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## Traditional Indian Justice in Ontario: A Role for the Present?

### Abstract

It is the author's position that for too long the study of "Indian law" in Canada has meant the study of law imposed upon Canadian Indians. It is suggested that the study of the indigenous law ways of Ontario's native Indians has been wrongly neglected. This is so not merely because of the historical interest of the subject to Indians and non-Indians alike, but also because the study of traditional law ways provides an opportunity for modern native communities to understand the historical continuity of local responsibility for justice among natives and to build upon that tradition in assuming more responsibility for the administration of justice in native communities today. The approach of this paper is threefold. Its starting point is a review of recent studies which indicate that native men and women are dramatically over-represented in the province's prison system, particularly for minor offences. The paper then investigates the historical evidence that social mechanisms existed in traditional Iroquois and Cree-Ojibwa societies in Ontario that performed the functions of a justice system in those societies before Euro-Canadian law was imposed on them. Next, the author considers whether, and to what extent, traditional native approaches to conflict resolution in Ontario are in accord with modern Canadian criminal justice policy. Concluding that the values which inspired traditional native justice ways and current criminal policy are indeed compatible, the author proposes that native communities in Ontario be encouraged to rediscover the value of their justice traditions and presents concrete examples of the sorts of current Canadian justice initiatives which seem to offer particular hope for the future.

# TRADITIONAL INDIAN JUSTICE IN ONTARIO: A ROLE FOR THE PRESENT?

BY MICHAEL COYLE\*

*It is the author's position that for too long the study of "Indian law" in Canada has meant the study of law imposed upon Canadian Indians. It is suggested that the study of the indigenous law ways of Ontario's native Indians has been wrongly neglected. This is so not merely because of the historical interest of the subject to Indians and non-Indians alike, but also because the study of traditional law ways provides an opportunity for modern native communities to understand the historical continuity of local responsibility for justice among natives and to build upon that tradition in assuming more responsibility for the administration of justice in native communities today.*

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The Indian on the prairie, before there was White Man to put him in the guardhouse, had to have something to keep him from doing wrong.<sup>1</sup>

## I. INTRODUCTION

Much has been written recently in Canada on the subject of native Indians and criminal justice and, in particular, on the disproportionate involvement of natives in the Canadian criminal justice system. Not surprisingly, the vast majority of Canadian publications on "Indian law"

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<sup>1</sup> High Forehead, Cheyenne informant to K.N. Llewellyn & E.A. Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941) at 2.

or “criminal justice and Indians” have focused solely upon Euro-Canadian law and the issues raised by Euro-Canadian law as it concerns Indians. The contemporary Euro-Canadian legal system is, after all, the only legal system of practical significance to most Canadians, natives included. Still, as evidence mounts concerning the inadequacies of our criminal justice system as it affects Indians in Ontario, the question arises whether there are any *native* traditions of conflict resolution in Ontario that might be of value if adapted to today’s needs. Curiously, this is a question which policymakers in Ontario seem to have almost completely overlooked.

How did the ancestors of Ontario Indians deal with disputes before Euro-Canadian law was imposed upon them? For disputes must have arisen, as they arise in every society. What were the mechanisms that regulated anti-social conduct among Indians in Ontario before the arrival of Europeans? Did those mechanisms act in the same way as a criminal justice system: defining, stigmatizing, and punishing particular acts which seriously threatened the social order? If those traditional mechanisms did perform the functions of a criminal justice system, were they also based on ideas or values that are compatible with the current philosophy of Canadian criminal law? These are the questions that this paper seeks to address.

The discussion that follows is organized in three parts. First, it reviews briefly the record of the Canadian criminal justice system as it affects Indians in Ontario, highlighting some of the dramatic problems raised by the current system and indicating the types of offences for which Indians in Ontario are most frequently imprisoned.

Second, the paper offers a general and tentative description of the mechanisms that preserved social order and deterred anti-social conduct in traditional Iroquois, Ojibwa, and Cree communities in Ontario. It will be seen that mechanisms did indeed exist in those Indian communities which performed the functions that modern Canadian society demands of its criminal justice system.

Third, the paper shows that many of the ideas that inspired Ontario Indian justice methods are in harmony with the philosophy behind current alternative sentencing policy. As such, Indian justice traditions in Ontario would seem to offer a particularly promising direction of justice reform. To illustrate the point, the paper will briefly refer to two recent initiatives in Canada whereby local Indian communities have taken more control over the justice process, in ways that emphasize traditional Indian values.

## II. ONTARIO INDIANS AND THE CRIMINAL JUSTICE SYSTEM TODAY

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.<sup>2</sup>

Since the mid-1970s, several studies have revealed a dramatic over-representation of Indians amongst the prison inmates of this province. Typical of these is *Warehousing Indians*,<sup>3</sup> published by the Ontario Native Council on Justice. That study reported that in 1981-82 the incarceration rate for native people in Ontario (status and non-status Indians) was more than three times as high as the rate for non-natives. While natives represented only slightly more than 2 percent of Ontario's population,<sup>4</sup> they accounted for 7 percent of all men and 14 percent of all women admitted to Ontario's jails and detention centres.<sup>5</sup> Further, natives were particularly over-represented in admissions involving a sentence of less than three months.<sup>6</sup> The number of native admissions for certain types of offences was distressingly high. For liquor offences, for example, natives represented 33 percent of all male and 79 percent of all female admissions to Ontario's jails — respectively sixteen and forty times their proportion of the population.<sup>7</sup>

The same study showed that the problem of over-incarceration was especially severe in certain regions of the province, particularly in the north. For example, native female admissions to the Kenora District Jail alone represented 49 percent of all native female admissions to the correctional system.<sup>8</sup> The study also revealed that natives in Ontario were less likely to be released on bail or parole than non-natives, more likely

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<sup>2</sup> Winston Churchill, quoted in P. Walker, *Punishment: An Illustrated History* (London: David & Charles, 1972) at 4.

<sup>3</sup> S. Jolly, *Warehousing Indians: Fact Sheet on the Disproportionate Imprisonment of Native People in Ontario* (Toronto: Ontario Native Council on Justice, 1983).

<sup>4</sup> This is the figure used consistently by Jolly and the Ontario Native Council on Justice. It is based on a 1981 figure of 185,000 natives (status, non-status, and Metis) and a total population of 8,625,107: see *ibid.* at 2. The writer's information, based on statistics published by the Native Community Branch of the Federal Secretary of State (the same Ministry relied on by Jolly), is that according to the 1981 census there were 110,100 self-described natives in Ontario (status, non-status, Metis, and Inuit). The latter figure would represent only 1.3 percent of the Ontario population. Use of this figure would suggest a slightly more dramatic over-representation of natives in our prisons. The writer has continued to use Jolly's figure because this leads to a more conservative estimate of the gravity of the problem, and because it facilitates easy comparison with the results of Jolly's study.

<sup>5</sup> *Ibid.* at 3.

<sup>6</sup> *Ibid.* at 10.

<sup>7</sup> *Ibid.* at 11.

<sup>8</sup> *Ibid.* at 8.

to remain incarcerated until the end of their sentence, and more likely to be readmitted to a provincial jail after their release.<sup>9</sup>

The most recent statistics available from the provincial Ministry of Correctional Services indicate that the situation has not improved substantially over the past four years.<sup>10</sup> In 1985–86, native men represented 7.7% of male admissions to the province's jails, and native women slightly less than 15 percent of female admissions — four and seven and a half times what one would expect from their proportion of the population.<sup>11</sup> Native men and women were sent to provincial jails for provincial liquor offences<sup>12</sup> in numbers fourteen and twenty-nine times their proportion of Ontario's population. For property offences,<sup>13</sup> public order offences,<sup>14</sup> and offences involving violence against the person,<sup>15</sup> the number of native male admissions to the province's jails in 1985–86 was in each case more than three times their proportion of the population.<sup>16</sup> The number of native female admissions was in each case more than five times their proportion of the population.<sup>17</sup>

Native people admitted to Ontario's provincial jails are most frequently incarcerated as a result of liquor-related offences; next most common are property offences, then public order offences, and, finally, offences of violence against the person.<sup>18</sup> Further, there is some evidence to suggest that an alarming number of these people are imprisoned because they failed to pay a fine initially assessed against them. In 1983–84, for example, of all native males sentenced to prison in Ontario for alcohol-related offences, 94 percent were incarcerated for non-payment of fines.<sup>19</sup>

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<sup>9</sup> *Ibid.* at 3-4, 15-16.

<sup>10</sup> Ontario, Ministry of Correctional Services, *Admissions to the Institutions: 1985-86* (Toronto: Correctional Services, 1986). See Table 1, *infra*.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Liquor Control Act* and 'drinking driving'.

<sup>13</sup> Theft, break and enter, property damage, arson.

<sup>14</sup> Obstruction of justice, breach of court order or parole, miscellaneous public order.

<sup>15</sup> Homicide and related, serious violent, violent sexual, assault and related.

<sup>16</sup> *Supra*, note 10.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* The proportions are 30.5%, 21.5%, and 11.9%, respectively.

<sup>19</sup> Ontario, Ministry of Correctional Services, "Strategic Planning Paper No. 6E: Native and Non-Native Admission Trends (Males)" (1985) at 6. On the high proportion of incarcerated native fine defaulters, see C.P. Laprairie, "Selected Criminal Justice and Socio-Demographic Data on Native Women" (1984) 26 *Can. J. Crim.* 161 at 164; D.A. Schmeiser, *The Native Offender and the Law* (Ottawa: Law Reform Commission, 1966) at 81; A.C. Birkenmayer & S. Jolly, *The Native Inmate in Ontario* (Toronto: Ontario Native Council on Justice, 1981) at 29-31; S. Jolly & J. Seymour, *Anicinabe Debtors' Prison: Final Report to the ONCJ on a Survey of Fine Defaulters and Sentenced Offenders Incarcerated in the Kenora District Jail for Provincial Offenders* (Toronto: Ontario Native Council on Justice, 1983) at 7-13.

The situation of Ontario's Indian youth is hardly encouraging. According to a recent report prepared for the Native Council on Justice, status Indian youth in Ontario are two and a half times more likely to be placed on probation than non-Indian young people, and four times more likely to be committed to training school.<sup>20</sup> The involvement of young native people with the justice system is particularly distressing, since the incarceration of adult natives is often the continuation of a pattern of conflict with the justice system first established during their youth.<sup>21</sup>

The disproportionate incarceration of native people in Ontario, particularly for relatively minor offences, is especially disturbing during a decade in which the Law Reform Commission of Canada has urged that prison sentences should be imposed with restraint. Prison, in the view of the Law Reform Commission, "must be restricted to the real criminal law and only used where necessary — for offenders too dangerous to leave at large, too wilful to submit to other sanctions, or too wrongful to be adequately condemned by non-custodial sentences."<sup>22</sup> The report of the Law Reform Commission on the criminal law concludes that in general prison is not conducive to rehabilitation (statistics on the number of repeat native offenders in Ontario confirm this),<sup>23</sup> and that it is not, therefore, a useful or appropriate measure in the case of minor or regulatory offences.

The disproportionate numbers of native people in prison, the high rate of recidivism amongst native inmates, and the number of native people incarcerated for non-payment of fines have been the subject of several excellent and careful studies.<sup>24</sup> The conclusions reached by such studies have been various. Recommendations include greater use of alternative sentencing measures such as community service orders and fine-option programs; better cross-cultural education of judges and court and prison staff; more participation by natives in the delivery of justice services; the development of local preventive and 'diversion' programs; and, more generally, an improvement of the overall economic and social prospects of natives in Ontario. In response to these recommendations,

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<sup>20</sup> S. Jolly, *Our Children are Hurting: Fact Sheet on the Disproportionate Involvement of Indian Young People in the Juvenile Justice and Child Welfare Systems of Ontario, 1981-82* (Toronto: Ontario Native Council on Justice, 1983) at 5.

<sup>21</sup> *Ibid.* at 1. Birkenmayer & Jolly, *supra*, note 19 at 10.

<sup>22</sup> Law Reform Commission of Canada, *Report — Our Criminal Law* (Ottawa: Information Canada, 1976) at 30.

<sup>23</sup> See Birkenmayer & Jolly, *supra*, note 19 at 10-12; Jolly & Seymour, *supra*, note 19 at 9; Laprairie, *supra*, note 19 at 163.

<sup>24</sup> An excellent review of the literature appears in P. Haveman *et al.*, *Law and Order for Canada's Indigenous People* (Ottawa: Solicitor General, 1984).

several programs have been developed in Ontario to involve more native people in justice administration. These include the Native Courtworkers Program, the hiring of special native police constables, and the appointment of native Justices of the Peace to serve northern communities.<sup>25</sup> All of these programs offer hope of greater native understanding of and control over the justice process.

The vast majority of the studies done and the measures implemented in Ontario to date, however, have focused on adapting natives more completely to the procedures and values of the Euro-Canadian justice system. This paper will inquire into traditional native values and social organization, to determine whether there are any native justice traditions in Ontario which might be adapted by Indian communities to permit them to deal with crime in a way that might be both more meaningful to the community, and more effective in its advancement of modern justice policy, than the current system has proved.

### III. TRADITIONAL INDIAN JUSTICE IN ONTARIO

#### A. *Introduction*

An estimated 185,000 natives (status, non-status, and Metis) live in Ontario today.<sup>26</sup> The vast majority of these are descendants of one of three Indian peoples: the Iroquois (in their own language, the *Hode-no-sau-nee*); the Cree; and the Ojibwa (in their own language, the *Anishnabek*). Anthropologists have found it convenient to describe the Cree and Ojibwa as 'Algonkian' peoples because of similarities in their traditional language and culture. The Iroquois, on the other hand, tend to be classed separately, together with groups including the Petuns, the Neutrals, and Hurons, who historically spoke similar 'Iroquoian' languages. This paper will review the justice traditions of the Ojibwa and the Cree together because of the similarities in their traditional societies, and will deal separately with the Iroquois. First, however, a brief introduction is needed to their respective ways of life.

At the time of their first contact with Europeans in the early seventeenth century, the Five Nations of the Iroquois (Mohawk, Oneida, Onondaga, Cayuga, and Seneca) occupied adjacent territories south of Lake Ontario and the St. Lawrence River in what is now New York State. Their society in many ways resembled that of their rivals, the Hurons, who lived on the eastern shores of Georgian Bay until the mid-

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<sup>25</sup> Ministry of the Attorney General, *Ontario Native Justice of the Peace Program: Plan for Native Justices of the Peace in the James Bay Area of Ontario* by S. Jolly & F.C. Hayes (Toronto: Ministry of the Attorney General, 19 April 1985).

<sup>26</sup> *Supra*, note 4.



seventeenth century when they were decimated and scattered by disease and Iroquois raids. Both the Iroquois and the Huron were agricultural peoples, relying for their subsistence on the farming of maize, beans, and squash, as well as on hunting, fishing, and the gathering of fruit and vegetables. Both lived in permanent settlements, often fortified, which may occasionally have had as many as three thousand inhabitants.<sup>27</sup> At the time of the arrival of Europeans in northeastern America, the Iroquois League does not seem to have numbered as many people as the Hurons (estimated at between 20,000 and 30,000 people).<sup>28</sup> The Iroquois, however, soon became renowned even amongst their French enemies for the sophistication of their political life, and for a time during the fur trade era, the Iroquois became perhaps the most influential Indian people on the continent.<sup>29</sup>

The political organization of the Iroquois League, reportedly studied by the drafters of the American constitution and described in 1851 by the American lawyer Lewis Henry Morgan as "the triumph of Indian legislation,"<sup>30</sup> is too complex to be treated in detail here. The League was established considerably before the arrival of Europeans in northeastern America. Originally composed of the five Iroquois nations (the Tuscarora people were admitted around 1715), the League held an annual council at Onondaga, which was attended by a certain number of Council chiefs (*sachems*) from each of the nations. The Council chiefs, who were appointed partly on the basis of the family to which they belonged and partly on the basis of their own merit, had collective authority to decide all matters of general concern to the League, except the conduct of war. The Council reached decisions by a complicated procedure, rich in ceremony and symbolism, which was designed to help the chiefs reach a consensus, for unanimity was necessary in all of the Council's decisions.

Outside the Council's jurisdiction were issues relating to the conduct of war, which were decided by separate, elected war chiefs, and matters of concern to one nation only, which were governed, depending upon

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<sup>27</sup> C.E. Heidenreich, "Huron" in W.C. Sturtevant, ed., *Handbook of North American Indians*, vol. 15 (Washington: Smithsonian Institute, 1978) 368 at 377. See also W.N. Fenton, "Northern Iroquoian Culture Patterns" in Sturtevant, *ibid.*, vol. 15, 296 at 306-9.

<sup>28</sup> See Heidenreich, *ibid.* at 369. In 1660 the *Jesuit Relations* gave the number of The Five Nations' fighting men at 2200: E. Tooker, "The League of the Iroquois: Its History, Politics and Ritual" in Sturtevant, *ibid.*, vol. 15, 418 at 421. See also F. Jennings, ed., *The Ambiguous Iroquois Empire* (New York: Norton, 1984) at 88, 95-96.

<sup>29</sup> On the diplomatic prowess of the Iroquois league, see, e.g., Jennings, *ibid.*

<sup>30</sup> L.H. Morgan, *League of the Iroquois* (New York: Corinth Books, 1969) at 76 (originally published 1851). For a general description of the workings of Iroquois government, see 54-146 and Tooker, *supra*, note 28 at 90-92.

their nature, by the chiefs of that nation, by village leaders, or by local 'clan' leaders.

The clan system was a vital element of Iroquois society, helping to bind the 'Great Peace' which reputedly prevailed continuously within the League from the time the League was established until the American Revolution. Each nation was divided into several matrilineal clans whose members were distributed across all the nations. In this way, each member of a particular nation would recognize clan 'brothers' in each of the other Iroquois nations. The clan system also had important political and economic functions, and, as we shall see, played a central role in the Iroquois system of justice.

In comparison with the Iroquois, relatively little written record remains of the ways of life of the Cree and Ojibwa peoples of Ontario as they existed around the time of the first European contact. The Ojibwa, who probably did not encounter Europeans directly until the 1620s,<sup>31</sup> seem to have inhabited the area surrounding the shores of Lake Superior and northern Lake Huron. The Cree, who first met European explorers and traders in the James Bay region during the early seventeenth century,<sup>32</sup> may also have ranged as far south as the northern Great Lakes. Both peoples migrated considerably during the fur trade era which followed. The Cree pushed west into the Prairies, while many Ojibwa seem to have migrated north toward James Bay. Today, many communities in northern Ontario contain a mixture of persons of Cree and Ojibwa descent.

Traditionally, both the Cree and the Ojibwa lived a nomadic existence, travelling for most of the year in small groups, seeking fish and game and gathering food. During the summer months, when food was relatively plentiful, they would gather in larger communities for feasts, religious ceremonies, and other social activities. Typically, these summer communities may have included fifty to three hundred people,<sup>33</sup> although French traders and missionaries in the seventeenth century occasionally reported having met larger summer gatherings of up to fifteen hundred

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<sup>31</sup> C.A. Bishop, *The Northern Ojibwa and the Fur Trade: An Historical and Ecological Study* (Toronto: Holt, Rinehart & Winston, 1974) at 8. The first recorded contact (with Jesuit missionaries at Sault Ste. Marie) was in September, 1664: see E.J.R. Danziger, *The Chippewas of Lake Superior* (Norman: University of Oklahoma Press, 1978) at 27.

<sup>32</sup> C.A. Bishop, "The Western James Bay Cree: Aboriginal and Early Historic Adaptations" (1983) 8 *Prairie Forum* 147 at 148; J.J. Honigmann, "West Main Cree" in Sturtevant, *supra*, note 27, vol. 6, 217 at 217-30.

<sup>33</sup> E.S. Rogers & J.G. Taylor, "Northern Ojibwa" in Sturtevant, *ibid.*, vol. 6, 231 at 233; Bishop, *supra*, note 31 at 7; H. Hickerson, *The Chippewa and their Neighbours: A Study in Ethnohistory* (Toronto: Holt, Rinehart & Winston, 1970) at 13. Danziger suggests a "basic unit" of 300-400 people for the Chippewa of Lake Superior: Danziger, *supra*, note 31 at 23.

people.<sup>34</sup> Traditional Ojibwa and Cree communities in Ontario were widely scattered groups generally following the leadership of an older man, respected for his experience and wisdom. Very often the leader was a particularly good hunter or warrior, or a *shaman* who could protect the community with powerful medicine.<sup>35</sup>

Each Ojibwa and Cree community lived independently and often far from its neighbours. Given the geographic diversity of the lands which they occupied, there must inevitably have been considerable variation in local customs. It is important to realize that neither of these peoples constituted a 'nation' if by that we mean a group of communities with a central government. Nevertheless, although traditional Cree and Ojibwa communities were content to preserve their independence from one another, they shared a cultural heritage with their closest neighbors, and the fundamental principles of their social organization seem to have been quite similar.

Before proceeding to analyze the particular mechanisms by which social order was traditionally maintained in Iroquois, Cree, and Ojibwa communities, two warnings should be given. First, this paper speaks only of what we know about the traditional justice ways of Ontario Indians on the basis of *written* records. Usually, therefore, the historical source is non-Indian. Often the writer is someone, such as a trading post manager or a missionary, who may not have been particularly interested either in investigating the intricacies of the social organization of the Indians or in discovering that their social organization was a complex or effective one. Occasionally, on the other hand, a historical writer is biased in the opposite direction, inventing or glorifying aspects of traditional Indian society for ulterior purposes.<sup>36</sup> Critical judgment of such historical testimony is especially important given the scarcity of the records available.

The second warning, equally important, is that in considering traditional Indian mechanisms of social control, it is necessary to rid oneself of non-Indian presumptions about how authority is normally

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<sup>34</sup> C.A. Bishop, "Territorial Groups before 1821: Cree and Ojibwa" in Sturtevant, *ibid.*, vol. 6, 158 at 158.

<sup>35</sup> E.S. Rogers, "Leadership among the Indians of Eastern Subarctic Canada" (1965) 7 *Anthropologica* 263 at 269; D. Jenness, *The Indians of Canada*, 7th ed. (Toronto: University of Toronto Press, 1977) at 120; Honigmann, *supra*, note 32 at 222. On the political power of *shamans* in Ojibwa society, see R. Landes, *The Ojibwa Woman* (New York: Norton, 1938) at 133-34.

<sup>36</sup> This is the case with Cadwallader Colden, whose *History of the Five Indian Nations of Canada* (New York: AMS Press, republished 1973) was written in hopes of establishing British jurisdiction over the territories of Iroquois "tributaries." See Jennings, *supra*, note 28 at 10-17. So too with B. de Lahontan, *Lahontan's Voyages*, ed. by S. Leacock (Ottawa: Graphic Publishers, 1932), which contains a dialogue with the Huron chief 'Adario' that is clearly embellished, if not entirely fictional (at 347-48).

exercised in society. In all of the Indian societies which populated North America at the time of European arrival, there was no equivalent of the European monarch, invested with supreme authority over a people regardless of his or her wisdom and irrespective of the public will. Amongst the Indians of Ontario, obedience to a particular leader's wishes depended upon his persuasiveness, his personal authority or wisdom, and the general esteem in which he was held by his community. Leaders remained leaders only as long as they held the respect of their community and, ultimately, only as long as they expressed the community's wishes. Thus, in the early eighteenth century, the sub-delegate of the Intendent of New France, speaking of the Ojibwa, noted that their chiefs "can not say to them: 'Do this and so,' but merely — 'it would be better to do so and so.'"<sup>37</sup> It was the same amongst the Iroquois<sup>38</sup> and the Cree.<sup>39</sup> Even in war, Indian leaders could not coerce their followers to fight.<sup>40</sup> As a result, in Iroquois, Ojibwa, and Cree communities, decisions involving the public interest were reached by consensus, and, if the matter was important enough, only after holding a council at which all those concerned (or at least the leading members of the community) could express their views.<sup>41</sup>

The limited scope of a leader's authority in traditional Ojibwa society has been aptly described by Basil Johnston, an Ontario Ojibwa teacher and ethnologist:

Leadership was predicated upon persuasion; its exercise upon circumstances and need. It was neither permanent nor constant for a chief. Rather, it was temporary and intermittent as it was obtained in the physical world. Twice annually, once in late summer and again in early spring, does the occasion arise for the exercise of leadership among the birds. Late in summer, the birds assemble in flocks under one leader to proceed to the south; in early spring, they return under the guidance of a leader. When the need is ended, so is leadership.

Even when circumstance demands leadership, the act of leading is without compulsion. The followers follow freely and are at liberty to withdraw. When the flock arrives at its destination, the members disband and terminate the conduct of leadership. . . .

Furthermore, there is no contesting for leadership among the creatures. Leadership is a burden, not to be sought, but perhaps even to be avoided. A leader

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<sup>37</sup> Danziger, *supra*, note 31 at 23. See also B. Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976) at 61-62.

<sup>38</sup> Morgan, *supra*, note 30 at 105-6, 138-39.

<sup>39</sup> See, e.g., Honigmann, *supra*, note 32 at 222.

<sup>40</sup> Danziger, *supra*, note 31 at 23; Jenness, *supra*, note 35 at 278; Morgan, *supra*, note 30 at 72-73; G. Copway (Kah-Ge-Ga-Gah-Bowh), *The Traditional History and Characteristic Sketches of the Ojibway Nation* (Toronto: Coles, 1972) at 144 (originally published 1850).

<sup>41</sup> Danziger, *supra*, note 31 at 23; Johnston, *supra*, note 37 at 63; Morgan, *supra*, note 30 at 107-8; Heidenreich, *supra*, note 27 at 371-72; Father L. Hennepin, *A New Discovery of a Vast Country in America*, ed. by R.G. Thwaites (Toronto: Coles, 1974) at 513 (original English edition, 1698).

is chosen by consensus for his foresight to lead the way. He is, therefore, first in terms of showing the way and not in any other sense.<sup>42</sup>

All available historical testimony indicates that the exercise of authority in traditional Indian societies was completely unlike the method of government to which most of the readers of this paper are accustomed. Communities were small and community decision making was a horizontal process which involved the participation and the consent of the community at large. Nowhere in Ontario was decision making the domain of an institutional hierarchy of full-time bureaucrats. Accordingly, if we require permanent and specialized institutions wielding absolute judicial or executive power before we recognize a justice system, if we cannot imagine justice without police, bailiffs, and prisons, we will be doomed to disappointment in our search for traditional Indian justice methods by the narrowness of our perspective. Later in this paper we shall briefly consider whether traditional Indian methods of social control might fall within modern definitions of 'law'. For the present, it is suggested only that a thoughtful search for those elements of traditional Indian social organization which may have performed the functions of a justice system should at least be uncluttered by non-Indian conceptions of authority.

#### B. *Traditional Iroquois Justice Ways*

That the Iroquois League was recognized as having its own autonomous system of dealing with criminals during the seventeenth century is reflected in the terms of the first treaty that the English and the Iroquois signed, at Fort Albany, New York, in 1664. That treaty provided for separate criminal jurisdictions of the two peoples, stipulating as follows:

That if any English, Dutch, or Indian (under the protection of the English) do any wrong, injury or violence, to any of ye said [Iroquois] Princes, or their subjects, in any sort whatsoever, if they complain to the Governor at New York or to the Officer in Chief at Albany, if the person so offending can be discovered, then that person shall suffer punishment and all due satisfaction shall be given, and the like shall be done for all other English Plantations.

That if any Indians belonging to any of the [Iroquois] Sachims aforesaid, do any wrong, injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to ye Sachims, and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaction shall be given to any of His Majesty's subjects in any Colony or other English Plantation in America.<sup>43</sup>

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<sup>42</sup> Johnston, *ibid.* at 61-62.

<sup>43</sup> As cited in P. Williams, *The Chain* (LL.M. thesis, Osgoode Hall Law School, 1982) [unpublished] at 97. See also Jennings, *supra*, note 28 at 10.

The methods the Iroquois used to discourage crime were somewhat different, however, from those of the English. During the seventeenth and eighteenth centuries, while English courts were transporting to exile 'incorrigible vagabonds', sentencing Puritans to life imprisonment, pillorying and branding them for their faith, and ordering sailors executed for begging without a permit,<sup>44</sup> the Iroquois responded to what they viewed as unacceptable conduct with relative restraint. Describing traditional Seneca society, Arthur C. Parker wrote of the general approach of the Iroquois as follows:

There were no houses of punishment, no police. The standard of behaviour was enforced by means of ostracism and by social persecution. Anxious to fit into the scheme of things, to gain the respect and to hold the regard of his fellows, the offender mended his manners before some irate warrior slew him as an enemy of the social body.<sup>45</sup>

In contrast to the sophistication and intricacy of the constitutional procedures governing their League, the Iroquois did not have a lengthy or elaborate penal code, with rigid procedures and punishments. Morgan concluded that the Iroquois lacked such a code because, in his words, "crimes and offences were so infrequent under their social system."<sup>46</sup> Whether that statement is meaningful or not, an intrusive criminal code would have run against the grain of Iroquois society, with its emphasis on individual freedom.

Ostracism and ridicule of wrongdoers, the two Iroquois sanctions identified by Parker, were likely to be particularly effective devices in a relatively small community whose members regularly met face-to-face.<sup>47</sup> In a society where leadership was based on public respect, the loss of that respect meant that an offender would not be considered for public or ceremonial office. If the offender was a *sachem*, he risked being removed from his position by the clan that had originally selected him.<sup>48</sup> Finally, an offender who was particularly persistent in committing even minor offences apparently risked banishment from the community under threat of death.<sup>49</sup>

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<sup>44</sup> P. Walker, *Punishment: An Illustrated History* (London: David & Charles, 1972) at 76-79, 105-6.

<sup>45</sup> A.C. Parker, *An Analytical History of the Seneca Indians* (Rochester: New York State Archeological Association, 1926) at 65.

<sup>46</sup> Morgan, *supra*, note 30 at 330.

<sup>47</sup> See, e.g., *ibid.* at 333; Colden, *supra*, note 36 at xvi; Copway, *supra*, note 40 at 144.

<sup>48</sup> A.C. Parker, *The Constitution of the Five Nations, or the Iroquois Book of the Great Law* (Albany: University of the State of New York, 1916) at 34-35, 106.

<sup>49</sup> Jenness, *supra*, note 35 at 138.

Although ostracism and shame served as flexible and powerful deterrents of offensive conduct in traditional Iroquois society, in the case of more serious offences clan councils would become involved in the settlement of the conflict. The clan of the offender was held responsible for the offence, while the victim's clan was entitled to negotiate compensation on the victim's behalf.<sup>50</sup> Restitution in the form of presents, often of wampum beads (which had special symbolic significance), was commonly required from the offending clan, to atone for its wrong. The amount of presents depended upon the seriousness of the offence. The payment was apparently made by means of voluntary contributions from the members of the offender's clan at large.<sup>51</sup> Thus, as one writer has pointed out, "the community assumed responsibility for reparation to the victim; [for] all in the village or clan were seen as having contributed to the offences by their own misbehaviour."<sup>52</sup>

The Iroquois clan system probably increased the community's sense of responsibility for the conduct of its members, but it also served to heighten the individual's sense of responsibility to the community — for it was the offender's peers who suffered directly for the offence and who could in turn be expected to counsel and rebuke the wrongdoer.

The significance of the payment of wampum by the offender's clan was described by Morgan (referring to the case of murder) as follows:

The present of white wampum was not in the nature of a compensation for the life of the deceased, but of a regretful confession of the crime, with a petition for forgiveness. It was a peace offering, the acceptance of which was pressed by mutual friends, and under such influences that a reconciliation was usually effected, except, perhaps, in aggravated cases of premeditated murder.<sup>53</sup>

Compensating the victim's loss, even if only symbolically, was probably also one of the system's objectives. Thus, in 1668, Father Louis Hennepin wrote of the Iroquois method of dealing with theft as follows:

Their old Men, who are wise and prudent, watch over the Publick. If one complains that some Person has robb'd him, they carefully inform themselves who it is that committed the Theft. If they can't find him out, or if he is not able to make

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<sup>50</sup> Jenness, *ibid.* at 138; J.A. Noon, *Law and Government of the Grand River Iroquois* (New York: Johnson Reprint, 1964) at 37.

<sup>51</sup> Jenness, *ibid.* at 138. Noon, *ibid.*, at 34 cites Lafitau as indicating that the clans had wampum "banks" for this purpose.

<sup>52</sup> C. Jefferson, *Conquest by Law: A Betrayal of Justice in Canada* (sponsored by the Explorations Branch, Canada Council, 1977) [unpublished] at 58.

<sup>53</sup> Morgan, *supra*, note 30 at 333.

restitution, provided they be satisfied of the truth of the Fact, they repair the Loss, by giving some Present to the injur'd Party, to his Content."<sup>54</sup>

It is said that theft was almost unknown amongst the Iroquois, even as late as 1850.<sup>55</sup> Houses were open to friends and strangers alike, who were free to share the food of their host. Wealth was not prized and what personal property existed was limited in value. Accounts vary as to the specific nature of the punishment meted out to thieves, but at the very least they were derided contemptuously for their dishonesty.<sup>56</sup>

Apart from theft, three further offences were apparently considered to be particularly serious by the Iroquois. According to Morgan, witchcraft, adultery, and murder were all liable to be dealt with by a clan council, or by a Grand Council if the offence involved more than one village. Each was visited with severe penalties. Witchcraft, which was seen as a grave threat to the community, was punishable by death<sup>57</sup> (as it was in England and the American colonies until 1790).<sup>58</sup> Among the Iroquois a witch could be killed on sight if caught in the act of sorcery. Otherwise, a council was called, and the witch and his or her accuser appeared before it. Confession of guilt, if combined with a promise of reform, could lead to dismissal of the charge. On the other hand, if no confession was forthcoming and the council's investigation sustained the charge, the witch would be condemned and delivered to executioners who had volunteered for that purpose.<sup>59</sup>

Adultery was another offence that was considered serious enough for intervention by the clans. According to Morgan, only women were ever prosecuted for this offence. A council investigated the facts, and if the case was made out the woman would be whipped publicly for her transgression.<sup>60</sup> According to David Cusick, the son of a Tuscarora chief who wrote some twenty-five years before Morgan, a woman found

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<sup>54</sup> Hennepin, *supra*, note 41 at 513. Hennepin's penchant for exaggeration and falsification (at least with respect to his own achievements) is well known. His accounts of native life, however, are probably accurate in general. See viii, xli-xlii. There was no apparent reason for him to fabricate this description concerning the Iroquois, whom he generally considered cruel "savages": see 507-12.

<sup>55</sup> Morgan, *supra*, note 30 at 333; Jenness, *supra*, note 35 at 138; W.B. Newell, *Crime and Justice among the Iroquois Nations* (Montreal: Caughnawaga Historical Society, 1965) at 68.

<sup>56</sup> Newell, *ibid.*, at 68; Morgan, *ibid.* at 333-34; Colden, *supra*, note 36 at xxxiii. D. Cusick, *Ancient History of the Six Nations* (Lockport: Niagara Co. Historical Society, 1827) at 37 reported that theft was also punished by public whipping.

<sup>57</sup> Morgan, *ibid.* at 330. See also H.R. Schoolcraft, *Notes on the Iroquois* (Millwood, N.Y.: Krause Reprint, 1975) at 87-88 (originally published 1846).

<sup>58</sup> Walker, *supra*, note 44 at 75.

<sup>59</sup> Morgan, *supra*, note 30 at 330-31.

<sup>60</sup> *Ibid.* at 331.



guilty of adultery amongst the Tuscaroras was traditionally punished by having her head shaved and being banished from her village.<sup>61</sup> Whatever the punishment meted out in a particular community, it is reported that adultery was rare among the Iroquoians.<sup>62</sup> Presumably this was in part because of the ease and frequency with which married couples separated, as well as because of the disgrace that resulted if the offenders were discovered.<sup>63</sup>

Iroquois procedures for dealing with murder are described in some detail by Morgan. His description provides insight into both the conciliatory role and the sophisticated justice procedures of the clans (which Morgan refers to as "tribes"):

The greatest of all human crimes, murder, was punished with death; but the act was open to condonation. Unless the family were appeased, the murderer, as with the ancient Greeks, was given up to their private vengeance. They could take his life whenever they found him, even after the lapse of years, without being held accountable. A present of white wampum, sent on the part of the murderer to the family of his victim, when accepted, forever obliterated and wiped out the memory of the transaction. Immediately on the commission of a murder, the affair was taken up by the tribes to which the parties belonged, and strenuous efforts were made to effect a reconciliation, lest private retaliation should lead to disastrous consequences. If the criminal belonged to one of the first four tribes, and the deceased to one of the second four, these tribes assembled in separate councils, to inquire into all the facts of the case. The question of the guilt or innocence of the accused was generally an easy matter to determine, when the consequences of guilt were open to condonation. The first council then ascertained whether the offender was willing to confess his crime, and to make atonement. If he was, the council immediately sent a belt of white wampum, in his name, to the other council, which contained a message to that effect. The latter then endeavored to pacify the family of the deceased, to quiet their excitement, and to induce them to accept the wampum in condonation. If this was not sent in due time, or the family resisted all persuasions to receive it, then their revenge was allowed to take its course. Had it chanced that both parties belonged to one of the four brother tribes, a council of this division alone would convene, to attempt an adjustment among themselves. If, however, the family continued implacable, the further interference of mutual friends was given over, leaving the question to be settled between the murderer and the kindred of his victim, according to the ancient usage. If the belt of wampum was received before the avenger had been appointed, and had left the lodge on his mission, it was usually accepted as a condonation, but if he had gone forth, the time for reparation had passed. The family then either took upon themselves jointly the obligation of taking what they deemed a just retribution, or appointed an avenger, who resolved never to rest until life had answered for life. In such cases, the murderer usually fled.<sup>64</sup>

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<sup>61</sup> Cusick, *supra*, note 56 at 37.

<sup>62</sup> Morgan, *supra*, note 30 at 331; de Lahontan, *supra*, note 36 at 240 (though de Lahontan's accounts must generally be taken with a grain of salt: see *supra*, note 36).

<sup>63</sup> de Lahontan, *ibid.*, at 235.

<sup>64</sup> Morgan, *supra*, note 30 at 331-32.

The Iroquois method of dealing with murder thus attached a heavy stigma to the offence, threatening exile, execution, or the imposition of a chastening sanction upon murderers and their kindred. Yet the system also offered a flexibility of response to the crime. Sir William Johnson, writing in the eighteenth century, reported that the Iroquois were generally averse to executing murderers,<sup>65</sup> although that decision ultimately rested with the victim's kin, who had to ensure that the satisfaction given for the offence would be sufficient to permit the victim's spirit to find rest in the next world.<sup>66</sup> In addition, according to the letters of Jesuit missionaries, leniency was generally the rule in the case of a person who had killed while drunk.<sup>67</sup>

As for the effectiveness of the Iroquoian system of clan responsibility for murder, W. Vernon Kinietz has written as follows (referring to the Hurons, who also had a system of clan responsibility for crime):

Punishment for the crime of taking of a life was visited not on the murderer, but on the tribe to which he belonged. This seemed very strange and conducive to lawlessness to the visiting Europeans, but *most of them admitted that this system engendered more restraint than did punishment by death in Europe.*<sup>68</sup>

For Kinietz, the great strength of the Iroquoian response to murder was its focus on the murderer's kin; as Kinietz suggests, would-be murderers could be expected to hesitate when faced with the prospect that not only they but their relatives as well would suffer the consequences of their act even if they themselves managed to escape. It is evidently difficult at this late date to evaluate the relative effectiveness of the Iroquois clan system as a deterrent to murder, but it cannot be denied that Iroquois society had developed a complex network of mechanisms aimed at discouraging and preventing conflicts. Conciliation efforts by clan councils, the obligation of each clan to atone for wrongs committed by its members and the corresponding responsibility of individual Iroquois to their clans for their conduct, the threat of physical punishment after investigation and deliberations by council in the case of the most serious misconduct, and the possibility of ostracism in the case of less serious wrongs: these were only the most easily recognizable features of traditional

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<sup>65</sup> Quoted in Newell, *supra*, note 55 at 60; see also W.M. Beauchamp, *The Iroquois Trail, or Footprints of the Six Nations in Customs, Traders and History* (New York: AMS, 1976) at 84 (originally published 1892).

<sup>66</sup> Newell, *ibid.* at 57-58.

<sup>67</sup> R.G. Thwaites, ed., *Jesuit Relations and Allied Documents: The Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791* (Cleveland: Burrow Brothers, 1896-1901) vol. 53 at 257. See also Hennepin, *supra*, note 41 at 513-14.

<sup>68</sup> W.V. Kinietz, *The Indians of the Western Great Lakes, 1615-1760* (Ann Arbor: University of Michigan Press, 1972) at 64-65 [emphasis added].

Iroquois society that discouraged offensive conduct. Less obvious perhaps, but also important, was what lay behind that machinery: a disdain for dishonesty and a respect for others that brought the admiration of non-Indian visitors;<sup>69</sup> the role of the elders, the most respected members of the community, in inculcating a sense of right and wrong into the young;<sup>70</sup> and ultimately, the desire of each Iroquois to gain and preserve the esteem of the community in which he or she lived.

### C. *Ojibwa-Cree Justice Ways*

Very little has been written about the ways in which conflicts were traditionally resolved among the woodland Ojibwa and Cree. Few early historical records have been uncovered that even refer to the social organization of these communities, scattered throughout the interior of northern Ontario during an era when European traders in the north tended not to range far from their trading posts.<sup>71</sup> As well, cultural prejudices may have meant that the functioning of Cree and Ojibwa communities seemed less interesting to European settlers than the more structured Iroquoian societies, about which much more has been written. Finally, the flexibility of Cree-Ojibwa community life may have meant that such informal methods of social control as may have existed amongst the Cree and Ojibwa were not fully appreciated by non-Indian observers.

A. Irving Hallowell, an anthropologist who did field work in the Lake Winnipeg area during the 1930s amongst a band of Saulteaux Ojibwa, wrote of the Saulteaux as follows:

Prior to this time [1875] there were no chiefs in the modern sense, nor any formal band or tribal organization. Of institutionalized penal sanctions there were none, nor were there any juridical procedures provided in the aboriginal culture. No one, in short, was responsible for punishing crime or settling disputes.<sup>72</sup>

In a similar vein is the conclusion of Reverend Frederick Baraga, a Catholic missionary (and graduate of a European law school) who lived for fifteen years in an Ojibwa community on the southern shores of Lake Superior. Reverend Baraga wrote in 1847 that "there are no fixed punishments in this tribe, prescribed by some law or sanctioned

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<sup>69</sup> See W. Johnson, quoted in Newell, *supra*, note 55 at 68; LeJeune in Thwaites, *supra*, note 67, vol 10 at 215; Morgan, *supra*, note 30 at 335-36.

<sup>70</sup> Hennepin, *supra*, note 41 at 513; Morgan, *ibid.* at 119-21, 184-87.

<sup>71</sup> E.S. Rogers, "History of Ethnological Research in the Subarctic Shield of the Mackenzie Valley" in Sturtevant, *supra*, note 27, vol. 6, 19 at 29; Bishop, *supra*, note 34 at 158.

<sup>72</sup> A.I. Hallowell, *Culture and Experience* (Philadelphia: University of Pennsylvania Press, 1955) at 120.

by usage," for any particular crime.<sup>73</sup> Baraga also emphasized that Ojibwa chiefs did not possess 'executive power' by which they could enforce obedience to their advice.<sup>74</sup>

Both Baraga and Hallowell lived amongst bands that had already lived for a long time in the shadow of non-Indian civilization (the Indians with whom Baraga lived greeted each other regularly with "bonjour").<sup>75</sup> Still, it would not be surprising to learn that no Ojibwa or Cree communities ever did have "institutional penal sanctions" or "juridical procedures." Traditional communities were small — it will be recalled that communities larger than hunting groups do not seem to have remained together during the year for more than several weeks or months at a time. Ojibwa and Cree social structures were therefore necessarily informal.

That is not to say, however, that Cree-Ojibwa society did not have effective means of deterring offensive conduct. The fact that Cree and Ojibwa communities survived at all suggests that ways were developed to discourage conflicts. Baraga and Hallowell themselves confirmed this. Thus, Baraga noted that the chiefs and wise men in the band he knew inveighed against wrongdoings, such as stealing from traps.<sup>76</sup> He reported that in the case of murder, although the victim's kin were entitled to avenge the death at any time, negotiations were often initiated by concerned persons in hopes of persuading the victim's family to accept presents in lieu of retaliation. Further, Baraga added, in cases of unintentional killing, the victim's kin would always accept presents rather than avenge the death.<sup>77</sup>

While Baraga wrote of instruction by elders, negotiations to reconcile offenders with the victims of their crime, and acceptance of presents in atonement for harm, Hallowell for his part emphasized that fear of supernatural retribution in the form of disease or misfortune as well as fear of retaliation by sorcery served to deter wrongdoing amongst the *Saulteaux*.<sup>78</sup> Further, the *Saulteaux* believed that people who were ill because of past wrongdoing could only be healed after publicly confessing their transgression. The result, according to Hallowell, was both shame for the offender and reinforcement of the sanction by educating the

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<sup>73</sup> Reverend F. Baraga, *Chippewa Indians: As Recorded by Rev. F. Baraga in 1847* (New York: Studia Slovenica, 1976) at 33. Baraga was not free from the prejudices of his time, describing the Indian mind as "uninteresting" and "not capable of much refinement" (at 67); and see 34: "the magnificent Milky Way they call by the insignificant name of the way of the departed spirits."

<sup>74</sup> *Ibid.* at 22.

<sup>75</sup> *Ibid.* at 55.

<sup>76</sup> *Ibid.* at 25.

<sup>77</sup> *Ibid.* at 24.

<sup>78</sup> Hallowell, *supra*, note 72 at 120-21, 268-69.

community on the effects of wrongful conduct.<sup>79</sup> What was the apparent effect of these sanctions? Hallowell observed as follows:

These people have never engaged in war with the whites or with other Indian tribes. There are no official records of murder; suicide is unknown; and theft is extremely rare. Open expressions of anger or quarrels ending in physical assault seldom occur. A spirit of mutual helpfulness is manifest in the sharing of economic goods and there is every evidence of cooperation in all sorts of economically productive tasks. No one, in fact, is much better off than his neighbor. Dependence upon hunting, fishing, trapping for a living is precarious at best and it is impossible to accumulate food for the inevitable rainy day. If I have more than I need I share it with you today because I know that you, in turn, will share your surplus with me tomorrow.<sup>80</sup>

Others who have written about traditional woodland Cree or Ojibwa society have described the same mechanisms of maintaining community harmony as Hallowell and Baraga: the teaching of wisdom by elders and leading members of the community both by example and by their discourse at feasts and ceremonies;<sup>81</sup> mediation by leaders and elders in an effort to resolve disputes;<sup>82</sup> the public or private warning of offenders by leaders or *shamans* that their conduct must not be repeated;<sup>83</sup> the fear of sorcery or other supernatural retribution for wrongdoing;<sup>84</sup> and the fear of public disgrace occasioned by unworthy conduct.<sup>85</sup>

The nature of traditional Cree and Ojibwa societies made severe, codified punishments unnecessary and impractical. Taking a hunter's life, or even seriously restricting his freedom, would usually deprive his family and force the community to take over his responsibility of protecting and feeding them. As a result, individual self-discipline was expected, and in general Ojibwa and Cree communities seemed to have considered the remedying of wrongs that did not directly endanger the community as a whole to be a private affair. Theft, adultery, and hunting in another's territory (at least after European contact) were all wrongs for which

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<sup>79</sup> *Ibid.* at 272-74.

<sup>80</sup> *Ibid.* at 278.

<sup>81</sup> Johnston, *supra*, note 37 at 69-70; Jefferson, *supra*, note 52 at 48-49; Copway, *supra*, note 40 at 141.

<sup>82</sup> Danziger, *supra*, note 31 at 23; Rogers, *supra*, note 35 at 7; J.G.E. Smith, *Leadership Among the Southwestern Ojibwa* (Ottawa: National Museum of Canada, 1973) at 17; Johnston, *ibid.*, at 63-64.

<sup>83</sup> See L. Bird, *The Aboriginal Laws and Justice System of the Cree Indians of the Bay Area (Winisk, Ontario, 1984)* [unpublished] at 1-2; H.E. Driver, *Indians of North America*, 2d ed. (Chicago: University of Chicago Press, 1969) at 291; Copway, *supra*, note 40 at 143.

<sup>84</sup> E.G. Higgins, *Whitefish Lake Ojibway Memories* (Cobalt, Ontario: Highway Book Shop, 1982) at 79; Smith, *supra*, note 82 at 13.

<sup>85</sup> Jenness, *supra*, note 35 at 125; Copway, *supra*, note 40 at 144.

the community might not interfere at all, except by ridicule or, perhaps, by the leaders' public condemnation of the offender.<sup>86</sup>

Only in the case of the most serious offences, such as murder if it threatened a dangerous feud, or evil sorcery, or (possibly) repeated theft, would the community as a whole directly intervene. Intentional killing, as we have seen, could lead to active negotiations by members of the community with the victim's kin in hopes of placating the latter and preventing a bloody feud.<sup>87</sup> (On the other hand, if no feud was likely, for example, if the victim had no kin, it seems that the community would not generally involve itself.)<sup>88</sup> Retaliation by the victim's kin was also liable to be prevented by the community where the killing had evidently been provoked. In such cases, according to Ka-Ge-Ga-Gah-Bowh, an Ojibwa chief writing in 1850, the chief would intervene to shield the killer.<sup>89</sup> Sorcery was a crime that might be punished by execution, if confirmed by the leaders and elders.<sup>90</sup> Theft, if serious or repeated, could lead to banishment from the community<sup>91</sup> or a public humiliation, for example, by forcing the thief to wear a special costume that revealed his or her transgression to all.<sup>92</sup> In each of these cases, perceiving a grave threat to continued order in the community, members of the community at large would consult together before taking action aimed at preventing further misconduct.

#### IV. CONCLUSIONS

What is important in these circumstances is that to the whole community justice appears to have been done and that there will be respect for the law.<sup>93</sup>

Even from this brief review of traditional Ontario Indian societies, it has become clear that the Ojibwa, Cree, and Iroquois relied upon a sophisticated array of mechanisms to maintain order in their societies before the arrival of Europeans. We have seen that a number of methods

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<sup>86</sup> Copway, *ibid.* at 143-44; Baraga, *supra*, note 73 at 25; Kinetz, *supra*, note 68 at 84-86; Bird, *supra*, note 83 at 2; Higgins, *supra*, note 84 at 79.

<sup>87</sup> Blood feuds were a serious threat to the community and could lead to many deaths; see, e.g., W.W. Warren, *History of the Ojibwa Nation* (Minneapolis: Ross & Haines, 1970) at 138-40 (originally published 1857).

<sup>88</sup> Kinetz, *supra*, note 68 at 84-85; Jenness, *supra*, note 35 at 125.

<sup>89</sup> Copway, *supra*, note 40 at 143.

<sup>90</sup> See Jefferson, *supra*, note 52 at 47.

<sup>91</sup> Bird, *supra*, note 83 at 1.

<sup>92</sup> Copway, *supra*, note 40 at 144. Copway's language suggests that the Ojibwa used the same punishment for adultery.

<sup>93</sup> The Ontario Court of Appeal, on reducing the sentence for murder of Gabriel Fireman, a Cree Indian, from ten to two years: *R. v. Fireman* (1971), [1971] 3 O.R. 380 at 384.

were universally used by Ontario's Indian peoples to prevent anti-social behaviour. These certainly included:

1. regular teaching of community values by elders and other respected persons in the community;
2. warning and counselling of particular offenders by leaders or by councils representing the community as a whole;
3. use of ridicule or ostracism by the community at large to shame offenders and denounce particular wrongs;
4. public banishment of individuals who persisted in threatening peace in the community;
5. mediation and negotiations by elders, community members, or (in the case of the Iroquois) clan leaders, aimed at resolving particularly dangerous private disputes and reconciling offenders with the victims of the misconduct;
6. payment of compensation by offenders (or their clans) to their victims or their victims' kin, even in cases as serious as murder; and
7. in the case of wrongs that posed a grave threat to the community (such as sorcery, murder, and, perhaps, theft or adultery), physical coercion or execution of the offender, either directly by the community (after investigation and deliberation by a council) or by the victim of the wrong, who was recognized by the community as having a right to take such action.

When one reviews the specific mechanisms by which these methods of social control traditionally functioned, one notices differences, of course, between the Iroquois and the Cree-Ojibwa traditions. The Iroquois clan system, for example, was a sophisticated and unique method of deterring individuals from misconduct while facilitating reconciliation between the families of the victim and the offender. Cree and Ojibwa communities seem to have relied to a greater extent than the Iroquois on the threat of supernatural sanctions or retaliation by sorcery.

Nevertheless, as outlined above, the chief methods of social control adopted by Ontario Indian peoples were similar. So, too, it is suggested, were the underlying values that inspired those methods: values that emphasized first, restraint by the community in the application of force to prevent wrongdoing; second, the avoidance of numerous prescribed penalties for particular offences in favour of a more flexible response to an offender's misconduct; and third, reliance on the local community (where possible) and not on some higher or specialized body to determine an appropriate response to the misconduct of one of its members.

It might be asked whether the traditional mechanisms of social control described in this paper involved the application of 'law'. The question is a difficult one to answer, both because of our limited understanding

of traditional Indian society, and because of our modern cultural biases as to what law must look like. On the first point, it is instructive to consider the experience of Hoebel and Llewellyn, the first a pre-eminent anthropologist who spent much of his life studying Indians, the second a distinguished teacher of law. In their preface to *The Cheyenne Way*, a book recognized as a landmark study of the law ways of the Cheyenne Indians, Hoebel and Llewellyn wrote that “three years of puzzlement went into the analysis of the material before order emerged.”<sup>94</sup> No such detailed investigation has yet been done of traditional native methods of dispute resolution in Ontario.

On the second point, we have seen that in traditional Ontario Indian societies, there was no strict separation of formal from informal methods of dealing with wrongful behaviour. While eminent scholars such as Hoebel and Llewellyn have insisted that the term ‘law’ should not be limited to the contents of paper rules, court decisions, and statutes,<sup>95</sup> the task of defining what constitutes law in a society that did not have such formal institutions is a particularly difficult one. An institution-oriented approach led Hallowell and Baraga to conclude that the communities they knew lacked laws, although both described mechanisms of social control. On the other hand, a more flexible attitude adopted by the Jesuit missionary LeJeune led him to conclude in 1636, as would Morgan two centuries later, that the Iroquoian community he lived with were “not without laws.”<sup>96</sup>

One might examine traditional Indian justice ways in Ontario in light of Hoebel’s definition of law, a definition which is frequently referred to by modern scholars studying traditional societies. According to Hoebel, “A social norm is legal if its neglect or infraction is regularly met in threat or in fact, by the application of physical force by an individual or a group possessing the socially recognized privilege of so acting.”<sup>97</sup> Hoebel’s definition is a functional one, which seeks to distinguish legal norms from purely moral rules and everyday social pressures. Flexible in application, his definition is also probably not very far from the working conception of law used in practice by most Canadian lawyers. Some recent writers have preferred to modify Hoebel’s definition in the context of traditional societies to include as legal norms those that were sanctioned

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<sup>94</sup> Llewellyn & Hoebel, *supra*, note 1 at ix.

<sup>95</sup> *Ibid.* at 60.

<sup>96</sup> Thwaites, *supra*, note 67, vol. 10 at 215.

<sup>97</sup> E.A. Hoebel, *The Law of Primitive Man* (Cambridge, Mass.: Harvard University Press, 1954) at 28.



traditionally by ostracism, shame, or by “socially accepted supernatural authority.”<sup>98</sup> These broader definitions have the merit of recognizing the particular importance of non-physical sanctions in traditional Indian societies, although it may be argued that they also risk widening the definition of law to a point where it becomes difficult to distinguish a ‘legal’ sanction from any other social sanction. The relative merits of these definitions raise interesting philosophical questions which will not be resolved here. It is suggested that if one applies any of the definitions cited to traditional Indian societies in Ontario, one will find that they had rules, if only concerning the most grave misconduct, that could be considered law. In Ontario, however, the question of whether particular traditional Indian sanctions should be categorized as ‘laws’ would seem to be of theoretical significance only. A more important question, to this writer, is whether those traditional mechanisms of social control performed the same functions as our modern criminal justice system.

According to the report of the Law Reform Commission of Canada on criminal law, criminal law operates at three different stages: “At the law making stage it denounces and prohibits certain actions. At the trial stage it condemns in solemn ritual those who commit them. And at the punishment stage it penalizes the offenders.”<sup>99</sup> Our criminal justice system, then, is expected to denounce and prohibit certain kinds of wrongful conduct and to condemn and penalize offenders who commit them. Related to these functions, Canadians expect their criminal justice system to perform some or all of the following roles: to deter the public from committing offences (general deterrence), to deter individual offenders from repeating their misconduct (specific deterrence), to protect the public from serious offenders, and, where possible, to rehabilitate those offenders.

If one considers Ontario’s traditional Indian societies from this functional perspective, it will be seen that the array of traditional mechanisms of social control enumerated in this paper collectively served every one of the functions assigned to our modern criminal justice system. Specific and general deterrence, public condemnation and punishment of offenders, mechanisms designed to reform offenders and restore harmony in the community — these may not be traditional Indian terms, but none would have been a new concept to Ontario Indian communities before the arrival of Europeans. In addition, although it is obviously beyond the scope of this paper to comment upon whether the justice mechanisms of traditional Indian societies in Ontario were more effective in achieving

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<sup>98</sup> See, e.g., D. Kane, Canada, Ministry of the Attorney General, *Customary Law: A Preliminary Assessment of the Arguments for Recognition and an Identification of the Possible Ways of Defining the Term* (Ottawa, 1984) at 22-23.

<sup>99</sup> *Supra*, note 22 at 27.

their ends than the justice machinery prevalent in Europe at the same time, we have seen that several commentators have remarked upon the general harmony that prevailed within the traditional Indian communities which they knew.<sup>100</sup>

It is also true that many of the general principles that guided the functioning of justice within Ontario's traditional Indian societies are principles currently endorsed by the Canadian criminal justice system. Restraint in the use of coercive punishment except when absolutely necessary;<sup>101</sup> involvement of the community and particularly lay persons in decisions affecting offenders rather than leaving such decisions solely to police and the courts;<sup>102</sup> greater local management of justice programs (for example, in the administration of community service orders);<sup>103</sup> efforts designed to reconcile offenders with their victims or to provide compensation to victims;<sup>104</sup> and the use of informal methods aimed at 'diverting' offenders away from undue exposure to the formal criminal justice system<sup>105</sup> — all of these ideas had their counterparts in Ontario Indian traditions.

It would seem then that native justice traditions in Ontario have much to offer native (and perhaps non-native) communities that, consistent with the recommendations of government bodies and non-government

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<sup>100</sup> Apart from the conclusion of Morgan and Hallowell, quoted earlier, see, e.g., the Jesuits' references to the Hurons and Jemison's comments on the Iroquois cited in Newell, *supra*, note 55 at 24-27; and see Le Jeune's description of Huron society in Thwaites, *supra*, note 67, vol. 10 at 215. Others, of course, such as Baraga and Champlain, have had a different view of the adequacy of the traditional mechanisms. Baraga, *supra*, note 73 at 27, for example, thought that "nothing but Christianity can civilize the Indian, can make him become a moral, sober, industrious, good, happy man." For Champlain's view, see Kinietz, *supra*, note 68 at 63.

<sup>101</sup> See, e.g., *supra*, note 22 at 17-22; see also Law Reform Commission of Canada, *Diversions* (Working Paper No. 7) (Ottawa: Information Canada, 1975) at 3-15.

<sup>102</sup> *Diversions*, *ibid.* at 5-6, 22-25; Canada, Solicitor General, *Native People and Justice: Reports on the National Conference and Federal-Provincial Conference on Native Peoples and the Criminal Justice System* (Ottawa: Information Canada, 1975) at 38. And see Canada, Department of Justice; Saskatchewan, Department of Justice; Federation of Saskatchewan Indian Nations, *Reflecting Indian Concerns and Values in the Justice System* (Ottawa: Department of Justice, 1985) at 38-44.

<sup>103</sup> Canada, Department of Justice, *ibid.* at 38-44. On the Ontario experience with local Community Service Order programs, see M.L. Polonoski, *The Community Service Order Programme in Ontario* (Toronto: Ministry of Correctional Services, 1981).

<sup>104</sup> Formal victim-offender reconciliation programs now operate in Ontario in Kitchener and Sudbury, for example, under the *aegis* either of the Ministry of Correctional Services or the Ministry of Community and Social Services.

<sup>105</sup> *Diversions*, *supra*, note 101; Canada, Solicitor General, *supra*, note 101 at 38, 48-50. For further information on Canadian diversion policy, see Canada, Department of Justice, "Federal Guidelines Paper on Post Arrest-Charge-Pre-Trial Diversion" (Ottawa, 1981) [unpublished]; National Steering Committee of Diversion Practitioners, "A Response to the Current Draft of a Potential Discussion Paper on Diversion Policy" (1979) [unpublished]; E.K. Glinfort, "Formal Criminal Justice Diversion" (1974) [unpublished].

groups alike,<sup>106</sup> choose to exercise greater local control over the justice process as it affects their communities.

The writer does not suggest that it would be appropriate, or desirable from the point of view of native communities, to attempt today to resurrect *en masse* specific traditional procedures for dealing with particular kinds of anti-social conduct. Many of the specific traditional procedures and offences, rooted in the society and time that gave rise to them, would prove meaningless or unacceptable to a modern native community. Nor would reliance on native justice traditions offer a simple remedy for all of the problems that natives currently encounter in the criminal justice system. The over-incarceration of natives in Ontario is a complex problem with cultural, social, and economic roots, and determined, multi-faceted efforts will be required to resolve the problem. Finally, those communities that do seek to exercise greater local control of the justice process in a way that emphasizes traditional ways will not be without obstacles. Depending upon the community, these might include diminished respect for leaders' authority and for elders' teachings, the demoralizing effects of a new 'tradition' of permitting non-native institutions to deal with local problems, and lack of support for greater native management from members of the existing justice system.

Nevertheless, there exists in Ontario a native tradition of dealing with crime, one which is in harmony in many respects with current criminal justice policy. At the same time, the number of natives imprisoned in Ontario for minor, non-*Criminal Code* offences remains unacceptable, and seems inconsistent with the current, stated criminal justice policy of restraint and use of community-based alternatives to incarceration. Permitting and encouraging native communities to take greater responsibility for dealing with crime, in ways that those communities find compatible with their living values and heritage, is merely a natural corollary of current justice policy. Such an approach offers the hope of rebuilding a sense of community responsibility, the promise of greater sensitivity to the community's justice needs, and a feeling of greater community control over at least one important aspect of community life. Lastly, by making members of the native communities more conscious that justice is not something that was given to them by Europeans, it offers hope of greater respect for traditional values and for law.

Examples of the sorts of justice programs that might achieve the goals described are not difficult to imagine. Native community involvement in sentencing decisions, in the shaping and supervising of community

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<sup>106</sup> See, e.g., Canada, Solicitor General, *ibid.* at 38 (statement of general philosophy approved by the provincial and federal ministers at the National Conference on Native Peoples and the Criminal Justice System, 1975).

service orders, probation, and parole terms, and in the development and administration of diversion programs for first offenders — these are only the most obvious areas where native justice traditions and current justice procedures seem to intersect. No attempt will be made here to set out a detailed blueprint of specific programs that might be developed in Ontario, for to do so would be to ignore the diversity of Ontario Indian communities and to overlook the fact that any meaningful initiative will have to be embraced and developed by the communities themselves. However, two current native initiatives provide examples of the sorts of projects that are possible.

Facing severe problems with juvenile delinquency and violent crime on their reserve, in 1975 the Roseau River First Nation in Manitoba consulted a local probation officer and decided to set up a 'tribal justice committee' in response to the problem. Since then, the Committee, which consists of several elected band officers and other respected reserve members, has operated a pre-charge diversion program that deals with native youths referred to it by local police, probation services, and community members. All offenders whose cases the Committee accepts are given the choice of appearing before the Committee or being dealt with by the outside justice system. The Committee emphasizes traditional values in dealing with offenders. The actions that it might take in a particular case include requiring that the offender apologize, give restitution or reparation to the victim of the offence, perform community service tasks supervised by a member of the Committee, or work with an appropriate local service agency. The Committee also provides pre-sentence recommendations and post-sentence supervision in the case of reserve members whose cases are heard by the regular court system. Finally, the Committee acts as a general vehicle through which solutions are sought to local justice problems. It has been instrumental in obtaining the appointment of a resident native probation worker, in influencing Legal Aid to provide regular service to the reserve, and in persuading the Attorney General of Manitoba to provide sittings of the local Provincial Court on the reserve.<sup>107</sup> Although statistics are not available to demonstrate that the Committee's work has reduced crime or delinquency rates at Roseau River, the views alike of Chief Carl Roberts and current members of the Committee, His Honour Judge Robert Kopstein, the local Provincial Court Judge who commenced sittings at the reserve, and of Milton Kotyk, the probation officer most closely involved with the reserve during the tenure of the Committee, are that the Committee's work has had a positive

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<sup>107</sup> M. Kotyk, Presentation (Manitoba Probation Officers Conference, Winnipeg, November 1975) [unpublished].

effect on the level of crime and delinquency in the community, has improved morale on the reserve, and has significantly increased local participation in the justice process.<sup>108</sup>

A completely independent, but in some ways strikingly similar, initiative has been developed by the Beausoleil Ojibwa community at Christian Island, near Midland, Ontario. During the early 1970s the Chief of the band, together with a local probation and parole officer, consulted with then Senior Family Court Judge William Golden about two pressing justice concerns on the reserve. First, there had recently been a dramatic increase in juvenile delinquency, almost exclusively directed at local property owned by non-natives; second, the probation officer, stationed on the mainland, was experiencing problems communicating with the juvenile offenders from the island who were in his charge. In response to these problems, the band decided to create a 'lay assessors group' consisting of twelve adults chosen from the community by the Band Council. Henceforward, during court sittings involving native juveniles who were alleged to have committed some delinquency on the reserve, two members of the group who were unrelated to the juvenile would preside over juvenile cases with the judge. It would be the task of the two lay assessors to determine an appropriate sentence in each case where the judge made a finding of delinquency.

Based on their knowledge both of the juvenile and of the community's needs, the lay assessors at Christian Island have generally assigned what in Judge Golden's view are "high profile" dispositions, including work in the community, payment of restitution to victims, and exclusion of the offender from social activities on the island.<sup>109</sup> Although the judge makes the formal announcement of each disposition in court and is legally required to ensure that each disposition is in accord with the law, he does not participate in the lay assessors' discussions and has never altered a disposition determined by the assessors. Thus, it is clear to all involved in the court process that members of the community in fact make each sentencing decision. Other important elements of the program at Christian Island included the establishment of special Family Court sittings on the island itself (where hearings are conducted in the presence of interested community members as well as the juvenile's parents), and, as at Roseau River, the hiring of a resident native probation worker to supervise juvenile offenders.

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<sup>108</sup> Information obtained by personal communication.

<sup>109</sup> Ontario, Attorney General, Research Services, *An Evaluation of the Lay Assessors Program on Christian Island* (Toronto, 1985) [unpublished] at 24.

The results of the Christian Island program? One result, according to Rodney Monague, the Chief of the band, has been increased community respect for the band council and leaders. Further, in the view of Judge Golden, the lay assessors' work has served as a catalyst in bringing the community together to deal with the problem of delinquency.<sup>110</sup> Finally, although key persons involved in the Christian Island program (including Chief Monague and Judge Golden) have recognized that other factors may have affected the amount of delinquency on the island, a recent evaluation of the program by the Ministry of the Attorney-General notes as follows:

Both natives and officials in the criminal justice system . . . felt that the Lay Assessors Program was a major contributing factor in the reduction in juvenile crime on the island in the late 1970's. They also felt that this program continued to serve as a deterrent to would-be offenders.<sup>111</sup>

It is beyond the scope of this paper to describe in a more detailed way, or to evaluate independently, the native initiatives at Roseau River and Christian Island. The similarities of the projects, however, provoke reflection. Both have achieved their results through the participation of lay community members, not through the involvement of a large external bureaucracy. Both, nevertheless, operate with at least the passive support of outside justice personnel. Both continue native traditions of problem solving in areas where Canadian criminal procedures permit flexibility, and in areas where current procedures (in sentencing, for example) seem to yield particularly unfortunate results in regard to natives. Finally, the comments of those involved in the two programs suggest that both have served not only in the effort to reduce crime in the community, but also in some measure to improve community morale and increase respect for local leadership.

None of the similarities between the programs at Roseau River and Christian Island are the result of prior co-ordination between the projects' organizers. All, it is suggested, reflect the application of an innovative, but common-sense approach to the realities of life in a modern native community. As such, the common features of the two projects could provide useful guiding principles for the development of future native justice initiatives. In the end, however, it should be kept in mind that the projects at Roseau River and Christian Island are merely two examples of the types of programs that can be developed by a native community. The point is not the initiatives at Roseau River or Christian Island. The point is that native communities can take more control over the man-

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<sup>110</sup> *Ibid.* at 25.

<sup>111</sup> *Ibid.* at 2.

management of crime, and can do so to their own satisfaction, in a way that is consistent with native traditions and present justice policy. To all who are interested in redressing the current situation of natives in Ontario's justice system, the potential benefits of such an approach merit serious consideration.

Table 1  
Provincial Admissions Summary<sup>1</sup>

Total Provincial Admits					
Offence	Native <sup>2</sup>	Total	Percent Native	Native Male (%)	Native Female (%)
Liquor Control Act	1,658	5,440	30.5	27.8	58.8
"Other Federal Statutes"	122	1,173	10.4	11.0	6.8
Theft/B&E/Property Damage/Arson	1,143	15,127	7.5	7.2	11.7
Obstr. Justice, Br. Ct. Order, Misc. Public Order, Parole Viol.	642	8,433	7.6	7.0	15.3
Homicide & Related Serious Violent/ Violent Sexual/ Assault & Related	634	8,709	7.3	6.8	15.2
ALL OFFENCES (including above)	5,319	64,466	8.3	7.7	14.8

<sup>1</sup> Ontario, Ministry of Correctional Services, *Admissions to the Institutions: 1985-86* (Toronto: Correctional Services, 1986).

<sup>2</sup> Self-described (Status or non-status or Metis).

