

# NAVAJO NATION COURTS, PEACEMAKING AND RESTORATIVE JUSTICE ISSUES<sup>1</sup>

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## Introduction

Peacemaking as carried out by Navajo Peacemakers is a form of restorative justice, but the basic principles of Peacemaking predate Euro-based restorative justice models and programs by centuries. It will be argued in this paper that because the current Peacemaking program is the result of different cultural processes than those contributing to Euro-based restorative justice programs, Peacemaking may have already surmounted many of the issues that are of concern about restorative justice programs operating in the dominant society. It is concluded that some of these solutions may be of use to non-Native American programs, but some will not because of their rootedness in Navajo (*Dine*) specific cultural practices and values.

This paper contains brief overviews of traditional Navajo justice strategies and current Peacemaking principles, a comparison of Peacemaking principles with the restorative justice model, and finally, a discussion of ten issues that have been raised about restorative justice programs and how these may or may not apply to Peacemaking.

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### Traditional Navajo Justice Strategies

The following discussion is relatively superficial because of space limitations, even though a significant amount of research has been carried out on Navajo ethics and justice ideologies and practices. The writings of Haile (1943), Reichard (1983) and Farella (1984) are recommended for very detailed and in- depth scholarly analyses of Navajo ethics and values.

Traditional Navajo (*Dine*) values and practices follow very similar patterns to those found among other North American Indigenous groups (see Dumont 1993). According to Benally, among Navajos

the individual is taught the interrelationship and interdependence of all things and how we must harmonize with them to maintain balance and harmony. . In the words of the elders, the aim of Navajo life is to seek *hozho*, a state of much good, peace, happiness, and plenty. (Benally 1988: 10)

Farella (1984) quoting Wyman defines *hozho* as “good as opposed to evil, favorable to man as opposed to unfavorable or doubtful.. .beauty, perfection, harmony, goodness, normality, success, blessedness, order, ideal...”

According to Reichard (1983: 124), Navajo “ethics includes actual as well as ideal behavior, etiquette and law, as well as religious restrictions.” Wrong-doing is a lack of self-control. Acts are not seen as wholly bad; once things were brought under control the “evil effect is eliminated.. .good then in Navaho dogma is control.” (Reichard 1983: 5).

‘Bad’ is disruption. It is what ‘should not be done’ according to spiritual tradition (Haile 1943: 84). Disruption occurs when people fail to act humbly towards everything within ‘the circle’, that is, within the universe, including ‘man, rocks, air, plants, fire, animals, water, insects.’ (Tso 1989: 4-5). Tso continues:

as long as we behave in a humble manner to all parts of the universe we are in harmony. To act in a humble manner is to act without thoughts of power or control, without unnecessary action against others and against nature. (Tso 1989: 4-5)

Unnecessary actions included rape, stealing, laughing at others, committing adultery, lying, seeking another’s death, quarreling in jealousy, wishing someone or their livestock dead, and “stealthily touching a sleeping woman” (Haile 1943:

85). According to Shephardson (1965) the disruption of harmony is 'bad' because it "invites retaliation, ridicule and ostracism against the disrupters, and because it disturbs the community." Behavior, not intent, was the focus. The name for wrong-doer translates roughly as 'he took the chance', of being offensive in a spiritual sense (Haile 1943: 86). As Haile (1943: 84) states, "A crime like murder or theft was primarily a social crime, involving no personal guilt. So long as the offender paid the penalty society was satisfied..."

According to Zion (1995) and Zion and Yazzie (1997), the traditional justice institution was the clan or the kinship structure. *K'e*, or a relationship of obligations to the group based on respect, solidarity, love and loyalty to the group was and still is the main Navajo justice mechanism (Zion and Yazzie 1997; Yazzie 1996). 'Reciprocity' is another translation for *k'e* (Yazzie 1996).

A variety of methods were used traditionally to deal with disruptions, including 'killing with eyes', a form of shaming in which a wrong-doer was constantly watched by members of the community, even as he or she slept. Its specific purpose and function was 'to invoke anger or peace' (Bluehouse, personal communication, July 24, 1998). If the watched person reacted with anger, it would be explained to them that they had a problem and offers would be made to help them rid themselves of the monster (the problem) so they could continue to live within Navajo society (Bluehouse 1996). If they reacted with peace, this signified that they understood the situation, and they would be nurtured by the community (Bluehouse, personal communication, July 24, 1998.). Relatives would not only try to get someone to change their behavior but would also assume obligations for family or clan members, such as making reparations, and would ensure that there were no future transgressions. According to Yazzie and Zion (1996: 162), "The moral force of the group was used to persuade people to put the group's good above individual welfare. It is said of a wrongdoer that 'he acts as if he had no relations'".

Also common were divination by hand-tremblers to discover thieves and witches, and informal meetings of relatives and community leaders who pressed for consensus (Shephardson 1965).

This latter traditional justice mechanism is the direct ancestor of the current Peacemaking process. Disputes were resolved by 'talking things out' among those concerned about the issue, including 'the victim', 'the offender' and family/clan members (Zion and Yazzie 1997). Relatives and community members were integral to the proceedings. Since no blame was attached to any of the participants, the terms 'victim' and 'offender' as used in English, are inappropriate in

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describing this process; 'aggrieved' and 'wrong-doer' will be used hereafter instead, although these words still bear inappropriate connotations of fault.

In traditional Peacemaking, a respected community leader, the *Naat'aani* or headman, "arbitrated disputes, mediated quarrels, resolved family problems and tried to correct wrong-doers" (Zion 1983: 106). A *Naat'aanii* was a person who spoke well and wisely; his/her role was non-authoritarian; and he or she had persuasive, not coercive authority (Zion and Yazzie 1997; Zion 1983). The *Naat'aanii* facilitated the session using prayer, value clarification, self-expression, teachings from traditional narratives about mythic creatures, and consensus (Zion 1995; Zion and Yazzie 1997). Motive was not an issue; rather it was the significance of the loss suffered by the aggrieved party or his/her family, and the general reputation and character of the disputants. There were no general rules governing the offense; each dispute was dealt with on a case by case basis, and the resolution was dependant on the people involved (Shephardson 1965). As Farella (1984: 147-148) explains, this lack of general rules in carrying out justice is "why attempts at describing normal or even normative Navajo behavior are so futile. What is normal and normative is the degree of difference, even the idiosyncrasy, that characterizes solutions."

Navajo justice was and is more concerned with the "wholeness of the person, a peaceful community and adjusting relationships than it is with punishing people" (Zion 1995). The goal was reconciling or restoring solidarity with victims and offenders and preventing recurrence (Zion 1995; Yazzie 1994; Ladd 1957). Restitution to the injured party was the frequent result though more severe punishments, such as capital punishment carried out by the aggrieved or the aggrieved's family, were possible if the person continued to cause trouble (Ladd 1957; Shephardson 1965). There was no formal authority to enforce whatever resolutions were reached (Shephardson 1965). Social control was progressive. The ideal solution was for all parties to leave a meeting feeling a solution had been reached, including the offender who now understood himself or herself better. If the wrong-doer left the meeting feeling ashamed, then a second 'monster' had been added to the first monster, that is, to the original wrong (Bluehouse, personal communication, July 24, 1998). If a person did not comply with the agreed-upon solution, then they might be shamed or 'nagged' into fulfilling their obligation (Austin 1993), although this was not a desirable strategy because of the possibility of unleashing other monsters, such as ill- feelings (Bluehouse, personal communication, July 24, 1998). Shaming was only done if it had a specific purpose, such as forcing the person to confront an underlying behavioral problem and dealing with it (Bluehouse, personal communication, July 24, 1998). In summary, as Zion states, "in Navajo justice thinking, you don't correct the

person: you correct the *action*" (James W. Zion, personal communication, June 29, 1998)

### The Navajo Nation Courts and Contemporary Navajo Peacemaking

Members of the Navajo Nation who are accused of criminal offenses can be tried in federal courts for serious crimes, in state courts for crimes committed off the reservation, and in Navajo Nation courts for lesser and some serious criminal offences<sup>2</sup> that are committed on the reservation. Navajo Nation courts have jurisdiction over all civil matters within the Nation. All of these courts operate on a Euro-based adversarial model, structured after the state courts. In anticipation of an attempted take-over of Navajo court jurisdiction by the states during the Termination Era, the adversarial nature of the courts was perpetuated when the Navajo switched from the Bureau of Indian Affairs-established Courts of Indian Offenses which had begun operation in 1892, to the present CoUrts of the Navajo Nation, which began operation in 1959 (Yazzie and Zion 1996). The current courts apply Navajo common law as their law of preference (Bluehouse and Zion 1993: 328) but are still adversarial in nature. By 1981, many Navajo community and judicial leaders saw this non-egalitarian, confrontational, 'win/lose' model as inappropriate for the many members of the Navajo Nation who still practiced 'Navajo custom law' and expected the criminal justice process to be a 'journey of healing', not of punishment (Tso 1992). The Peacemaker Courts, begun in 1982, although not re-institutionalized into the court system until 1992, were seen as a remedy to these problems (Zion and Yazzie 1997). They formalized the informal use of Peacemaking which some, though not all, Navajo judges had been quietly using to complement court procedures for many years (Zion 1995).

The Peacemakers were first set up as one of five courts that operate within the Navajo Nation (the others are district, family, small claims and appellate). Since early 1996, the term 'Peacemaker Courts' has not been used in order to differentiate Peacemaking from the other more formal, Euro-influenced components of the Navajo court system. Current day Peacemakers operate as a parallel, complementary system to the Navajo courts, for as the Chief Justice of the Navajo Nation states, "While we need modern courts and jails to deal with

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<sup>2</sup> Zion points out that the Navajo Nation Code allows incarceration up to six months maximum, although consecutive sentences can be used to extend sentence length. The high rate of federal declination of prosecution has led Navajo Nation Courts to prosecute some serious offenses, for example, prosecuting homicides as 'aggravated batteries' (James W. Zion, personal communication, June 29, 1998).

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violent offenders who show no insight or intent to reform, we recognize that we should be healers, not punishers” (Yazzie 1996: 12)

The Navajo Peacemakers, of which there are over 250 individuals located in the 110 ‘chapters’ or semi-autonomous communities that make up the Navajo Nation, are brought in by disputants to help them arrive at a harmonious settlement of a dispute. The disputants may be referred to the Peacemakers by the Navajo courts; the Navajo police; existing service delivery systems such as Social Services, Indian Health Services, Behavioral Health and the AIDS Office; or primarily by self-referral. Disputes may be based in land use, grazing rights, and domestic conflict including child custody and family violence. Criminal offenses up to and including sexual assault, and reparations for willful deaths, have also been dealt with, although most cases are civil disputes (Yazzie and Zion 1996: 172-3). In mid-1998 a new procedure will take effect that will increase the Peacemakers’ criminal caseload as many criminal cases are diverted to Peacemaking (Yazzie 1998). The majority of disputants are adult members of the Navajo Nation.

A quick comparison shows that the procedures and values used in Peacemaking have persisted from earlier times and “continue to be a viable method of law and justice” (Zion and Yazzie 1997: 56). Like traditional Navajo justice mechanisms, Peacemaking procedures are aimed at getting at the heart of the issue and guiding people to adjust their relationships so that they return to good relations, or build a new relationship if they did not have good relations to start with (Zion and Yazzie 1997; Yazzie and Zion 1996). Peacemaking is based on ensuring discussion, achieving consensus, providing for relative need, and healing (Yazzie 1996: 6). It is not just a one-time incident; as an essential component of Navajo thinking or world view, it is “a way of life” (Bluehouse 1996: 57).

The Peacemakers are respected members of the Navajo community, male and female, who are chosen by their communities because they have “demonstrated character, wisdom and the ability to make good plans for community action” (Austin 1993: 10). They may have a blood or clan relationship with the disputants or they may be community members, but either way, they are not neutral mediators. They are guides and teachers (Yazzie 1994; Zion and Yazzie 1997). They include medicine people, traders, lawyers, Native American church leaders, and non-Indian clergy.

Peacemakers assist disputing parties by: helping them to lay out the problem, say what they feel about it, and discuss it sometimes at great length; using *naat ‘aah* or the planning process to help the parties arrive at a solution to the problem; giving his or her opinion about practical, concrete outcomes and a good group decision by means of counseling or ‘lecturing’ the parties based on Navajo

spiritual narratives; helping participants achieve consensus and harmony; and helping participants achieve forgiveness (Navajo Nation Judicial Branch, n.d.; Zion and Yazzic 1997; Yazzie 1996; Austin 1993). Blaming is not part of the process, although family and clan members often act as a reality check on the statements of the disputants (Yazzie and Zion 1996). According to Bluehouse (1996: 54), “We don’t point the finger in peacemaking. We put the problem on the table. We acknowledge that there are problems, but this is not the place to point fingers and have shouting matches.” Making decisions for others is also not part of the process. Coercion is not part of Navajo justice (Austin 1993).

The Peacemaking session will frequently start with a prayer by the Peacemaker or a senior family member to summon spiritual assistance and participation, and to focus the mind of the participants on the proceedings. It may end with a meal to seal the agreement. Family, clan and community members with an interest in the dispute are invited to attend and have a say; criminal justice system members are excluded (unless they are one of the participants). Sessions are often held in a room in the local court house. The result is a plan developed so that the aggrieved person receives *nalyeeh* (usually compensation for injury and an adjustment in the relationship between aggrieved and wrong-doer). This is, however, not only compensation, but is also restoration in that it is “what is needed to make the injured person feel better” (Yazzie 1996: 11). According to Zion and Yazzie,

[a] final decision often involves a transfer of goods to the injured person, to compensate for actual injury and to serve as a symbol of good relationship. The amount or value of the compensation can include ‘a little extra’ to show the seriousness of the act or injury. An agreement to deliver goods (such as jewelry, sheep, horses or money) also has the effect of showing the innocence of a victim, as with the open and visible delivery of horses to compensate for a rape, or a husband’s act of giving *nalyeeh* to a wife to make up for an assault. (Zion and Yazzie 1997: 79)

If the disputants refuse to follow the procedures of Peacemaking or do not follow through on their commitment, they are referred back to the adversarial system (Bluehouse 1996). The family of the wrong-doer, as ‘traditional probation officers’, are responsible for making sure that the *nalyeeh* is paid and that the wrong-doer does not re-offend (Zion and Yazzie 1997). The results of the session are enforceable by a court order in court-ordered cases, or the disputants may ask the court to step in if they wish (Bluehouse 1996: 57).

In keeping with pragmatic Navajo values, Peacemakers are paid a modest fee (currently \$60) by the disputants (Zion 1983, personal communication, June 29,

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1998). They are supervised to a limited extent by the local judge. Administrative support is provided by district court staff (Peacemaker Liaisons) who organize the implementation of Peacemaking in communities, assist in referring cases to and from Peacemakers, liaise between the Peacemakers and the judges when court orders are needed for enforcement, and provide technical assistance to the Peacemakers as needed (Zion 1995; Bluehouse, personal communication, July 24, 1998). Until the evaluation of Peacemaking which is currently underway is completed, there are only rough indicators of effectiveness. These suggest that the recidivism rate among wrong-doers is about 20 % for all categories of cases (Yazzie and Zion 1996: 172).

### The Restorative Justice Paradigm and Peacemaking

The primary goal of restorative justice programs<sup>3</sup> is to bring justice back into the community using a process that respects “the feelings and humanity of both the victim and the offender” (Van Ness and Strong 1997: 25). This means the empowerment of victims, the community and offenders (McCold 1996: 97). The current criminal justice system operates based on a model that focuses on upholding the authority of the state, deterring offenders, and punishing wrongdoing. Repairing the harm done to the victim and the community has become nearly irrelevant (Van Ness and Strong 1997: 10).

The restorative model is based on a number of principles that vary greatly from the retributive, deterrent, protective principles of the adversarial system. Principles include that: the victims need to regain control of their lives, overcome a feeling of powerlessness and to receive vindication; the community needs to restore its order and its members’ confidence of safety, and to reassert its common values; offenders need to have ‘contributing’ injuries (such as alcohol or child sexual abuse) and injuries resulting from the crime healed (Van Ness 1996: 23-4). In addition, victims and offenders need personal involvement in the process so that the offenders know who they owe and the victim can be re-empowered so that, for example, their fear of crime is reduced. (Hudson and Galaway 1996).

The restorative justice model can be summarized in three propositions: crime is primarily a conflict between individuals (not between an individual and the state) resulting in injuries to victims, communities and offenders; the aim of the criminal justice process should be to reconcile parties while repairing the injuries caused; and the process should facilitate active participation by victims, offenders and their

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<sup>3</sup> The literature on restorative justice programs is extensive. See McCold (1997) for a comprehensive listing.

communities instead of being dominated by the government (Van Ness 1996: 23). The goal of restorative justice is that “the community seeks to restore peace between victims and offenders, and to reintegrate them fully into itself; the goals for victims can expressed as healing and for offenders as rehabilitation” (Van Ness 1996: 28). In general, the establishing of blame for past behavior is less important than problem-solving for the future (Kennedy and Sacco 1998: 206). McCold (1996: 94) expresses the restorative model in terms taken from Jewish culture which sound remarkably similar to the principles of Navajo Peacemaking described earlier: “The community’s injury is to *shalom*, right relationships, among members of the community. The damage is against peace, and requires a local effort to restore harmony.”

Victim-offender reconciliation programs, mediation and perhaps arbitration are the most common types of restorative justice programs in non-Indigenous societies. In these programs trained mediators work to empower participants, promote dialogue between victims and offenders, and encourage mutual problem- solving (Van Ness 1996: 24).

Peacemaking is not the kind of alternative dispute resolution found in Euro-based systems; it differs markedly from the examples above. Seidschlaw (1997) in discussing Indigenous Peacemaking in North America points out a number of differences between Peacemaking and mediation. Mediation is a one-time service with a cost associated with it; Peacemaking is primarily a way of life that fulfills one’s sense of responsibility to the community. Peacemaking functions best in the context of community culture and values; in mediation this context is not an important part of the process. Spirituality, specifically Native American beliefs are an integral part of Peacemaking. Prayers are used to set the stage for Peacemaking by mentioning the issues and the need to show respect to all participants, including the spiritual. Prayers remind the participants that they are part of the spiritual world and that they must use their “sacred mind and sacred language” to solve the problem facing them (Bluehouse, personal communication, July 24, 1998). Mediation, on the other hand, exists within an environment that brings individuality and material achievement into the process and probably works best if it ignores cultural values.

Similarly, Navajo Nation Peacemaking is a unique form of restorative justice because of its singular dynamics rooted in Navajo relationships and ways of doing things (Zion 1995). As Zion and Yazzie (1997: 55-6) state, it is not alternative dispute resolution, it is original dispute resolution. It also differs from dominant society restorative justice programs: the Peacemaker is not a neutral mediator but may be a blood or clan relative; mediation excludes feelings where Peacemaking promotes their expression; consensus is sought rather than an arbitrary decision by

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the mediator; there is a reliance on prayer as a means of involving the spiritual but this is irrelevant to mediation; the *naat 'aanii* has a teaching and problem-solving role not held by a mediator; support group members (family, clan, community) are included as participants rather than excluded; and the Navajo and other spiritual narratives are used as guides to problem-solving unlike the absence of spiritual guidelines found in most mediation programs (see Zion 1995). In addition, the *naat 'aanii* is not a trained professional in mediation, but a respected community member with special expertise in Navajo spirituality. The Peacemakers have already been trained in accordance with Navajo traditions as *naat 'aanii* before they join the Peacemaker division. They then receive 16 hours of training from the Peacemaker Director in Peacemaking techniques, administrative duties (paperwork), the relationship between the technical support unit of the Judicial Branch and the Peacemakers, the Peacemakers' responsibilities to the technical support unit, the importance of the Navajo (and/or Christian) creation and journey narratives as the source of law, ethical standards, and contemporary issues, such as domestic violence (Bluehouse, personal communication, July 24, 1998).

With these marked differences between the Navajo and non-Indigenous models of restorative justice, it is likely that the issues currently of concern about restorative justice programs may have a different relevance to Peacemaking.

### Issues in Restorative Justice and Their Relevance to Peacemaking

While there are many issues that arise in any discussion of restorative justice, only ten will be discussed here. These are: the relationship between the retributive and the restorative justice systems, victim perceptions of justice, offender perceptions of justice, due process, community perceptions of justice, antagonism from criminal justice personnel, lack of program resources, program effectiveness in reducing incarceration and recidivism, mediator skills, and expanding clientele to include organizations, repeat offenders, and violent offenders.

Hudson and Galaway (1996: 11) raise the issue of *the relationship between the two models of justice*. They ask if the restorative justice system should be separate from or part of the criminal justice system. There are arguments on both sides which are thoroughly presented in Galaway and Hudson (1996) and discussing them here would be too time-consuming. The most important point for the purposes of this paper is that the question is being asked at all. In the Navajo criminal justice system, the question has already been answered: Peacemaking is an essential part of the criminal justice system. It should not replace the Euro-based components of the system, because these are still needed for specific types of offenders, and as an alternative to Peacemaking. It has been suggested that the

fear of court sanctions makes Peacemaking a more attractive option (James W. Zion, personal communication, June 29, 1998). On the other hand, the goal of the Navajo Judicial Branch is to move more and more disputes into the hands of Peacemakers, even serious offences, as will be discussed shortly. Peacemaking is seen as a more effective mechanism for decreasing the social ills that underlie criminal behavior and thereby reducing Navajo involvement in criminal behavior (Yazzie 1998).

One of the most important aspects of *victim perceptions of justice* is whether or not the victims feel that they are voluntarily participating in restorative justice programs. Umbreit (1994) found that a small percentage of victims in his sample felt that they had been coerced into participating and thereby felt re-victimized. Wright (1996: 229) suggests that the victim's knowledge that the offender may otherwise be prosecuted or go to prison leads to feelings of pressure. Griffiths and Hamilton (1996: 187) point out that Indigenous women and female adolescents are particularly vulnerable to pressure. Power structures within Indigenous communities may also compromise the fair operation of restorative justice programs for certain community members (Griffiths and Hamilton 1996: 188).

Ashworth (1993) suggests that restorative justice programs do not provide clear criteria for consistent settlements to the victim or to the community. It might be difficult for victims to get what they consider a just reparation since some offenders may not have the resources to make full reparation. Along the same line, he argues that there are few criteria for measuring harm done to the community and what would be fair reparations to it. Research by Umbreit (1994) found confirmation of one of these issues and introduced another. First, he found that some victims felt that the punishment given the offender was inadequate. Second, some victims were concerned that mediation lacked the authority to enforce completion of mediation agreements.

Peacemaking cannot happen without the participation of the 'victim', the wrongdoer, and their respective families and/or clans. There have been cases where a reluctant victim was compelled by the court to take part in the process, when the judge felt it was in his or her best interests (Bluehouse, personal communication, July 24, 1998). According to Zion:

A judge may or may not exercise the discretion to refer a case based on many factors. For example, a judge would not send a case into peacemaking where the victim of a violent offense is reasonably afraid of a perpetrator or coercion by relatives. A court could, however, require 'shuttle diplomacy' peacemaking, which is traditional, whereby the peacemaker conducts extended

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negotiations with a victim without facing a perpetrator or with a victim and perpetrator's relatives. (Zion 1998: 4)

As an added protection, the process ensures that the victim has a strong support group present. As well, the victim will have a chance to express his or her feelings in a controlled environment. Since a consensus is needed before the procedure is over, the victim should be able to get whatever reparation he or she thinks is equitable, and should come out of the process with issues resolved.

As well, the offender can be compelled by a court order to participate in Peacemaking. Reasons for this can include being needed to assist in the healing of others, and for self-healing. Offenders have also been pressured by their family to participate (Bluehouse, personal communication, July 24, 1998). This is discussed further in the section on due process.

*Offender perceptions of justice* are a third issue. Offenders may feel that pleading guilty (if necessary) and diversion from the system into mediation will offer them a better chance, even though they might have had a valid defense against the charges (Wright 1996: 229). Wright (1996) and Ashworth (1993) both point out that some victims may be more vindictive than others and make greater demands. Similarly, victims may discriminate on economic grounds, leading to inequity (Harland 1996: 511). Umbreit (1994: 105) reports that a small number of offenders felt that the punishment they received was too severe or out of proportion to the offence. At the opposite end of the spectrum, some victims of a serious offence may be satisfied with a symbolic form of reparation such as an apology. This is an issue of proportionality, the achievement of which is one of the aims of the criminal justice system. Hudson and Galaway (1996: 13) point out that this question is really the result of confusing the retributive and the restorative models, since in the restorative model, "fairness is not uniformity but satisfaction."

This response applies equally well to Peacemaking. The objective of Peacemaking is not punishment or blaming. It is to restore the relationship between all the participants. What it takes to do so must be agreed upon by all parties present and must be enforced by all parties present. If the wrong-doer or aggrieved cannot live with the arrangement, they have two recourses: they can ask to reconvene the Peacemaking, or they can take the problem to the Navajo Courts.

*Due process* has been raised as a related issue. Ashworth (1993) suggests that there is a conflict between the victim's right to participate and the procedural rights of the offender in some kinds of restorative justice. He suggests that the

victim might have undue influence, especially on the court process. This is particularly a concern in serious crimes.

Due process is inherent to Peacemaking. As Zion states:

Peacemaking does not violate due process of law because no decision can be imposed on an unwilling party. Procedural due process arises when an individual is to be deprived of liberty or property or be denied a substantive legal right. Given consent, there is no deprivation of a right. The peacemaker rules clearly require that an individual's procedural rights are protected. Peacemaking does not deny the right to a trial by jury. If an individual does not consent to peacemaking or a decision, that person can return to court for a jury trial. Peacemaking does not deny access to the courts, because an individual can refuse to make an agreement and come back before the court. (Zion 1998: 3)

In a more fundamental way, according to Navajo justice thinking, when an individual acts out, thereby demonstrating that they are unbalanced in body, mind and spirit, they are asking for community help, and invoking community responsibility and obligations (*k'e*) to them (Bluehouse, personal communication, July 24, 1998). An individual, therefore, is willing to take part in the process by definition.

*Community perceptions of justice* is an issue in that there is currently a political climate of 'get tough' on offenders. Restorative justice programs may be seen as 'soft' by those with this kind of agenda (Harland 1996: 510). It has also been suggested that offering some kinds of offenders diversion is incompatible with the goal of offering restitution and assistance to victims (Umbreit 1995). Research by McElrea (1994) indicates that, on the whole, victims are not as vindictive as imagined and that most of them want to help 'straighten out' the offender, especially if the offender is young. Research done in the late 1980s and early 1990s found public support for reparation, restitution and community service programs as long as the victim agrees to participate in the procedure. Even so, these programs were not seen as suitable for violent or repeat offenders (Lee 1996: 339-40).

Griffiths and Hamilton (1996: 188) suggest that not all Indigenous communities may want to deal with serious offenders. Some communities practiced banishment for serious offences, repeat offenders, or in cases where the individual refused to abide by community-imposed sanctions. These communities may think of the

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Euro-based criminal justice system as the modern equivalent of removing the offender from the community.

Support for Peacemaking seems fairly widespread throughout the Navajo Nation, based on the estimated 1000 cases handled by Peacemakers in 1997, despite some logistical problems that may have held down numbers (James W. Zion, personal communication, June 29, 1998). The option of proceeding with serious offences through the adversarial courts is always available, which means that victims in Peacemaking are there because they want to be there.

Nevertheless, there has been and still is a small degree of resistance to Peacemaking among some political leaders and community members (see Nielsen 1996; 1998). Most of this relates to a discrediting of Navajo values by acculturated Navajo Nation members and concerns of political leaders about Peacemakers having too much political autonomy.

*Antagonism from criminal justice personnel*, according to Marshall (1995), arises mainly from the attempts of these personnel to use the new programs to fill their own organizational needs. They sometimes impose restrictions that interfere with the operation of the restorative program. Because the criminal justice system is more offender-oriented than victim-oriented, the restrictions most often affect the interests of the victims.

This is a very relevant issue for Peacemaking. Nielsen (1998) and Gould (1997) both found resistance by Navajo Nation criminal justice personnel to Peacemaking (see also Bluehouse 1996: 57). There were concerns expressed by a few Navajo Nation judges, lawyers, and court clerks about how Peacemaking fitted into the Navajo Court system, and by some Navajo police officers, about Navajo Peacemakers having little knowledge of the western law (Gould 1997). These concerns seem to be related to a confusion by criminal justice personnel about the difference between Navajo restorative justice, and western-based retributive goals and procedures, and to the acculturation of criminal justice personnel into Euro-based values about justice and its mechanisms.

*Lack of resources* such as funding, expertise, and political will is also an issue for restorative justice. McElrea (1994) expresses the fear that restorative justice programs may be adopted as a means of reducing the costs of courts and prisons without recognizing that communities need financial resources to properly operate these new programs (see also Harland 1996: 512). A related issue is the lack of human resources in the community. Griffiths and Hamilton (1996) raise the issue of the 'healthiness' of community members, leaders and others who play key roles in restorative programs in Canadian Aboriginal communities. Because of the tragic

impacts of colonialism, many Indigenous communities have social problems, such as wide-spread alcoholism, family violence and child abuse. Community members who act as mediators will have to deal with their own personal issues before they can help others. A final resource needed by these programs is political will (Harland 1996: 515), which the current climate suggests is in short supply.

This is also an important issue for Peacemaking. While Peacemakers are paid a fee by participants, this is more a token of commitment than it is a living wage. Zion (personal communication, June 29, 1998) suggests that only a handful of the over 250 Peacemakers rely on Peacemaking as a regular source of income. Funding is also scarce for the technical support unit of the program, where program statistics are recorded, training is developed and offered, and educational materials are gathered and prepared. Discussions are currently underway about possible changes in structure that could alleviate some of this funding stress. On a more positive note, there is a great deal of political will and few problems with finding stable, capable community members to act as Peacemakers. Support for Peacemaking seems general throughout the Nation, In terms of the Peacemakers themselves, the community must first choose the Peacemakers, and then the participants must choose the Peacemaker who will assist them; therefore, incompetent Peacemakers are quickly weeded out, thanks to word of mouth.

*The effectiveness of restorative programs in reducing incarceration and recidivism* is another issue. Umbreit (1995) raises the issue that, while restorative program staff often tout mediation as an alternative to prison, there is little evidence that these programs decrease incarceration. Some research has found that mediation has contributed to reducing the length of sentences and changing the locale of the sentence served from prison to jail. There is also some question of whether or not these programs reduce recidivism. Umbreit (1994: 117), for example, found a 'marginal but non-significant impact of the mediation process' among juveniles. He suggests that the mediation process may be over-shadowed by the contrasting influences of a dysfunctional family and criminal friends. However, in the Euro-based society, as Harland states,

the perception that it is not the business of the criminal justice system to try to right the underlying social and cultural wrongs that maintain and encourage the existence of stable and visible class of criminals is both deeply ingrained and a convenient excuse for its abject failure to reduce crime (Harland 1996: 511).

Restorative justice programs may try to respond to the underlying causes of the crime and the needs of the parties involved, but they still suffer some restraints

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because of the wide-spread nature of the above attitude, and because true 'healing' of all parties is not an objective.

This is not the case with Peacemaking. One of the primary purposes of Peacemaking is precisely to identify the underlying problems that are leading to the disharmony and to develop a plan to combat them. A specific example of how this operates is provided by the Navajo Courts' Minority Male Program. People charged with driving while intoxicated were diverted into Peacemaking where the problems leading to the intoxication were sought, found and dealt with. Although no statistics are given, Yazzie and Zion (1996: 170) report that recidivism rates dropped. As well, the objective of Peacemaking is not punishment, and unless the participants agree that incarceration will in some way benefit the wrong-doer, incarceration is not a likely outcome. If consensus is reached that the wrong-doer should serve time, a referral will be made back to the courts for sentencing.

*Mediator attitude and competence* were a concern to small numbers of both victims and offenders (Umbreit 1994: 98-9, 105-6). When mediators were unable to control the proceedings, it left either the victim or the offender feeling re-victimized or victimized. Hudson and Galaway (1996: 3) warn that giving the community responsibility for justice procedures will likely mean that the processes of restorative justice will have to be 'deprofessionalized', that is placed in the hands of non-professional community members, because "[b]y their very nature, professions remove power from others and concentrate it in their own alleged area of expertise."

Again, this is not an issue for Peacemakers. Peacemaking in and of itself is a form of community obligation; it is a return to traditional structures that placed leadership in the community. The Peacemakers must have expertise and knowledge in Navajo and other creation and journey narratives, which is acquired through living and having learned 'Navajo thinking' through traditional oral history. The training they receive from the technical support unit is not to make them more 'professional', but to acquaint them with organizational requirements. In addition, Peacemakers who cannot control their sessions will quickly lose their clientele.

*Expanding clientele* to include repeat and violent offenders can be an issue in restorative justice not only because of public resistance to 'going easy' on these offenders but because these kinds of cases need more time to prepare and work through (Marshall 1995). While questions of the suitability of serious cases such as rape and aggravated assault have been raised, there is also evidence that as long as the victim is willing to participate, victim-offender mediation may be successful (McElrea 1994). Very little research has been done on expanding restorative

justice programs to include organizations. The issue raised previously about resources to support programs is also a concern here. It should be pointed out that there is also an opposite concern about 'widening the net' of social control to include offenders who, for example, might have had their charges dismissed (Hudson and Galaway 1996: 12). This issue boils down to a question of which offenses should be dealt with by restorative justice and which by the retributive system.

For Peacemakers, there is a relatively simple answer: Since it is not a matter of punishment but reconciliation and reparation, any offence is eligible, as long as the people affected are willing to actively participate. Peacemaking has been used once so far in a wrongful death-products liability civil case against a corporation. After a child was scorched to death in a dryer, his family filed a successful standard wrongful death manufacturer negligence suit (*Yazzie and Zion 1996*). Cases of death and rape have already been referred to. Widening the net is also not an issue, since any dispute no matter how trivial or serious, is eligible if the participants agree to conduct a Peacemaking. Regarding 'widening the net', since there are no systemic repercussions such as a criminal record or a police file resulting from Peacemaking, there is no reason for keeping a participant out of Peacemaking.

This brief review of ten issues suggests that some of the major issues currently facing restorative justice programs in the non-Indigenous society are not relevant for Peacemaking. There are only three issues, lack of resources, community perceptions of justice, and antagonism from criminal justice personnel, that Peacemaking seems to share with restorative justice programs.

## Conclusion

American Indian Nations in the United States are justifiably afraid that the dominant society will continue to impose social institutions on them that are not in their best interests. While legal pluralism is an undeniable fact in the United States, mainstream American society is not known for its tolerance or respect for difference. One of the underlying issues that must be acknowledged is the possible threat to Peacemaking that could come from a perceived lack of legitimacy. This is already an issue with Navajo Nation members who have been so acculturated into dominant society values that they question traditional Navajo justice procedures. Add to them members of the dominant society's state and federal criminal justice systems who see Navajo justice procedures as inferior to those of the dominant society, and pressure to drop or modify Peacemaking becomes a very real, immanent danger. As Zion states so well, it would be "our old problem

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of trying to pound a round peg (Indian justice) into a triangle of power, force and authority” (James W. Zion, personal communication, June 29, 1998). An insidious strategy would be for these groups to push for Peacemaking to be standardized to fit non-Indigenous restorative justice programs such as alternative dispute resolution or mediation, which these individuals might see as more familiar, more legitimate, less threatening to the status quo, and untainted by ‘Indianness’. However, as Austin states:

Indian systems do not need instructions on empowerment, balancing disparities in bargaining positions, principles of ethics in mediation, or the kinds of disputes that mediation systems can or cannot handle. They do not need, and must not have, outsiders peering in to nod affirmance or indicate disapproval. Indian systems need support to do what they know how to do best - use fundamental principles of equality and responsibility to talk out disputes for harmony. (Austin 1993: 47)

If Native American restorative justice systems such as Peacemaking are left to develop on their own, they may present valuable lessons to the Euro-based retributive and restorative systems. The shift in thinking towards restorative justice in the Euro-based system is based on the ineffectiveness of the current system in battling crime, the tendency of incarceration to worsen offender involvement in crime rather than deter or rehabilitate them, and the dissatisfaction of victims with the current system (Van Ness and Strong 1997: 6). As Marshall states, “[restorative justice] is a practice that contains the seeds for solving a new problem - the inadequacy of the criminal justice system itself, as it lurches from crisis to crisis, based on a primitive philosophy of naked revenge” (Marshall 1995: 230). As was seen in the previous discussion of issues, Navajo Peacemaking has developed solutions to many of the issues that plague non-Indigenous restorative programs. Of course, some of these may not be usable by non-Indigenous society because of their rootedness in Navajo culture. Some researchers such as Goldburg (1997) even go so far as suggesting that Native American justice procedures are so deeply based in Native American spirituality that they cannot be replicated in the non-Native world at all. Other scholars disagree, believing that non-Indigenous systems are so aware of their own ineffectiveness that they will be open to new ideas (James W. Zion, personal communication, June 29, 1998).

One of the significant characteristics of current restorative justice thinking is its willingness to look outside the practitioners’ society for ideas and possibilities (Van Ness and Strong 1997: 117). This bodes well for the relationship between Peacemaking and other restorative justice programs, both Indigenous and non-

Indigenous. Peacemaking strategies that seem to have a strong potential for usefulness to non-Navajo justice programs include the use of victim and offender support groups, and the use of consensus to deal with both victim and offender concerns. As well, Peacemaking and other restorative programs have common issues for which they are searching for solutions, such as the lack of funding resources, and the development of community and criminal justice support.

Sharing strategies and ideas can only make them all stronger.

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