

“Restorative Justice: Integrating Peacemaking into Modern America”

By Adam Mendelowitz* (Jan. 5, 2008)

“Peacemaking focuses on the maintenance of relationships. If people treat each other with respect and people accept their responsibility, things move toward a feeling of harmony, and justice has really been done. If justice happens in the adversarial system it seems to be by accident. The adversarial system relies on who has the best lawyer, who understands the technicalities...”¹

– The Honorable Michael Petoskey, Chief Judge of the Grand Traverse Band

The peacemaker carries an earthen bowl filled of burning sage around the circle and says a prayer through the wafting smoke. The victim and wrongdoer, both accompanied by family, friends, and fellow tribe members, gather and are seated around the circle. All offer a small gift to the peacemaker, perhaps nothing more than a symbolic pouch of tobacco. No one sits at the head of the circle. Openness is encouraged and each participant is given the chance to speak his or her mind. Discussion is not limited to legal issues. Thoughts shift between the facts of the wrong, explanations, the feelings of the victim, apologies, and even the violence on our television screens.² The peacemaker speaks last, not as a judge but as a teacher. She recites an antediluvian tribal story as a lesson to be applied to the current conflict. The story provides a sense of community and acts as a foundation for consensus building among the participants.³

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¹ Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 880 (1999).

² *Id.* at 875-76.

³ Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL’Y 419, 430-31 (1999).

In the United States over the past three decades interest has steadily been building in restorative justice, but it remains planted on the outskirts of our criminal justice system.⁴ While alternative dispute resolution and mediation have begun to thrive in the civil context, there seems to be something dangerous and foreign about extending such methods into the criminal realm. Nevertheless, restorative justice has slowly seeped into our punitive legal system. Victim/offender mediation first arose in the 1970s within Mennonite communities in the United States.⁵ Since that time such dialogues have been used by numerous localities throughout the country with increasing frequency. Some are wide reaching, like the program established by the state legislature in Vermont, but most service small towns or cities and are limited in scope.⁶ In each population restorative justice takes on a slightly different form and function. This paper, however, will not recount the many benefits of integrating restorative justice into our modern criminal justice system.⁷ Instead it will proceed from the notion that our country has taken retributive justice as far as (or more likely farther than) it can reasonably go and the time is therefore ripe to turn to restorative justice.⁸ In 2001 it was estimated that the rate of imprisonment in the United States is about 699 per 100,000, by far the highest the

⁴ *See id.* at 435.

⁵ Howard J. Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 BUFFALO L. REV. 981, 1007 (2007).

⁶ Ulrich, *supra* note 3, at 420; Sara Sun Beale, *Interdisciplinary Perspectives on Restorative Justice: Still Tough of Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 421 (2003); VERMONT DEPARTMENT OF CORRECTIONS, RESTORATIVE JUSTICE, <http://www.doc.state.vt.us/justice/restorative-justice> (last visited Jan. 5 2008).

⁷ Much has been written about the benefits of restorative justice including its success at reducing recidivism, efficiency, and low cost. *See e.g.* Costello, *supra* note 1, at 901. While many studies have shown a reduction in recidivism, including a 2001 report by the Canadian Department of Justice, perhaps the most notable study in America was that of 1,298 juveniles conducted by the Victim Offender Mediation Association which showed a 32% reduction. Victim Offender Mediation Association, <http://www.voma.org/docs/connect3.pdf> (last visited Jan. 2 2008).

⁸ Beale, *supra* note 6, at 422.

world.⁹ Punitive justice and incapacitation can only be taken so far; we must look towards a different model in some contexts such as minor juvenile offenses. In contrast to our current retributive or punitive system, “restorative justice offers a different lens for viewing the problem of crime and provides a new outlook on the appropriate public response to the harm that results when an offense is committed.”¹⁰

Building off of recent trends in American criminal law, this paper will begin by painting a broad picture of restorative justice and the numerous obstacles to its integration in this country. As a roadmap around these many stumbling blocks, the second section will suggest looking inward to the most extensive and often overlooked examples of restorative justice currently functioning within our country: those of the American Indians.¹¹ In addition to providing a workable framework, the traditional justice system of American Indians demonstrates, first, that restorative justice is not something foreign to America, and secondly that restorative justice must begin within a community and work upwards from the ground level. The second section will explore both how American Indians use restorative justice in contemporary America and its ancient roots. Lastly, the third and final section will address a few lingering issues and doubts about replicating such as system more universally and actual attempts to do so in several Minnesota communities.

⁹ The United States now exceeds Russia (a rate of 644 per 100,000). There are currently over 2.1 million Americans in our prisons and jails, a five fold increase over the past 30 years. The Sentencing Project, <http://www.sentencingproject.org> (last visited Jan. 2 2008).

¹⁰ Gordon Bazemore & Mark S. Umbreit, *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century*, 16, <http://www.ncjrs.gov/pdffiles/framwork.pdf> (last visited Jan. 2 2008).

¹¹ Kathy Elton & Michelle M. Roybal, *The Practice of Restorative Justice: Restoration, A Component of Justice*, 2003 Utah L. Rev. 43, 55 (2003). Please note that the term “American Indian” will be used in this paper to refer to the original inhabitants of North America because of the author’s understanding that it is preferred over other terms such as “native” and “aboriginal.”

I. Promise and Pitfalls

While recognizing that there are many different forms of restorative justice, this paper will use the term in its most general sense so as to encompass all of the varieties that are used by American Indians within their traditional justice systems. The phrase has been defined as “a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime.”¹² Restorative justice is built upon the idea that crime does not harm the state as much as it harms individuals and relationships. Based on this notion there are three main goals: (1) accountability of the wrongdoer both to the victim and to the greater community, (2) personal development within the wrongdoer, and (3) future protection of the victim and the community. These three goals reflect the three participants that restorative justice is meant to serve: the victim, the wrongdoer, and their shared community.¹³ The focus is not upon punishment but instead upon the healing and prevention of harms. The consequent needs of both victim and offender are addressed, with rehabilitation of the wrongdoer often taking the form of support rather than incapacitation. Such an approach both highlights the individual effects of a crime and maximizes the participants’ role in fashioning a solution. This requires understanding, responsibility, as well as the opportunity to make amends in some situations. Both the victim and the offender are key players in constructing a just resolution rather than passive participants merely watching the wheels of justice.¹⁴ Such a system is “neither punitive nor lenient.”¹⁵ Restorative

¹² John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4 (1999).

¹³ Elton, *supra* note 11, at 50.

¹⁴ *See generally*, Howard Zeir & Harry Mika, Fundamental Concepts of Restorative Justice, Mennonite Central Committee, 1997, <http://www.ojp.usdoj.gov/nij/publications/rest-just/ch1/fundamental.html> (last visited Jan. 2 2008).

¹⁵ Bazemore, *supra* note 10, at 16.

justice programs are already widely and successfully used throughout the Western world, particularly in New Zealand, Australia, Germany, Austria, and Finland.¹⁶ However, in the United States restorative justice is often seen as only a gimmick on the fringes of the criminal justice system.

There are several reasons why progress has been so slow in this country. Most notably our current political climate has made it very difficult for restorative justice to gain national support. Both democrats and republicans have been guilty of playing the “tough on crime card” in recent years, particularly after the shocking Willie Horton advertisements in the 1988 presidential election that devastated Michael Dukakis’ bid. Put simply, our political system historically rewards those candidates who pledge to be tough on crime or, worse yet, have voted for draconian crime bills leading up to an election year as little more than a symbolic act.¹⁷ This is particularly troubling because the increasingly punitive focus is now being reflected in the sentencing of juveniles. In New Zealand restorative justice gained support both from social democrats and Christian pro-family conservatives, but in our political environment backing anything but increasingly punitive laws is a great risk.¹⁸ Indeed, pundits often say that “control of the crime issue is a necessary, though perhaps not sufficient, requirement for political victory in America.”¹⁹

A second barrier is the market driven news media. Throughout the 1990s television coverage of crime, particularly on local news stations, rose to astonishingly high levels. By the late 1990s both local and network news programs devoted an average

¹⁶ Beale, *supra* note 6, at 418-20.

¹⁷ *Id.* at 428-29.

¹⁸ Braithwaite, *supra* note 12, at 4.

¹⁹ Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 577 (1996).

of 20-40% of their broadcasts to crime stories.²⁰ This tabloid-style coverage is propelled by market competition and does not correlate to crime rates, which actually decreased during that same time period. This is extremely problematic because of the likely correlation between viewing crime in the news and one's fear of such crime.²¹ Such overblown coverage makes it less likely that anything other than a criminal justice system built upon prevention through incapacitation will garner public support. Lastly and partially related to the first two obstacles, a recent emphasis on sentencing principles also stands in the way of restorative justice. Federal mandatory minimum sentences, rigid sentencing guidelines, and punitive recidivist statutes beginning with California's so-called "three-strikes" law are at odds with the basic ideals of restorative justice.²² These hindrances in our country, however, are far from insurmountable. In fact a much rosier picture can be found without venturing half way around the world. Within our nation many American Indian tribes practice forms of restorative justice at the community level. Indeed, restorative justice may be a viable option throughout our nation if we begin to understand the Honorable Robert Yazzie, Chief Justice of the Navajo Nation and his claim that, "traditional justice is not 'alternative dispute resolution,' but original dispute resolution [which]... continues to be a viable method of law and justice."²³

II. American Indian Peacekeeping

²⁰ Beale, *supra* note 6, at 425-427.

²¹ *Id.*; see generally Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 *passim* (1997).

²² Beale, *supra* note 6, at 413-15.

²³ James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 55-56 (1997).

For generations many American Indian tribes, including the Navajo, maintained traditional justice systems that can only be described as restorative in nature. For the Navajo the end goal of their traditional judicial practices was the concept of “hozho nahaslii,” which describes the healing and renewed good relations between the parties. Although difficult to translate, in English the phrase means something along the lines of “now that we have done this, we are all again in a state of wholeness and interconnectedness.”²⁴ The traditional Navajo system emphasized truth, communication, restoration, forgiveness, and often integrating wrongdoer back into the community. This process stands in sharp contrast to the system that was harshly imposed on all American Indian tribes in the late nineteenth century. In 1879 Secretary of the Interior Carl Schultz infamously reported to Congress that “if the Indians are to be advanced in civilized habits it is essential that they be accustomed to the government of law, with the restraints it imposes and the protection it affords.”²⁵ Power was soon delegated to the Bureau of Indian Affairs (then a subsection of the Department of War) to develop Western-style Courts of Indian Offenses on many reservations with the clear purpose of terminating established American Indian legal systems. Judges were chosen from among the most assimilated Indians and they were even required to wear Western attire.²⁶ This kulturkampf continued almost unabated into the 1970s.

At that time, bolstered by an emerging body of scholarly work regarding the benefits of alternative dispute resolution, a “renaissance” of American Indian judicial

²⁴ Ulrich, *supra* note 3, at 431; Robert Yazzie, “Hozno Nahaslii” – *We Are Now In Good Relations: Navajo Restorative Justice*, 9 St. Thomas L. Rev. 117, 124 (1996).

²⁵ William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice and Limitations of Tribal Peacekeeping in Indian Dispute Resolution*, 76 N. DAK. L. REV. 551, 568 (2000).

²⁶ *Id.* at 572.

systems began to gather strength.²⁷ Several tribes, most notably the Navajo, began to rediscover and rebuild traditional tribal legal institutions. In 1982 the Navajo Nation became the first American Indian tribe to reinstitute such a system: the Navajo Peacemaker Court. This was no small accomplishment; the Navajo is the largest American Indian nation with a land area roughly the size of South Carolina (located in the Four Corners region) and over three hundred thousand members. Today the Navajo Peacemaker Court includes over two hundred and fifty peacemakers and handles hundreds of criminal and quasi-criminal cases each year.²⁸ Many other tribes have since followed suit based on the effectiveness of the Navajo Peacemaker Courts and have revitalized similar programs within their own tribal judicial systems. On the national level this culminated with the passage of the Indian Tribal Justice Act in 1993, which both recognized traditional tribal legal systems and provided funding through the newly established Office of Tribal Justice and Tribal Courts Project. Although the Justice Department's funding slowed in the wake of the 2000 elections and despite the much publicized criticisms by Orrin Hatch, the courts not only continue to function, but have grown in stature.²⁹

While traditional tribal courts take on many different forms, ranging from formal peacemaking courts to more traditional talking circles, this paper will focus on the relatively more developed courts of the Navajo and the Grand Traverse Band of Ottawa and Chippewa (located in Michigan's Upper Peninsula) because of their close similarities to standard notions of restorative justice today. The Navajo Peacemaker Court is grounded in the tribe's clans and local communities and has been described as

²⁷ Ulrich, *supra* note 3, at 425.

²⁸ Nor is the court is not limited to juvenile offenses. Costello, *supra* note 1, at 877, 894-95.

²⁹ *Id.*; Bradford, *supra* note 25, at 584.

“egalitarian law.”³⁰ The process begins by when the injured party demands “nalyeeh” or peacemaking. A relative will then seek out a “naat’aanii,” a respected member of the community who acts as a teacher rather than as a decision maker. Often the naat’aanii knows both of the parties personally and such knowledge is expected to be utilized during the process, in contrast to neutrality required in most forms of mediation.³¹ The courts include the parties, families, and any other affected or interested individuals and the procedure is based upon “talking things out.”³² Everyone can openly express their feeling and speak for as long as they like.³³ The ceremony generally proceeds similarly to as described in the vignette which opened this paper. Even though the naat’aanii is expected to share his or her opinion, it is merely persuasive and the parties themselves must arrive at a consensus and mend the dispute. As in mediation, the principal job of the naat’aanii is to meticulously identify the problems at hand.³⁴ The keys to peacemaking are discussion, consensus, relative need, and healing.³⁵

The Peacemaker Court of the Grand Traverse Band, which was established in 1996, operates in much the same fashion. The Ottawa name for the court is “Mnaweejeendiwin” which translates roughly into “walking together in a good way.”³⁶ Like the Navajo system, it is also relationship-centered and educational in nature. According to the Honorable Michael Petrosky, Chief Judge of the Grand Traverse Band, in peacemaking “if people treat each other with respect and people accept their responsibility, things move toward a feeling of harmony, and justice has really been

³⁰ Yazzie, *supra* note 24, at 120.

³¹ Ulrich, *supra* note 3, at 430-31.

³² Yazzie, *supra* note 24, at 120-22.

³³ *Id.*

³⁴ Zion & Yazzie, *supra* note 23, at 79.

³⁵ Yazzie, *supra* note 24, at 120-22.

³⁶ Costello, *supra* note 1, at 876.

done.”³⁷ The process begins when a case is referred to a Peacemaker by a trial court judge, tribal law enforcement officer, the tribe’s prosecutor’s office, or a tribal social worker. Sometimes peacemaking may be used as an alternative to probation. Peacemakers are chosen based upon their upstanding character and respect within the community, but all peacekeepers also receive mediation training.³⁸ Unlike the Navajo system, however, the peacemaker may not have had prior personal relationships with the parties. The ceremony itself is conducted in a similar fashion to that of the Navajos; there are comparable rituals, the parties sit in a circle, and they are encouraged to openly express their feelings.³⁹ If a consensus is reached, then both the victim and the offender sign a resolution agreement. If the parties cannot resolve the conflict then it is referred to the tribal trial court.⁴⁰ The Grand Traverse Band peacemakers, in contrast to their Navajo counterparts, only handle juvenile misdemeanor cases. They claim that peacemaking is particularly effective in such cases, where the opportunity for dignity replaces the shame of fines and possible jail time.⁴¹

In the movement towards integrating restorative justice into the American judicial system more generally there are several lessons that can be taken from both the Navajo Nation and the Grand Traverse Band. First and most simply, the programs demonstrate that restorative justice not only can be used effectively in contemporary America, but that it is currently doing just that. The American Indian peacemaking courts, especially the method employed by the Grand Traverse Band also provide a practical and effective framework for integrating restorative justice within our modern court system. The

³⁷ *Id.* at 880.

³⁸ *Id.* at 881-82.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 883.

method employed by the Grand Traverse Band works both within and in cooperation with the Western styled tribal court; the end result of peacemaking is not only healing and renewed relations but also a written contract. It provides an invaluable opportunity to conscionable juveniles who with the help and support of their community are able to take responsibility for their actions.

Secondly, traditional American Indian peacemaking demonstrates that restorative justice is not foreign or alternative but native and innate. As is often said, traditional justice is not alternative dispute resolution. While only a minor point, the recognition that restorative justice is already working in this country might provide the traction to finally make inroads into our judicial system more generally. Lastly and closely related to the second point, we must also take note of the fact that American Indian peacemaking efforts have succeeded in the face of often sharp opposition from Capital Hill. Restorative justice need not emanate from Washington; it both originates and operates at the community level. While this is already occurring throughout the country today, it is too often viewed as the result of failure at the federal level rather than a necessary component of restorative justice. The framework and lessons that peacemaking provides, however, must be applied carefully outside the American Indian community.

III. Moving Forward

While, as we shall see, a collection of programs in Minnesota provide reason for optimism, replicating American Indian practices can be problematic.⁴² Most importantly, “the operation of tribal peacemaking presupposes certain socio-cultural conditions, such

⁴² See *infra* pp. 12-13.

as... strong kinship networks” and unifying spiritual goals.⁴³ This begs the question of whether non-Indian America has a strong enough sense of community and commitment to that community to support peacemaking. While there is reason for doubt on a nation-wide basis, certainly within the country there are many thousands of communities that could serve just such a role, from schools and universities to nonprofit service and religious groups. Furthermore, Kay Pranis, the Restorative Justice Planner for the Minnesota Department of Corrections, argues that while it is necessary to pick the setting and context of such programs carefully, fully formed communities are not needed as a prerequisite to restorative justice.⁴⁴ This is because “criminal events provide opportunities for communities to experience constructive collective action, which builds new relationships and strengthens existing ones.”⁴⁵ In addition, it is important to remember that traditional methods are adaptable. The Navajo Nation did not merely turn back the clock when it recreated its Peacemaker Court. The Court is traditional justice tempered by modern needs. Chief Justice Yazzie writes that “Navajo justice methods are practical... They build on processes which are universal. Indian justice recognizes human relationships and reinforces them to reach practical conclusions.”⁴⁶ Given the adaptability of American Indian Peacemaking, it would only make sense to be equally flexible when applying its lessons to different contexts throughout the country.

Borrowing, however, has already begun in Minnesota. Drawing upon Chippewa⁴⁷ and Sioux communities within the state, several Circle Sentencing Projects have been

⁴³ Ulrich, *supra* note 3, at 443.

⁴⁴ Ulrich, *supra* note 3, at 448-449.

⁴⁵ Kay Pranis, *The Minnesota Restorative Justice Initiative: A Model Experience, The Crime Victims Report, May-June 1997*, <http://www.ojp.usdoj.gov/nij/publications/rest-just/ch1/mnrjmodel.htm> (last visited Jan. 3 2008).

⁴⁶ Zion & Yazzie, *supra* note 23, at 82.

⁴⁷ This is a different band of the Chippewa Nation than that which comprises the Grand Traverse Band.

developed in Minnesota communities, starting with a program in North Minneapolis for juvenile delinquency matters.⁴⁸ The program, which originally gained approval in the state legislature and operates in connection with the state's Department of Corrections, has also been upheld by the Minnesota Supreme Court.⁴⁹ The process begins with the offender pleading guilty, agreeing to participate in the community sentencing process, and applying to a community justice committee. The community justice committees are comprised of criminal justice professionals as well as ordinary community members. If the case is accepted then members of the committee meet with the victim and the offender and arrange for support groups for each person. The Sentencing Circle is somewhat formal but still mirrors peacemaking courts. It includes the victim, offender, their attorneys, and members of the community. Together they arrive at a consensus about the appropriate sentence, which must then be approved by a judge. The offender also must repeatedly return to the circle to ensure that progress is being made.⁵⁰

While there has been very little independent research regarding the effectiveness of Circle Sentencing, case studies from Minnesota and a 1996 report by the Canadian Department of Justice indicate successful results and significantly lower rates of recidivism.⁵¹ In addition, participants who completed the Minnesota programs have given Circle Sentencing high marks on almost three thousand post-process and roughly eight hundred follow up surveys. Overall 97% of victims, 94% of offenders, and 96% of community participants agreed or strongly agreed that the final agreement was fair in

⁴⁸ Ulrich, *supra* note 3, at 438-39.

⁴⁹ Restorative Justice Online, *Minnesota State Supreme Court Upholds Use of Sentencing Circles*, <http://www.restorativejustice.org/editions/2002/Feb02/mnstatesupremecourtup> (last visited Jan. 3 2008).

⁵⁰ Ulrich, *supra* note 3, at 439-40.

⁵¹ Barbara A. Belbott, *Restorative Justice*, in *ENCYCLOPEDIA OF JUVENILE JUSTICE* 324, 325 (Marilyn D. McShane & Frank P. Williams III eds. 2002); MINNESOTA DEPARTMENT OF CORRECTIONS, *USING CRIME TO REWEAVE SOCIAL FABRIC: DEVELOPING SOCIAL CAPITAL THROUGH RESTORATIVE PROCESSES – STORIES FROM THE STREET* (2000).

post-process surveys.⁵² Further, in follow up surveys, 86% of victims, 94% of offenders, and 94% of community participants felt very satisfied or satisfied with the outcome of the process.⁵³ Although the program is still small, its level of success represents a promising start to the broader application of traditional American Indian peacemaking.

If we have not already reached the place in our criminal justice system where we cannot become more punitive, we will soon be there. A mountain of scholarly work has also made clear that our retributory system is often at odds with the goal of rehabilitation. It is high time to look in a new direction, particularly in the area of juvenile offenses. Thankfully a road has already been laid out for us. Indeed, the experiences of the Minnesota Restorative Justice Initiative demonstrate that traditional American Indian justice is not only compatible with our current system, but effective. Perhaps the success of Minnesota's Circle Sentencing also helps to explain why two other Navajo words are not lost in translation even today. The Navajo terms "ahwiniti" and "agha'diit'aahii" have little place in traditional American Indian justice and most precisely mean "where they talk about you" and "someone who pushes out with words." These are also the Navajo words for "trial" and "lawyer."⁵⁴

⁵² MINNESOTA DEPARTMENT OF CORRECTIONS, RESTORATIVE JUSTICE PROGRAM EVALUATION: FISCAL YEAR 2006 REPORT, 14-15 (2007).

⁵³ *Id.*

⁵⁴ Zion & Yazzie, *supra* note 23, at 76, 78.