors, defenders and judges, backed up with prisons, were established, what did that do? We told ordinary people that justice was not their business. We told people to let others handle social problems. We stripped ordinary people of their responsibilities to keep peace in their own communities. What is the result? People dial "911" where they can. In our area, as it is in many others, there is no response or it comes too late. Otherwise, they hide behind closed curtains in locked houses, trembling in fear of crime and feeling they can do nothing. About the only thing they can do to feel good is vote for "law and order" politicians, and it just doesn't work. The criminal justice system has collapsed. We stripped ordinary people of their responsibility for their own communities and we locked them out of the process. Our peacemaking policy is to return justice responsibility to communities and to help them solve their own problems. If they can't handle it, we are there as a backup with our western adjudication and police system. Our experience, however, is that community justice *does* work.

The other question is, "Where should tribal justice end?" We often hear questions about the limits of peacemaking. People ask us, "What kinds of cases *can't* be handled in peacemaking?" We don't know, and I'll tell you why: Most of the cases in our peacemaker system are those where members of the public choose it. Some lawyers sneer, "Well, you can't handle a murder in peacemaking!" We can't? We see murder cases which U.S. Attorneys do not prosecute in our court system, handled as an aggravated assault. Likewise, we see people going into peacemaking to deal with murder. In the Navajo Nation, as it is elsewhere, the victim of a murder is often no stranger to the murderer; they are often relatives. We would have never thought that child sex abuse cases

could be handled in peacemaking, when the system was revived in 1982. There are being handled well there. Non-Indian lawyers tell us we can't use peacemaking in domestic violence cases. We can't? Experience using it shows us that women are not revictimized in the process, and women victims actively seek it rather than get a restraining order in our adjudication system. Rather than attempt to limit peacemaking by sitting in an office and speculating about it, we let the people decide. There is no limit to peacemaking.

Does it just work for Navajos? There have been several cases in our system involving non-Navajos where it works well. In fact, there is a version of Navajo peacemaking, based on our system, operating in Norfolk, Virginia. Something very much like peacemaking is being used to deal with juvenile offenders in Australia and New Zealand, and a proposed South African delinquency code incorporates peacemaking approaches.

I see no end to the capabilities of tribal justice, if we have the tools we need. Rather than tools, Indian courts get their own version of *nayéé* or "that which gets in the way of a successful life." What gets in the way of *our* successful life? The Indian Civil Rights Act of 1968, where we always have the threat of outside interference with our criminal judgments through federal judicial review. That law currently limits criminal sentences to a maximum of one year in jail, including probationary periods. What would a federal probation officer say if told that he or she has only one year to work with a serious offender? The 1978 ruling in the *Oliphant* case, which tells us we have no jurisdiction over non-Indians (unless they are adopted in or "assume tribal relations). The fact that although Congress put significant new burdens on Indian nation courts under the Indian Civil Rights Act of 1968, Congress has *never* appropriated funds to fully implement that law. In 1990, the U.S. Civil Rights Commission told Congress of the unfairness of that disparity. In 1993, the

Indian Tribal Justice Act became law. As of today, Congress has appropriated *no* monies for Indian nation court operations under that Act. Instead of getting support for our existing systems, we are hearing proposals for a greater federal presence in Indian Country. With all due respect for the many fine and sincere U.S. Justice Department officials here, it's like the old commercial: "Please mother, I would rather do it myself." As I hope I've shown you with our experience with community justice, it works better and is far less expensive.

In other words, while we see no end to the capabilities of Indian justice, whether it is justice under our adjudication system or traditional justice, there are barriers ^{//}-*nayee*- in federal justice policy which hold us back. They are continued threats to the integrity of our courts; a lack of federal support; and tying our hands on criminal jurisdiction and sentencing. All those things must be changed, with your help.

It isn't all bleak, and I would be an ungrateful guest of the Bureau of Justice Assistance if I didn't point out the bright spots. U.S. Justice Department programs help us a great deal. We have planning staffers who take your justice studies home, read them and suggest their findings for use in our court plans. Those materials are very helpful. I am delighted to see new emphasis upon helping us with U.S. Justice Department grant programs. An Office of Juvenile Justice and Delinquency Programs grant to use peacemaking to deal with juvenile offenders is showing us that traditional justice works with them. We recently got a U.S. Justice Department grant to study our gang program, and we are very grateful for it.

More importantly, there is a new spirit in the U.S. Justice Department which I greatly appreciate. Under the leadership of Attorney General Reno, Herb Becker and Mary Morgan, and with the assistance of Ada Melton, we have a new national partnership to "talk out" problems. I say

"talk out," because we do a little peacemaking with them. We don't always agree, but the final product will be good. Aside from national initiatives, we are working with state-level Justice Department officials to address problems on a local level.

Is there an "end" to tribal justice? No! There is no end to what we can do if we work together to identify the *nayéé* or monsters and then slay or weaken them together. We need to sweep aside the barriers and explore the limitless possibilities. Whenever I talk about Navajo peacemaking, I hope to show that there are other ways of doing justice; other ways of dealing with problems; different approaches to problem-solving.

I close by simply saying this: The "beginning" tribal justice for us is "going back to the future." We start with our own traditional beginnings. There is no "end" to tribal justice if only people like you support us.

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