Restorative justice practices in Native American tribal law

By Sarah Morton, Elderly Services Attorney, Blue Ridge Legal Services[1]

Introduction

Today there are approximately 300 tribal justice systems within the borders of the United States, which serve more than 550 federally recognized Indian Nations.[2] In the last 30 years, many Native American communities have begun a return to their ancient dispute resolution mechanisms. For most Native American communities, a return to traditional concepts of justice represents a re-adoption of reconciliatory postures that parallel the growing mainstream interest in restorative justice. Native American tribes are in a unique position to develop and promote faith-based restorative justice techniques, both because of their traditional use of the practices and because their legal status avoids Establishment Clause concerns that will affect the implementation of such programs in the nation at large. However, although these traditional practices have much to offer the modern Native American community, they also have troubling drawbacks which must be dealt with as they are merged back into tribal justice systems.

Legal Status of Native American Tribes

Historically, the relationship between the Native American Tribes and the US government has been inconsistent. For over two centuries, the federal government alternately maintained policies which regarded tribes as enduring self-governing bodies that should be preserved, and other policies which promoted the view that tribes should gradually disappear and their members assimilate into mainstream society. Sometimes the one position has been

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[1] With legal research assistance from Rosa Nielsen, BRLS Summer Law Clerk.

[2] Tribal Law & Policy Institute, US Dept. of Justice, *Healing to Wellness Courts: A Preliminary Overview of Tribal Drug Courts,* 3 (1999). There are more tribes than justice systems because many of the smaller tribes have too few cases to justify their own permanent court personnel. Smaller tribes participate in intertribal court systems featuring appointed members from each tribe who travel to hear cases. U.S. Commission on Civil Rights, *The Indian Civil Rights Act*, 47 (1991).

dominant, sometimes the other.[3] This ongoing wavering reflects a larger historical debate, over whether the best way to promote understanding and reconciliation with indigenous peoples is to integrate them into mainstream society or to allow and encourage them to maintain their own traditions in coexisting communities. Because of the historical vacillations in Native American policy, it is unclear whether present way of thinking is just another swing in policy, or if it represents the status of the tribes for years to come.[4]

Today, the tribes are independent entities with inherent powers of self-governance. However, the independence of the tribes is subject to the powers of Congress to regulate and modify the status of the tribes.[5] So while tribes are usually described as "sovereign," they would be better described as "semi-sovereign" or "semi-self-governing.[6]

It is important to acknowledge the continuing legacy of colonization and European domination in tribal law.[7] First, the fluctuating policies of the federal government and the consistent disregard for tribal ways have negatively impacted the tribal courts. Even during periods where tribes were seen as valid and even valuable political entities, traditional tribal ways generally were not encouraged. Rather, the European settlers tended to impose their own forms of government, with little to no regard for the approach of Native Americans.[8] As a result, many tribes today are dealing with judicial systems that were structured by outsiders and do not reflect traditional procedures or conceptions of justice. Many tribes also find that these foreign systems do not meet their community's current needs. Second, even today the federal

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[3] WILLIAM C. CANBY, JR., AMERICAN INDIAN Law, 10-29 (1998).
[4] *Id.* at 32
[5] United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628 (2004).
[6] The incoherence of the Court's current line of thinking has been criticized by scholars and at least one member of the Supreme Court. *Lara*, 541 U.S. at __, 124 S. Ct. at 1641-1648 (Thomas, J., concurring) (2004).
[7] American Indian Law refers to the US federal law governing the status of Native American tribes and their members. American Indian law determines when tribal law applies. Tribal law is the internal law that each tribe applies to its own affairs and members. Tribal law varies from tribe to tribe, and may range from oral tradition to entire codes borrowed from non-Native American sources. Canby, *supra* note 2, at 1, 3.
[8] *See* U.S. Commission on Civil Rights, *supra* note 1, at 4 (1991). Canby, *supra* note 2, at 24-25, 29.

government severely limits the authority of tribal courts to handle issues arising in their own territory. Serious offenses by Native Americans, as well as offenses by non-Native Americans committed on tribal territory, are outside the authority of tribal courts and are instead handled by the federal government.[9] Thus, even today as tribes are beginning to return to traditional dispute resolution, the footprint of colonization still marks many efforts.

Indian Civil Rights Act of 1968

Congress's legislation regarding the tribes is voluminous, but one particularly important piece of legislation is the Indian Civil Rights Act of 1968.[10] The Indian Civil Rights Act makes some, but not all, of the provisions of the Bill of Rights applicable to Native American tribes. Examples of Applicable Protections include freedom of speech, free exercise of religion, certain procedural protections in trials, and the prohibition against cruel and unusual punishments.[11] Significantly missing, however, is any sort of Establishment Clause.[12]

Establishment Clause

The Establishment Clause has implications for government-backed implementation of restorative justice initiatives in the United States at large. The First Amendment of the U.S. Constitution states "Congress shall make no law respecting an establishment of religion..."[13] The clear implication of the amendment is that the state cannot establish an official church.

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[9] *See* Tribal Law & Policy Institute, *supra* note 1, at 12 (1999). *See also* Canby, *supra* note 2, at 168. *Cf.* DAVID H. GETCHES ET AL., CASES & MATERIALS ON FEDERAL INDIAN LAW, 755 (4th ed. 1998), ("[t]he institutions of the United States political and legal system… were not designed to ensure the vitality of a culture whose essential spirituality pervades all aspects of being and understanding").
[10] 25 U.S.C. §§ 1301-03 (1968).
[11] *Id.*
[12] *Id*. This was a recognition of the role of religion in the various aspect of tribal life, including government. U.S. Commission on Civil Rights, *supra* note 1, at 5.
[13] U.S. Const. amend. I.

However, under current precedent, the government also may not coerce citizens or explicitly endorse, promote, or favor one religion or even religion generally.[14] This will limit, and perhaps even prohibit, the use of faith-based restorative justice programs within the traditional judicial system. An informative comparison is the current controversy over state use of Alcoholics Anonymous, a faith-based alcoholism rehabilitation program. Several federal and state courts have held that the use of AA or similarly religious programs by courts or probation services violates the Establishment Clause.[15] Additionally, even optional federally funded AA programs

[14] *See, e.g,* County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989). The Court writes:

> Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Moreover, the term "endorsement" is closely linked to the term "promotion," and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite."

This is, of course, a great oversimplification of Establishment Clause jurisprudence, but it suffices for the purposes of this discussion. For a more comprehensive discussion see EUGENE VOLOKH, THE FIRST AMENDMENT § VIII (2001).

[15] *See, e.g.*, Jackson v. Nixon, 747 F.3d 537, 545 (8th Cir. 2014) (a required treatment program with religious elements could violate the Establishment Clause); Inouye v. Kemna, No. 06-15474, 2007 U.S. App. LEXIS 21462 at *25–26 (9th Cir. 2007) (religion-based drug treatment programs mandated for parolees a well-established Establishment Clause violation); Kerr v. Farrey, 95 F.3d 472, 474, 479-80 (7th Cir., 1996) (prison's use of Narcotics Anonymous, a religious program, was impermissibly coercive, thus violating the establishment clause); Arnold v. Tennessee Board of Paroles, 956 S.W.2d 478, 484 (Tenn., 1997) (where treatment program is religious and is the only treatment program available, forced participation and consideration of attendance or non-attendance in parole decisions violates Establishment Clause); Griffin v Coughlin, 88 N.Y.2d 674, 691-92, 649 N.Y.S.2d 903, 673 N.E.2d 98 (N.Y., 1996) (prison mandated rehabilitation programs which incorporate AA principles violate Establishment Clause).

However, that prohibition arguably only applies in coercive situations. Two circuits have held that state funding of faith-based rehabilitation programming does not violate the First Amendment if the state is entirely neutral in its promotion of various secular and religious options. See DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397 (2d Cir., 2001) (state's funding of a treatment facility did not violate the Establishment Clause despite the facility's inclusion of religious AA sessions if the facility's staff neither coerces clients to attend such sessions nor themselves indoctrinate clients in AA principles); Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880 (7th Cir., 2003) (Wisconsin' funding of a halfway house that incorporated Christianity into its treatment program did not violate the Establishment Clause where parole officers were required to offer a secular alternative, would not recommend the halfway house to an offender with no Christian identity or interest, and would not encourage potential participants to convert).

have been called into question by legal scholars.[16] The US Supreme Court has yet to rule on this issue. If valid, such principles would apply to other contexts as well. By means of analogy, faith-based restorative efforts could not become a required aspect of the mainstream judicial system, and possibly could not even be a government-funded option.

By contrast, the lack of any establishment clause applicable to their government means that Native American tribes do not have this limitation.[17] As a result tribes can, and often do, establish official churches, or promote one particular faith and faith-based views.[18] The United States only fully recognition this freedom in the past 50 years. Prior to the American Indian Religious Freedom Act of 1978, Native Americans' religious rights were regularly infringed.[19] Many Native American children were forcibly removed from their families and communities, then sent to boarding schools where they were forbidden to practice their own spirituality.[20]

As the more recent experience of several tribes illustrates, though, the implementation of overtly faith-based restorative justice programs is possible within the context of modern tribal government.

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[16] Emily M. Gallas, Comment, *Endorsing Religion: Drug Courts and the 12-Step Recovery Support Program*, 53 AM. U.L. REV. 1063, 1079 (2004). Two tests are outlined in Establishment Clause case law: the coercion test and the apparent endorsement test. In the recent AA cases, courts have generally relied on the coercion test and found establishment clause violations if a prisoner or probationer is coerced to participate in AA or similar programming. Gallas argues that the *Allegheny* decision's endorsement test is more appropriate in that context because it looks at government promotion of religious ideas. She notes, however, that if a drug court provided non-religious alternatives to the 12-Step program, and promoted the programs equally, it could still withstand scrutiny under the endorsement test.

[17] The Supreme Court has consistently held that the Bill of Rights does not restrict Tribal Governments. *See* U.S. Commission on Civil Rights, *supra* note 1, at 4. Establishment concerns under state constitutions would be avoided because the power to regulate the tribes is almost exclusively federal. *See* Canby, *supra* note 2, at 2.

[18] Native Americans who follow the older tribal religions generally do not have an established "church" as such, because their beliefs pervade their culture and their daily lives in a way that makes it difficult to separate the religious components. An isolatable religious entity would be hard to construe, let alone officially recognize. *Cf.* GETCHES ET AL., *supra* note 8, at 755. In tribes where there is an officially recognized church or faith, it often is a Christian entity, rather than a traditional tribal religion. *See, e.g., Chaplain's Corner,* The Choctaw Nation of Oklahoma, https://www.choctawnation.com/chaplains-corner (last updated June 1, 2020; last visited June 10, 2020).

[19] Robin K. Rannow, *First Amendment and the American Indian Religious Freedom Act of 1978*, 10 AM. INDIAN L. REV. 151, 152 (1982).

[20] *Id.*

Restorative Justice in Native American Tribal Law

Although it is dangerous to over generalize among the tribes, certain practices and philosophies of justice are common to many Native American tribes. Two crucial Native justice concepts are the need to focus on the underlying problems rather than simply the criminal act itself, and the need to involve extended family and the community in the justice process.[21] In many tribal traditions, healing and reintegrating individuals into their community is seen as more important than punishment.[22] The peacemaking process, which can stand in place of the Western trial, brings together victims, offenders, and their supporters to solve problems. The goal of these sessions is to maintain or restore harmony and balance. In almost every tribe, there is a deep connection between justice and spirituality.[23] These statements about the tribes are, of course, generalizations. It is important to note that not every tribal tradition emphasizes reconciliation. A few, like cultures throughout the world, were almost exclusively retributive.[24] Nevertheless the new trend in Native American communities on the whole represents a shift back to an ancient commitment to restorative justice.

The idea that the tribe is an interrelated community of people, so that each individual is defined by their relation to others, has a profound impact on Native American legal thinking.

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[21] Tribal Law & Policy Institute, *supra* note 1, at 9 (1999).
[22] Lara Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous Peoples of America: Part One,* International Institute for Restorative Practices, at http://www.realjustice.org/library/natjust1.html (last visited Dec. 12, 2004).
[23] *See* Tribal Law & Policy Institute *supra* note 1, at 10. *See also* Mirsky, *supra* note 19.
[24] For example, some sources suggest that Cherokee traditions historically were primarily retributive, although there was also a widely-practiced yearly reconciliation ceremony. The ancient system of punishments was well-organized and laid out in advance, so it was not the unbridled system of revenge that some historians have portrayed it as. However, penalties were often harsh and detrimental to reconciliation. Punishments under the ancient system included having one's legs scratched for military violations, being thrown off a cliff for arson, death of the assailant or a clan member for murder, and corporal punishment, mutilation, or possibly gang rape for women who committed adultery. Modern Cherokee communities have replaced these practices with more mainstream punishment schemes, but many continue to practice the yearly reconciliation ceremony. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT, 12, 24-39, 189 (1975).

The notion of justice as essentially relational resonates within these communities.[25] A person is not seen as having "rights" in an individual sense, but he is infinitely valuable in his place within the web. The concept of rights held by an individual, independent of his social context, is a difficult one for many Native Americans to grasp. For them, such a concept is abstract, just as for a person immersed in Western culture the idea that rights could belong to anyone other than an individual is abstract. In fact, for Native Americans this person outside his social context is hypothetical, as no one actually exists in isolation. As a result, what Westerners think of as rights, and may even have statutorily provided as Native Americans rights, are generally regarded by the Native Americans themselves as situations in relationships, which are to be mediated rather than litigated. The end result is often the same, but the justification for it and the method of achieving that end are very different.[26]

Native American philosophy of justice tends to emphasize respect and interconnectedness. The Navajo concept of K'e is illustrative. "K'e" loosely translates as "respect", but also encompasses the ideas of restoring a person's dignity and worthiness, maintaining solidarity and reciprocity, and the idea that what one person does always impacts others. The idea that there is a ripple effect to all actions, that every action has a consequence and an impact on other people, is common to Native American thought, and is also held by many indigenous peoples outside North America. Those who study the topic have found the Navajo theory of K'e comparable to the Cree's "ki-ah-m" and the Zulu concept of "ubuntu".[27]

[25] FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE, 114 (1995).
[26] Pommersheim, *supra* note 22, at 116-117.
[27] Mirsky, *supra* note 19.

Circular or horizontal, rather than vertical, conception of justice

The philosophy of interconnectedness leads to a coordinating view of justice, described as either a circular or horizontal conception of justice. Whereas the predominant US legal system emphasizes vertical justice, which entails higher members of the hierarchy imposing the law on offenders, circular conceptions involve all participants looking inward at the community (or sideways at one another, for the horizontal model) and trying to restore or achieve right relationships.[28]

It is essential that Native American justice systems reflect their concept of justice. An overly individualized conception of rights can be seen as threatening to the tribe, which holds relationship as the central value. In addition, an individualized judicial process will be particularly hard for more traditional Native Americans to understand and take advantage of, as they define themselves in terms of relatedness, rather than individually.[29] Finally, a suitable legal system is essential for a meaningful continuation of traditional tribal values. As Frank Pommersheim points out, legal systems not only reflect cultural values, but also shape those cultural values. He offers several examples of how this could pan out in concrete cases. For example, in child custody disputes the mainstream judicial system generally only confers standing on the mother and father of the child. A Native American tribe, on the other hand, might see that distinction as arbitrary, because distant relatives and other tribal members are usually extremely involved with the child's upbringing. Rules that fail to grant those individuals standing in court send a powerful message about the nature of the family.[30]

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[28] Robert Yazzie, *Life Comes from It: Navajo Justice,* THE ECOLOGY OF JUSTICE 29 (Spring 1994), available at http://www.context.org/ICLIB/IC38/Yazzie.htm (Copyright 1994, 1997; last visited Dec. 12, 2004). Similar article available at https://transformharm.org/wpcontent/uploads/2018/12/Life-Comes-from-It_-Navajo-Justice-Concepts.pdf (last visited June 10, 2020).
[29] *See* Pommersheim, *supra* note 22, at 117.
[30] *Id.* at 117.

The cultural implications of a certain judicial system go far beyond standing. The possibility for remedies that reflect the commitment to interconnectedness is also essential. For example, monetary damages, which are seen as adequate compensation in the mainstream system, could be seen as inadequate and possibly even missing the point in Native American thought. Simply paying for harm is not enough, an offender also must take action to repair the relationships she tore, perhaps by assisting the victim in caring for crops or livestock. As another example, Pommersheim points out the different approach to securing an effective education for a child with a disability, say, a child who is deaf. While the mainstream judicial system tends to think of the problem (tastefully relabeled as "difference") as resting with the individual child, the Native American community would see the situation as a communication problem in the whole classroom.[31] This alternate conception of the problem affects the way it is solved. The ideal Native American solution would not be an individualized tutor and interpreter for the child, but instead the entire class should learn sign language so they could communicate with the child. Again, we see the conception of a problem, and remedy to it, as inescapably relational.[32]

This alternate framing of offenses and other problems inevitably leads to a unique system of penalties, rehabilitation processes, and reconciliation efforts that also address underlying problems. Restitution and service to the victim is seen as part of reconciliation in some tribes.[33] Interestingly, even the restitution component of the process can go beyond the individual, with the offender as well as his family responsible for providing compensation to the victim and the victim's family. When setting the amount of restitution, the group is to take into account both

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[31] *Id.* at 117-18. This way of thinking about disability is also urged by the most progressive disability advocates in mainstream society; *see The Social Model of Disability*, Disability Rights Commission, at http://www.drc-gb.org/citizenship/howtouse/socialmodel/index.asp (copyright 2004; last visited Dec. 12, 2004).
[32] Pommersheim, *supra* note 22, at 117-18.
[33] *Id.* at 117.

the victim's loss and the offender's ability to pay.[34] With many offenders, drug and alcohol problems also must be combated. More than 90% of issues before tribal courts are substance abuse related.[35] For substance abuse related offenses, some tribal Wellness Courts will prescribe healing ceremonies, talking circles, traditional dances or quests, or visits with a medicine man. Other tribes make use of more mainstream substance abuse treatment programs, but provide traditional forms of recognition at completion, such as the award of a blanket. Tribes seek to involve the participant's family members in all stages of the justice process, from the decision to enter the program to the final treatment and reconciliation stage. Involving the family helps the participant reestablish a support base. In addition, to help the offender reconnect to the tribe, she might be scheduled for visits with tribal elders or storytellers.[36] These options all seek to address the issues underlying offenses or other injustices, repairing breached relationships and avoiding further harm.

Traditional Restorative Justice Practices - Current efforts

The experience of the Navajo Nation is an informative study, both because of the relative influence their judicial system holds and because the Navajo were one of the first groups to

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[34] Yazzie, *supra* note 25.

[35] Tribal law & Policy Institute, *supra* note 1, at 11.
Healing to Wellness courts have been very successful in dealing with drug and alcohol-related offenses on reservations. *See Id.* at 7:

> For the Northern Paiute tribes whose traditional dispute resolution systems were destroyed in the late 1800s and early 1900s, I think the drug court grants provided my tribe and others with the funds necessary to return, as nearly as possible, to a traditional way of resolving matters before their courts… How splendid it is that mainstream society now not only embraces the concept of mediation but provides federal government funds to drug courts for tribes to reestablish, in a general sort of way, the traditional means our medicine men used to resolve disputes and reestablish harmony in our communities."

(quoting Judge Ronald Eagleye Johnny, Chief Judge, Duckwater Shoshone Tribal Court).

[36] *Id.* at 10. The Hualapai tribal tradition in particular emphasizes the interconnected nature of their community and the need for a community-based solution to the underlying problems. When someone commits an offense, the Hualapai often comment, "He acts as if he had no relatives." The solution, the Hualapai believe, is to bring that person back into the fold, helping him to establish ties with other community members. Mirsky, *supra* note 19.

attempt a return to traditional ways. Navajo peacemaking efforts have the potential for wide applicability and influence because the Navajo court system is the largest of the tribal court system, operating in the most populated Native American nation.[37] In addition, the Navajo judiciary is somewhat better situated in terms of funding and resources than that of many other tribes. In 1982 the Navajo judiciary embarked on an effort to study and implement traditional approaches to justice.[38] There are now peacemaker courts in all districts within the Navajo Nation.[39]

The Navajo Tradition, Hozhooji naat'aanii

The traditional Navajo practice of Hozhooji naat 'aanii is currently one of the best researched and most widely implemented traditional dispute resolution theory and process. Hozhooji means "rightness" and Naat'aanii basically translates as "to talk". Thus, Hozhooji naat 'aanii means, roughly, "people talking together to reestablish right relationships with each and the universe." When speaking English, Navajo usually use the term "peacemaking".[40]

Spirituality and Navajo Justice

Many Navajo leaders see a clear connection between spirituality and Navajo justice. Navajo spirituality centers around the Diyin Dine 'é, the Holy People. Traditionally minded Navajo believe that the Holy People created things in the world and remain present in it -in fire, water, air, and everything that grows. The Holy People passed down teachings, ways of thinking, and principles. These are known as beehazaanii, "The life way," or the law.

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[37] GETCHES ET AL., *supra* note 8, at 392-93.
[38] U.S. Commission on Civil Rights, *supra* note 1, at 33; Mirsky, *supra* note 19.
[39] GETCHES ET AL, *supra* note 8, at 393. At this point these courts supplement, rather than replace, the adversarial courts.
[40] Mirsky, *supra* note 19.

Traditional Navajos believe each person is a creation of the Holy People. As a result, one may not destroy another person or change him into something else. Each individual must respect other people as well as himself.[41]

These basic ideas clearly impact the Navajo approach to justice. Under the Navajo approach, the focus is on the individual, separating the action from the person. Both the dispute resolution process used and the attitudes held during it must indicate respect for individuals. All parties must be careful to avoid attitudes of superiority, and they must treat each other fairly. Participants in the process are to show respect for the individual who committed the offense, but do not show respect for her harmful actions. Rather than making the harmful action the focus of the encounter, peacemaking focuses on underlying relationship problems between victim and offender.[42]

Navajo Peacemaking Process

In the dispute resolution process, the victim, the offender, and the relatives of both are brought together in discussion. Mediators facilitate the discussion and attempt to get to the underlying relational issues. Neutrality in a mediator is not required, or even aimed for. In some situations, mediators may be relatives of the parties.[43] In other situations a mediator, called a naat'aannii, will be selected by the community to serve as a guide to those involved in the process.[44] Prayer is an important part of the peacemaking process. Prayer is seen as compelling

[41] *Id*.
[42] GETCHES ET AL., *supra* note 8, at 397; Mirsky, *supra* note 19.
[43] U.S. Commission on Civil Rights, *supra* note 1, at 10; Mirsky, *supra* note 19.
[44] Yazzie, *supra* note 25.

a spirit to be present, which creates a safe atmosphere in which a person can confess or talk about their problems.[45]

Challenges in Establishing a Peacemaking System

Currently the Navajo have a greater degree of independence in structuring their government than they have in earlier times. Historically European settlers and the US government have not been supportive of traditional Native American ways. This has influenced both the structure of the Navajo government and the mindset of many Navajo, leading to difficulties in returning to traditional ways.

Tribe members, particularly those with an affinity for the ancient traditions, often see their tribal government as imposed by the predominately white US government, and not reflective of traditional ways. However, the impact of European colonization went beyond government structure. Thus, another challenge facing advocates of traditional restorative justice models today is the mindset of the average Navajo. Both faulty teachings by early missionaries, as well as exposure to dominant culture in modern times, have altered the view of Navajo towards their ancient dispute resolution mechanisms. Most Navajos today see the US government's retributive model, rather than their own culture's traditional model, as representative of justice. Additionally, many Navajo were taught by outsiders that their practices, including reconciliation-oriented approaches to justice, were incompatible with Christianity.[46] These misconceptions can impede the perceived legitimacy of tribal peacemaking efforts, limiting their effectiveness.[47]

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[45] Mirsky, *supra* note 19.

[46] *Id.* Absent from that teaching is, of course, the perspective of many Christian groups that reconciliation-focused approaches to justice are actually more compatible with Christianity than retributive models. *See, eg, Choosing*

Proponents of a return to the traditional justice system attempt to respond to these concerns with educational efforts and community participation in judicial projects. "It took a lot of time. It's taking a lot of education, a lot of persuasion. Even among our people, we have to do the same thing," states The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation Supreme Court.[48] These outreach efforts can be difficult for tribal leaders, who often work with tiny budgets and few resources. In addition to community education and involvement, simple steps such as giving the tribal peacemaking court a traditional Native American name can lead to greater acceptance by the people.[49]

Efforts in Other Native American Nations

Within the past 25 years, other tribes have begun re-exploring and implementing their own tribal traditions.[50] Each group has its own tradition, with certain ideas emphasized more than others. In addition, the actual process used to achieve these goals varies somewhat from tribe to tribe. Nevertheless, many of the themes explored above are shared across native groups. This means that the tribes encounter similar benefits and shortcomings as they attempt to integrate traditional ways into modern judicial systems.

Christ's Way of Reconciliation, The Mennonite Central Committee, https://mcc.org/stories/choosing-christs-way-reconciliation (last updated October 27, 2020; last visited March 31, 2021).

[47] Mirsky, *supra* note 19.

[48] *Id*.

[49] Tribal Law & Policy Institute, *supra* note 1, at 9.

[50] Mirsky, *supra* note 19, ("[i]t wasn't until the 1990s when we decided that we didn't have to practice what they [the European-Americans] practice, because we are our own people" (quoting Louise Thompson, Justice Coordinator, Mohawk Council of Akwesasne)); ("[t]he institutionalization of Healing to Wellness Courts amid some American Indigenous Nations suggests that a spiritual revolution is slowing unraveling on the rez. Something stunningly spiritual is happening to indigenous North American jurisprudence." (quoting Judge Joseph Flies-Away of the Hualapai Nation)).

Analysis – Advantages and Disadvantages of the Return to Traditional Ways

Native American peacemaking offers several benefits over the mainstream Anglo-American trial system. First, peacemaking addresses the root of the problem, rather than individual incidents, which allows the process to address the underlying problem, avoiding reoccurrences. Second, many participants value the place for emotions in the peacemaking process. Third, many promoters of the peacemaking process point out that it encourages truth telling while the Anglo-American trial system is seen as encouraging lies. Fourth, many approve of the fact that peacemaking involves only the people affected, the victim and offender, their families, and community members. On the other hand, Native Americans tend to see the Anglo-American trial system as involving unnecessary people, such as lawyers. Finally, many judges appreciate the efficiency of the traditional dispute resolution process, which moves more quickly than most trials.[51]

Despite all these benefits, like all restorative justice initiatives, Native American processes have limitations and drawbacks. In fact, some of the system's most attractive features also lead to its shortcomings. One of the primary drawbacks of any non-coercive mediation-based system is the perceived lack of authority or enforcement capabilities. Sometimes one party to a conflict will refuse to participate in the process in the first place. At other times, participants will go back on the agreement after consensus has been reached. It can be hard for tribal leaders employing the traditional mechanisms to exert the kind of coercive authority needed to compel offenders to comply with their restitution agreements or planned substance abuse treatment. Some tribes have been able to ameliorate that issue by working with respected community leaders and panels of elders, in the hope that participants will conform their behavior to avoid failure in front of the community. In situations where other attempts fail, however, at

[51] *Id.*

least one Navajo judge thinks the mainstream adversarial system offers an essential backup plan.[52]

Most restorative justice practices attempt to deemphasize blame and instead work on restoring or creating healthy relationships. It is doubtful whether we can completely jettison determinations of guilt. In the rush to take the emphasis off blame, these dispute resolution processes to some extent assume that the person initially labeled as the offender is actually the person at fault. If this assumption is incorrect, and actually this is the wrong person, ignoring issues of guilt may not improve relationships. Although the wrongful accusation itself may indicate a need to work on issues of trust, there needs to be some limit against requiring someone to make restitution and restore a relationship that was harmed by someone else. Plugging on as if the person needs to make restitution and achieve re-integration could actually be very alienating. In the meantime, the actual person who was at fault remains at large in the community, potentially harming others, and probably feeling estranged.

Another potential disadvantage is the ability in a few tribes to demand restitution from an offender's family. In spurning individualism, these frameworks may risk going too far, and creating hostility from families that feel powerless to alter their fate due to one 'bad apple'.

While restorative justice is frequently touted for its individualized treatment and situation-specific results, the flip side is a possibility for unequal treatment from one offender to the next. In addition to undermining our nation's commitment to equal treatment before the law, unequal penalties also lead to a lack of predictability. Such an approach will result in wealthier

[52] *Id*. *See also* Tribal Law & Policy Institute, *supra* note 1, at 10. The Tribal Law & Policy Institute notes, however, that the lack of coercive power is only partially attributable to the peacemaking process. Tribal courts and sentencing circles are also hampered by federal legislation which prevents the tribes from imposing penalties or treatment programs greater than one year in length.

individuals paying more in restitution, for example. One can question whether treating people differently based on their circumstances really constitutes equal treatment.

Other weaknesses are more specific to this particular system. For example, in many tribal systems, there seems to be a possibility for an unpopular person to be treated unfairly. Community involvement in dispute resolution may foster innovative solutions and provide social support for the participants, but it also jeopardizes impartiality and equal treatment. One of the reasons the mainstream model favors an independent judiciary is precisely because of the risk to unpopular minorities when decisions are made by majority vote.[53]

Judge Joseph Flies Away of the Hualapai Nation serves as a consultant to the U.S. government and other tribes promoting traditional dispute resolution practices. Flies Away points out the need to modify old traditions for the present day. For example, he notes that the ancient tradition does not include a role for women. As a result, the system has to be altered for application to the modern tribes which have more egalitarian views when it comes to gender equality and participation.[54]

A final critique would relate to the pervasive spiritual component of the system. In this regard, it is important to note that many tribes see this as an integral aspect of their tradition that is not open to modification. The question presents itself, then, is how the tribal courts will work

[53] Unfortunately, the lack of an independent judiciary may be more systemic to Native American tribes generally, rather than simply a symptom of a flawed dispute resolution process. In 1978, years before the tribes returned to traditional ways, the National American Indian Court Judges Association reported that a lack of an independent judiciary was a serious problem in many tribes. In 1984 the Presidential Commission on Reservation Economics noted complaints of political discrimination by tribal courts. U.S. Commission on Civil Rights, *supra* note 1, at 44-45.

[54] Mirsky, *supra* note 19. Pommersheim points out that today women frequently serve as leaders in the tribes, including the tribal judicial systems. In 1995, eight of the nineteen tribal justices in South Dakota were women. By contrast, only one of the thirty-five mainstream South Dakota trial court judges was a woman. Pommersheim, *supra* note 22, at 127.

with participants that do not share that religious belief.[55] To be respectful, as these traditions require, and even simply to be effective, it seems that some modifications would have to be made to avoid coercing a participant into participating in a religious effort they felt uncomfortable with.

Even among those who share the promoted belief, state involvement in faith is not necessarily beneficial. The Establishment Clause may not apply to the tribes, but the policy considerations that led the framers to include it in the federal constitution are not specific to the national situation. The same arguments for eliminating the potentially coercive influence of the government in the area of faith would also apply to Native American communities. Most people have at least heard of Jefferson's 'separation of church and state' rationale. Less widely promoted are the religious justifications for the clause, that state action to promote a belief can be dangerous to religious establishments but most importantly to individual seekers and believers, who lose their ability to freely respond to God as they see fit. In this respect, using the force of government, even the admittedly weaker tribal form, could be seen as hindering a person's free response to God. Rather than allowing a person's conscience to guide them towards apology, forgiveness, and reconciliation, that response is imposed from the outside.

Some of the downsides to the traditional Native American process are common to all restorative justice initiatives. Others are more specific to the unique Native American systems. These flaws do not necessarily mean the programs should not be implemented, but they do

[55] Other tribal efforts may have less of a difficulty with that issue than others, because of the way they define or use spirituality in their system. The Mohawk Nation of Akwesasne begins sessions by requiring all participants to pay their respects to Mother Nature, which might conflict with some participants' beliefs. By contrast, the spiritual component of Hualapai peacemaking is much more generalized than that of Navajo or Akwesasne Mohawk peacemaking. The Hualapai emphasize interconnectedness, responsibility to a higher authority, and the fact that the higher authority is what makes peacemaking possible. Such a generalized approach may be palatable to people of various faith backgrounds. A Canadian tribe has had success with a process in which participants select their own prayers, of a faith and style that is meaningful to them. Mirsky, *supra* note 19.

suggest areas for discussion, and possible modification to eliminate or ameliorate these problems.

Conclusion

Native American tribes have a legal status which enables them to promote faith-based restorative justice techniques in ways that may not be possible in the nation at large. Many Native American leaders have shown interest in developing their traditional programs for justice and reconciliation. Despite several troubling issues that need to be addressed, on the whole, traditional practices have much to offer the modern Native American community.

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