Not Just the Peace Pipe but also the Lance: Exploring Different Possibilities for Indigenous Control over Criminal Justice

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INTRODUCTION

This article will begin by exploring whether contrasts between restorative and punitive models of criminal justice inform an ideological struggle between Western and Indigenous approaches of criminal justice as Indigenous communities strive for greater control over criminal justice. There is a perception of such an ideological struggle because many feel that Indigenous methods of justice that resemble restorative justice can provide effective solutions to the problem of Indigenous overincarceration. The honest answer is partly yes and partly no. An unqualified yes has some merit but can also be misleading. It neglects important considerations such as Western recognitions of restorative justice, the degree of cooperation between Western criminal justice systems and Indigenous communities, that tradition may not always remain relevant in contemporary Indigenous communities, persuasive critiques against restorative justice, and significant punitive inclinations among Indigenous peoples both past and present.

This analysis is insightful, but it also offers possibilities for Indigenous control over justice. Indigenous communities may want to revive traditional modes of corporal punishment as forceful alternatives to incarceration, or integrate them into restorative resolutions. Restorative justice processes can also be structured to deal with problems of power imbalance. Both possibilities can be explored in a meaningful effort to
address community safety so that Indigenous justice does not necessarily involve a lopsided emphasis on offender healing. This can also add a new dimension to dialogues between Indigenous communities and Western states. Western states have accommodated Indigenous approaches for lesser offences but have been reluctant when it comes to more serious offences. An untried but interesting possibility is to pitch corporal sanctions as deterrent alternatives to negotiate for greater control over criminal justice, serious offences included. It can be argued that such sanctions are not necessarily more inhumane than incarceration, provide deterrence and retribution, and are more culturally meaningful. Indigenous communities can also include processes designed to address power imbalances in their proposals. The idea is to deflate Western concerns that Indigenous justice means softer justice and therefore unable to address community safety.

The ultimate goal is Indigenous self-determination over criminal justice. Decisions about criminal justice will have to include the community at large, not just the leadership. This means extensive consultations with the community membership at large. They must include parties that may be vulnerable to certain crimes, like women vis-à-vis sexual or domestic assault. It would also have to include both traditionalists and “progressives” since this can become a significant source of community division and necessitate negotiations and compromise. This analysis will focus on Canada but will be supplemented by material from other jurisdictions. The article now begins by describing the important background problem of Indigenous overincarceration.

**INDIGENOUS OVERINCARCERATION**

Carol LaPrairie provides these Canadian statistics of Indigenous overincarceration:

There is virtually no over-representation of Aboriginal people in provincial correctional institutions in Prince Edward Island and Quebec, but over-representation in Nova Scotia and New Brunswick is 1/5 to two times higher than would be expected given the size of their respective provincial Aboriginal populations. In B.C., this disproportionality is 5 times, in Alberta 9 times, in Saskatchewan 10 times, in Ontario 9 times, and, in Manitoba, it is 7 times higher than expected. . . . An examination of change over time reveals that Aboriginal over-representation within the Federal prison population has grown from 11% in 1991/92 to 17% in 1998/99, and the increase has occurred primarily in the Prairie provinces.¹
Larissa Behrendt relates that Indigenous peoples comprise two percent of Australia’s population, yet comprise 28.6 percent of its prison population.\(^2\)

Incarceration is an important issue for Indigenous peoples because it is frequently asserted that deterrence through imprisonment is misguided. Criminologists frequently argue that there is no demonstrable correlation between increasing imprisonment terms and reducing crime rates.\(^3\) Justice E. D. Bayda says that prison offers little deterrence for the impoverished lacking in legitimate opportunities.\(^4\) Imprisonment often makes offenders worse by increasing their propensity for crime. David Cayley argues that placing a convict among other convicts obliges the convict to harden himself and become violent in order to survive and convince the other convicts to leave him alone. Prisons have countercultures where society’s rules are turned upside down. Defiance, disrespect for authority, and violence become the norms. The painful effects of being separated from society wear off once enough time is served. Convicts become acclimated and habituated into prison life and therefore unable to adapt to life outside.\(^5\) Bayda also states that jails are some of the best recruiting grounds for street gangs. Exposing a convict to more experienced criminals is more likely to worsen that convict’s propensity for crime.\(^6\)

Judge Heino Lilles relates that Kwanlin Dun people in the Yukon felt that jail carried no stigma, took away opportunities to heal people, and only hardened those who were confined.\(^7\) Rupert Ross asserts that jail not only hardened Indigenous inmates, but the deprivation of freedom also took away their capacity to develop “responsible decision making.”\(^8\) Imprisonment isolates offenders from society, but temporarily and usually worse for the experience. The release of incarcerated offenders can also imperil Indigenous communities, since the offenders come out more prone to crime, and may even act vengefully towards their accusers or anyone else they harbor a grudge toward.\(^9\)

Herein we see a key impetus behind the perceived ideological struggle. Indigenous concepts of criminal justice that resemble restorative justice are frequently touted as a solution to the problem of Indigenous overincarceration, that they can provide methods of addressing Indigenous criminality that are more constructive than incarceration. It will be necessary to compare and contrast Western, Indigenous, and restorative theories of criminal justice in order to understand this perceived ideological struggle and why Indigenous concepts of criminal justice are put forward as a solution. The discussion begins with an explanation of Western theories of criminal justice.
Western Theories of Criminal Justice

Western models of criminal justice are characterized by at least two emphases. One is reliance upon punitive sanctions such as incarceration to address crime. These include fines, probation terms, and for more serious offences or for particularly recidivist offenders, incarceration. Punishment has more than one rationale. Section 718(b) of Canada’s Criminal Code includes as a sentencing objective with the utilitarian goal of deterring “the offender and others from committing offences.” Deterrence has two dimensions. Specific deterrence means that the offender is punished to dissuade him or her from future crime. General deterrence communicates the punishment to society at large as a message that like conduct will meet with like punishment. Section 718(a) states that sentences must “denounce unlawful conduct.” Section 718.1 stresses that a “sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” These provisions reflect the Just Desserts rationale of punishment. Crime causes harm, and so pain must be inflicted upon the offender in proportion to the moral gravity of his or her crime. It is a retributive justification. Section 718(c) involves a third justification specific to imprisonment, separating of the offender from society when necessary. Society is protected by forcibly confining the offender in prison and depriving him or her of further chances to do harm.

Another emphasis of Western criminal justice systems is their use of adversarial procedures, which are confrontational in nature. The opposing parties of a case are the criminal accused, typically represented by a defence lawyer, and the state, represented by a public prosecutor. One party advances its case over the other party’s case through various tactics such as giving evidence in support of its own case, cross-examining adverse witnesses, and making legal and factual arguments to persuade the judge that its position is the correct one. Once both parties have had a fair chance to present their cases, a neutral and impartial judge (or jury where appropriate) then renders a decision based upon the evidence presented and the arguments that have been made. A brief description of some Indigenous theories of criminal justice now follows.

Indigenous Concepts of Criminal Justice

Before Indigenous concepts of criminal justice can be fully understood, it helps to understand the nature of Indigenous law. Modern states record their laws as codified statutes and reported case decisions with the
objectives of certainty and accessibility to the public. Indigenous law consists of commonly held customs transmitted through exemplary living and oral teaching from generation to generation. Sakej Henderson says that Algonquian law eschews the Western formula of prescription enforced through penalties in favor of persuasion and inculcation of shared values. He continues:

Sui generis Aboriginal orders reveal legal traditions based on shared kinship and ecological integrity. They demonstrate how Aboriginal peoples deliberately and communally resolved recurring problems. . . . Sui generis Aboriginal orders exist as comprehensive orders with deeply interrelated responsibilities, rights and obligations that are specific and precise. They are consensual, interactive, dynamic, and cumulative. They operate by their own force; they are not delegated orders derived from the British or French sovereign.

John Borrows demonstrates how Anishinabek storytelling itself provides a medium of law. He repackages traditional stories into common law case format. The story’s name is rendered as a style of cause. The story itself is then reformatted into sections such as the facts, the issues, and the decision. Some of his specific examples use the Trickster, a mythological figure of many contrasts that conveys the contrasting realities of life. He is both wise and foolish, blessed by luck and cursed by misfortune, kind and capricious. It becomes apparent that tales of the Trickster’s (mis)adventures contain moral lessons about showing restraint, foresight, and gratitude in the use of natural resources. Indigenous customary law is just as valid for constraining the exploitation of the natural world as environmental statutes and regulations.

Indigenous theories of criminal justice and law are often seen as a potential solution to the problem of overincarceration. Indigenous customary laws are adapted to modern usage to deal with criminal behavior by their own members in a more conciliatory fashion that heals the offender and anyone else affected by the crime, deals with the underlying causes of the offender’s behavior, and restores community harmony. This typically contemplates the use of community-based resolutions as an alternative to incarcerating the offender. The goal is to deal with Indigenous offenders more constructively, more in keeping with Indigenous traditions, and thereby make the use of imprisonment in large part unnecessary.

The Royal Commission on Aboriginal Peoples ascribes Indigenous overincarceration to the process of colonial subjugation of Indigenous peoples. The process of colonialism has meant enduring dislocation and poverty for Indigenous peoples. It has also suppressed and eroded the
traditional value systems of the Indigenous peoples. This removed cohesive social forces that held Indigenous societies together. These forces combine together to produce social breakdown and low self-esteem in Indigenous communities, resulting in Indigenous overrepresentation.\textsuperscript{16} The Royal Commission proposes Indigenous control over separate criminal justice systems as a solution to “the suffocating mantle of a legal system imposed through colonialism.”\textsuperscript{17} The reason is that Western justice systems place inordinate emphasis on retribution as an end unto itself, and worsen relationships through confrontational adversarial procedures. Indigenous concepts of criminal justice are more constructive for emphasizing rehabilitation, restitution to aggrieved parties, and reconciling offenders with their communities.\textsuperscript{18}

Putting these ideas into practice has occasionally produced brilliant successes. Rupert Ross relates that the Hollow Water Healing Circle Program, which emphasized healing and rehabilitation in dealing with pervasive sexual abuse in a Manitoba Indigenous community, resulted in only two of forty-three sex offenders repeating their offences after completing the program.\textsuperscript{19} The Family Group Conferencing Program in New Zealand drew upon Maori traditions to encourage meetings between offenders, victims, and their respective supporters. The goal was healing, not punishment. These meetings include public condemnations of offences but also equally public affirmations that offenders remained valued members of the community. This program was used for all young offenders, not just Maori youth. Half of all youth custody facilities closed from 1988 to 1992/93. Young offender prosecutions dropped by twenty-seven percent from 1987 to 1992.\textsuperscript{20} Contrasts between Western and Indigenous criminal justice concepts will be explained more clearly in the following section.

**Conflicts between Western and Indigenous Concepts of Criminal Justice**

Western criminal justice systems place a heavy emphasis on incarceration as a response to crime. The United States jailed more than one and a half million people by 1996, four times as many as were incarcerated in 1970.\textsuperscript{21} It also had the highest rate of incarceration among industrialized democracies at over six hundred inmates per one hundred thousand people by 1997,\textsuperscript{22} while Canada had the second or third highest at around one hundred thirty per one hundred thousand.\textsuperscript{23} David Cayley suggests that “tough on crime” policies represent attempts to score political points with the public by showing that “something has been done.”\textsuperscript{24} Western democracies have political cultures whereby legislators and executives are reluctant to accommodate noncustodial alternatives for certain ranges of offences for fear of losing political support after giving the appearance of being soft on crime. Public opinion sur-
veys during the mid-1990s indicated that approximately eighty percent of the voting public in Australia, Canada, England, the Netherlands, and the United States felt that existing sentences are too lenient. A frequent response to crimes that gain public notoriety for being prevalent and/or serious is to increase their imprisonment terms. Recent examples in Canada include street racing, auto theft, as well as possessing or trafficking in crystal methamphetamine.

This may raise political concerns regarding section 718.2(e) of the Criminal Code, which calls for restraint in the use of imprisonment with particular reference to the circumstances of Aboriginal offenders. Rachel Dioso and Anthony Doob performed a study to gauge Canadian public opinion on section 718.2(e). They admit that the sample of survey participants is not necessarily representative of Canada as a whole. Participants who viewed the present justice system as too lenient on offenders also tended to view section 718.2(e) negatively. One has to wonder how the Canadian public at large views section 718.2(e) given that surveys indicate that approximately eighty percent of the Canadian public feels that sanctions are too lenient. Accommodating Indigenous control over justice, with the implication of applying community-based alternatives to broader ranges of offences, could spark even considerable controversy with the Canadian voting public.

This political climate can also inspire opposition by judges when they feel they must emphasize deterrence and retribution at the direction of the legislators. Consider R. v. Naqitarvik, where an Inumarit man sexually assaulted his fourteen-year-old cousin. They had consensual sexual relations beforehand, but she resisted on the occasion that led to his being charged. Inumarit Elders wanted to use a community-based sentence that included counseling and rehabilitation. Judge Bourrassa of the Northwest Territories Territorial Court adopted their suggestions but also added ninety days in jail served on weekends, two years probation, and one hundred hours of community service. The Alberta Court of Appeal set aside the sentence as "wholly inadequate." The Court emphasized R. v. Sandercock, which set the starting point for sexual assault to three years imprisonment. The accused was sentenced to eighteen months to reflect his apology to the victim, his genuine remorse, and his positive response to counseling. Michael Jackson states:

It is important to ask why the Court of Appeal in Naqitarvik felt that they could not respect the wishes of the community, as expressed through the Inumarit, to have the accused dealt with by the community and not subjected to punishment by imprisonment far removed from the community. The Court does not clearly articulate this but it may be inferred from their reference to the Sandercock case that a substantial
term of imprisonment is deemed to be necessary in order to further general deterrence and to reflect appropriately the denunciation of society for sexual assault. In making judgments about deterrence and denunciation, however, the Court is seeking to reflect Alberta or Canadian society in general. Clearly it was not focusing on native communities.29

Appellate intervention remains a potential problem, as there continue to be successful appeals against judges’ acceptance of sentencing circle recommendations for not giving enough emphasis to deterrence (e.g. incarceration).30 An additional dimension to these contrasts is a tendency to equate Indigenous criminal justice theories with restorative justice. A full comparison between them forms the next part of the discussion.

**RESTORATIVE JUSTICE**

**Restorative Justice Defined**

Unlike the adversarial system where judges impose resolutions and encourage confrontational tactics, restorative justice envisions a process where persons with a stake in a conflict craft the resolution themselves by agreement. “Persons with a stake” is not necessarily restricted to the parties who would be involved were the matter to proceed in adversarial court. It can include a wider circle of persons who have been affected, even indirectly, by the conflict. Ideally everyone involved reaches a consensus on resolving the conflict. This also means an enlarged role for the victim. In the adversarial system, the prosecutor speaks to the harm done to the victim before the court. In a restorative process, the victim participates directly in the process. Ideally, a restorative resolution will have the victim’s agreement and will satisfactorily address the victim’s interests.

Restorative justice frequently envisions noncustodial alternatives to incarceration. The emphasis shifts from deterrence and retribution to rehabilitating and reintegrating the offender, repairing relationships between the offender and those affected by the crime, and furthering harmony in the community generally. Resolutions often include community service, victim restitution, and participating in programs to address problems such as substance abuse or anger management. Restorative justice also has a more holistic outlook. Western criminal justice systems focus on the offender’s action and how to punish it. Restorative justice emphasizes exploring the underlying reasons for an offender’s behavior, whether it is alcoholism, or a troubled childhood, or problems within the offender’s community itself. Discovering the
underlying causes of crime, and searching for ways to deal with it, will form the basis for many of the discussions that occur. Western democracies may rely heavily on incarceration and adversarial justice, but that has not stopped them from embracing restorative justice to some degree.

**Western Recognition of Restorative Justice**

Western democracies have often recognized the merits of restorative justice. An explanation of diversionary programs is now in order. The first step is an offender being approved for program participation based on criteria such as the offence being minor, the offender not having previously been through the program, and whether the offender is willing to accept responsibility for the offence. Diversionary programs often allow an accused to accept responsibility without prejudicing the right to plead not guilty at a later time. The court will then adjourn the case for a period of months or even over a year. The offender must then perform certain tasks or meet conditions with a view toward correcting the behavior. They often include attending counseling for certain types of behavior, meetings with the victim(s) under appropriate conditions in order to resolve differences, and community service. Successful completion means that the charge will be withdrawn on the next court date. If an offender does not complete the requirements, and a second chance is not given, the case is returned to the court system. The usual procedures and penalties become applicable again.

The Law Reform Commission of Canada produced a working paper in 1974 that encouraged the increased use of diversionary programs as better addressing the social roots of crime and encouraging the various participants to work together constructively instead of polarizing them through an adversarial trial. Michael Jackson notes that Canadian justice departments made increased use of pretrial diversionary measures, restitution, and community service hours shortly after the report was issued. The Standing Committee on Justice and Solicitor General, in 1988, openly doubted the deterrent effects of incarceration, as shown by high rates of recidivism, and concluded that imprisonment usually accomplished only temporary incapacitation. The Committee felt that even this incapacitation was usually unnecessary, since most offenders are not violent or dangerous. The Committee also stressed the need to explore alternatives that involved offenders accepting responsibility through rehabilitation and restitution to the victims.

Sections 718 and 718.1 of the *Criminal Code* include deterrence, denunciation, parity, and incapacitation as sentencing objectives. They, however, also include victim and community reparation, responsibility promotion, and rehabilitation, which are also objectives of restorative
Section 718.2(e) mandates a search for: “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” It calls for reasonable restraint in the use of imprisonment. The conditional sentence in Canada, where an offender serves time under house arrest with strict curfews and with appropriate probationary conditions, reflects this effort at restraint. Section 718.2(e) also mandates the search for noncustodial alternatives with particular attention to the circumstances of Aboriginal offenders. This implies a search for a broader context beyond the offence itself, which is reminiscent of restorative justice ideals.

It is interesting to observe that Indigenous peoples have been able to set up traditional justice initiatives in partnership with Western criminal justice systems. These include conferencing programs, diversionary programs, and sentencing circles. New Zealand found the merits of Maori approaches so appealing as to apply the Family Group Conferencing Program to all young offenders generally, not just Maori youth. These initiatives are created through partnership precisely because they appeal to Western recognition of restorative approaches as sometimes preferable alternatives to standard sanctions such as fines and imprisonment. These justice initiatives do not reflect ideological struggle. What they reflect is cooperation that emphasizes common ground between Indigenous practices, restorative justice principles, and the perceived needs of Western criminal justice systems concerning more effective social control.

These accommodations, however, are mostly limited to minor offences. Western recognition of the merits of restorative alternatives to incarceration is not unqualified. Section 718.2(e)’s call for restraint in the use of imprisonment is subject to a reasonableness threshold. The call for restraint in the use of imprisonment in Taking Responsibility is tempered by the need not to subject the community to “undue risk.” Western democracies still have political climates that favor deterrence and retribution and therefore inimical to expanding community-based sanctions for more serious offences. One can still see an ideological struggle in this respect. Chris Cunneen and Evelyn Zellerer caution us against assuming that existing programs indicate harmony between Indigenous peoples and the state. They may reflect top-down imposition that makes insufficient consideration of Indigenous perspectives, and therefore continued colonization and marginalization. Even this can admit to exceptions. The Community Council Project, located in Toronto, Ontario, is a highly expanded Indigenous diversionary program for which no offence is inherently ineligible. The Peacemaking Court of the Tsuu T’ina nation near Calgary, Alberta, uses a highly expanded diversionary program that excludes only sexual assault and
homicide from eligibility. Both Indigenous peoples and Western democracies may see merit in restorative justice, yet restorative justice itself is not without problems. Criticisms that have been made against restorative justice will now be considered.

**Criticisms of Restorative Justice**

Recent years have seen a number of varied criticisms directed against restorative justice. Only a few that are particularly pertinent to Indigenous justice issues will be discussed here. One criticism is that restorative justice is vulnerable to power imbalances between the participants. Restorative justice strives to create a less adversarial process and with less emphasis on formal rules. A “side effect” of this is that without rules to impose consistency and fairness, and without lawyers as advocates, a stronger party can impose its will on a weaker party. For example, some crimes, such as sexual assault and domestic violence, involve a considerable power imbalance between offender and victim. Barbara Hudson argues that there is a danger to applying restorative justice to such offences because it reinforces the power differential between offender and victim by removing the buffer of state power to prosecute as a source of victim protection. Annalise Acorn points out that domestic abuse often follows patterns of apology (by abuser) and forgiveness (by the victim) that sustain a relationship of power over the victim. Restorative justice exacerbates this by imposing standardized expectations of extending forgiveness to the offender and accepting apology. The restorative process can end up reinforcing that relationship of power whereby the abuser continues the abuse. Simply being present can be dangerous for the victim. Donna Coker notes that abusive men have sometimes attacked abused spouses after a Navajo peacemaker session.

Power structures in Indigenous communities can also produce power imbalances during restorative processes. Mary Crnkovich states:

> even relatively small settlements are segmented by such considerations as wealth, gender, family connections, inherited or acquired authority, and so on. Unless these inequalities are acknowledged and attended to, they can easily undermine the equality with which the pursuit of a common good is assumed to endow the sentencing circle.

Ross Gordon Green also cautions: “A concern with these community sentencing and mediation approaches is that local involvement should not become a forum for the application of political pressure to the
advantage of local elite and to the detriment of politically unpopular or marginalized offenders or victims.\textsuperscript{48}

Sherene Razack argues that Indigenous justice initiatives often reflect power imbalance between genders. Indigenous communities are suffused with patriarchal power structures that replicate European forms of governance. Male Indigenous leaders pursue community-based sanctions to the frequent benefit of male Indigenous offenders who commit crimes against Indigenous women.\textsuperscript{49} Power abuses against women plagued the South Vancouver Island Justice Education Project. Coast Salish elders (often from powerful families) would try to convince female victims to acquiesce in lighter sanctions by trying to lay guilt trips, threats of harm by witchcraft, and threats of sending the abuser to use physical intimidation. The problem was exacerbated by some of the Elders being themselves convicted sex offenders, which left the women wondering how seriously their safety and concerns would be addressed. The project was cancelled in 1993.\textsuperscript{50}

Another criticism is that restorative justice is softer justice. Mary Crnkovich related that Inuk accuseds in the Canadian north often saw sentencing circles as “a quick way out of jail.”\textsuperscript{51} Another example may be seen in an American case involving two Tlingit men named Guthrie and Roberts. They assaulted a pizza delivery man named Tim Whittlesley with a baseball bat. He suffered a fractured skull and was left deaf and partially blind. Under Washington law, they would each have faced three to five and a half years. Tlingit tribal officials and a Tlingit elder named Rudy James persuaded Judge Allendoerfer of the Snohomish Superior Court to release the two offenders. The conditions were banishment into a remote wilderness for a year and restitution to Whittlesley. They would appear before Judge Allendoerfer again after eighteen months to determine whether further punishment would be needed.\textsuperscript{52} This resolution instead turned into a part-time camping trip whereby the offenders continued to live in town at leisure. Judge Allendoerfer, when he found out what was going on, sentenced them to fifty-five and thirty-one months imprisonment respectively and held them liable for $35,000 restitution to the victim.\textsuperscript{53} These are not examples of onerous programs of rehabilitation promoting accountability and responsibility but abuse of restorative idealism to get off easy.

Power imbalances in favor of offenders combined with abusing restorative justice ideals to get off easy can work together to seriously compromise community safety. Lighter sanctions trivialize harm and lead to a sense that causing harm will not lead to meaningful sanctions. Potential offenders know that little risk is involved with inflicting harm, and therefore see an implicit license to commit crime. Potential victims, particularly vulnerable people such as women or children, end up in an unsafe environment.\textsuperscript{54} It is now time to explore in some detail
the relationship between restorative justice and Indigenous concepts of justice.

**Relationship Between Restorative and Indigenous Concepts of Justice**

**Similarities**

Many Indigenous societies held councils to resolve conflicts, which inspires parallels to restorative justice. These councils often involved the presentation of material gifts to the victim, or the victim’s kin, as reparation for the offence. These gifts would often be accompanied by apologies, or acknowledgments of responsibility. The acceptance of the gifts by aggrieved parties would signify the resolution of the conflict and the restoration of harmony. This practice is known to have occurred among the Cree, the Ojibway, the Iroquois, the Twanas, Clallams, the Puyallups, the Nisquallys, the Mi’kmaq in New Brunswick, and the Coast Salish in British Columbia. In some societies the offender’s clan bore collective responsibility for the infraction, while the victim’s clan was due the reparation. This was an especial deterrent against deviant behavior since the offender brought shame to the clan and became accountable to clan leaders. This was certainly true of the Iroquois, where council meetings often allocated wampum beads as compensation, which were of special symbolic significance. The Lake Babine of British Columbia used ceremonial feasts called balhats as a forum for resolving disputes. The first step was to present gifts to the offending party, as reparation with interest, along with a declaration of what the offender did wrong. The reparation was accompanied by a public affirmation of proper and expected behavior and a final recounting of the infraction after which that infraction was never to be mentioned again. These elements blended together to mark reconciliation and an end to the conflict. Contemporary adaptations of these approaches, like restorative justice, have often idealized the pursuit of community-based sanctions in alternative to incarceration.

Indigenous dispute resolution often emphasized exploring the underlying causes of misbehavior, much like restorative justice. Daniel Kwochka states: “Aboriginal traditions suggest that the acts are no more than signals of disharmonies in relationships, and it is the disharmonies that should be focused upon.” The Maori understood crime as reflecting “an imbalance in the spiritual, emotional, or physical well-being of an individual” or family. Maori dispute resolution had to address that imbalance in order for resolutions to be enduring and meaningful. Indigenous dispute resolution and restorative justice have apparent parallels, but there are also marked contrasts.
Differences between Indigenous Justice and Restorative Justice

Indigenous justice often differed markedly from restorative justice in that many Indigenous societies had harsh punitive sanctions. Turpel-Lafond and Monture-Angus describe banishment as the most severe remedy under Indigenous justice systems, since it involved “the end of social and cultural life with one’s community.”63 This was a common thread among Indigenous societies, a last resort for someone who just would not respond to previous efforts at correction.64 There were, however, plenty of others besides banishment. An Iroquois woman who committed adultery would be flogged publicly.65 The Iroquois also punished witchcraft with execution.66 Among tribes in what is now Washington state, a cuckolded man could slay the adulterer without fear of reprisal from the adulterer’s kin. Among some groups, the wife could also be killed without reprisal from the wife’s kin.67 A Sanpoils or Nespelem headman could order whipping for crimes including “murder, stealing, perjury, improper sexual relations, and abortion.”68

It could be said that these sanctions are relics of a bygone age, and that Indigenous justice as presently envisioned has been stripped of its harsher elements. There are, however, some indications that contemporary Indigenous communities may still be, given the opportunity, willing to use harsh punitive sanctions. Judge Heino Lilles has pointed out that Elders’ sentence advisory panels have occasionally recommended terms of incarceration that exceeded what the Crown prosecutor recommended.69 David Thomas, a Coast Salish man, was nabbed by several members of the Coast Salish, including Elders, and forced to participate in a ritual known as Spirit Dancing. He was confined to a long house for approximately four days. During this period he was subjected to several treatments including deprivation of food but not water, dunking underwater, whipping with cedar branches, and being lifted up several times while the others dug their fingers into his sides and bit him. His wife requested the ritual, who hoped that it would cure his alcoholism and improve their marriage. He ended up in the hospital since his preexisting ulcer was worsened.70 The themes of healing and dealing with the root causes of misbehavior are present here. The resemblance to restorative justice ends there. Members from the Coast Salish community unilaterally subjected an individual to some pretty significant physical measures against his will. This has the appearance not of consensus-based restorative justice but of an imposed corporal sanction in pursuit of a collective good. Australian judges, as another example, are willing to mitigate sentence to account for Indigenous use of payback, which can include spearing the offender’s leg or beatings with boomerangs.71 Another case involved
granting bail in a homicide case so that the offender could undergo payback, the judge recognized that it was necessary to diffuse community tensions stemming from the incident.72 There is now also an additional concern to be addressed.

**AN ADDITIONAL CONCERN:**
**TRADITION IN CONTEMPORARY TRADITIONAL SOCIETIES**

Even if Indigenous justice and restorative justice share parallels, it cannot be assumed that every member of an Indigenous community is a traditionalist in terms of justice ideology. Indigenous people of today live in a far different world than the one that existed before contact with Europeans. That different world includes the presence of technologies and economic structures that encourage a different lifestyle and the presence of different belief systems that can compete with traditional values. That significant numbers of Indigenous community members would depart from the old beliefs seems inevitable. Carol LaPrairie performed studies that indicate that within contemporary Indigenous communities there is divergence over issues such as the acceptance of traditional or contemporary values, individualism versus collectivism, and traditional spirituality versus other religions such as Christianity and new age spirituality.73 An Indigenous community, or at least the majority of its members, may not necessarily want a justice initiative or system that reflects traditional values. The system would not be in keeping with their more “contemporary values” and would therefore be illegitimate. It is then hardly fitting to characterize the situation as a dichotomous ideological conflict between traditional Indigenous values and Western criminal justice principles.

For example, Mi’kmaq traditionalists in Membertou have used traditional ceremonies and healing discourses to help young kids found acting on a suicide pact, promoting self-esteem in Mi’kmaq youth, and assisting them during crises and conflicts.74 Many Mi’kmaq in Membertou, however, are Catholic. They dismissed the ceremonies as “hocus pocus.” They did not discourage children from attending the ceremonies but did frown upon adult participation.75 Bruce Miller criticized the South Vancouver Island Justice Education Project for failing to ascertain contemporary justice ideologies among the Coast Salish community, some of whom did not consider themselves traditional.76 Not everyone in a contemporary Indigenous community will necessarily support a revival of traditional justice. Now that various theories of justice have been compared, it is now time to consider what practical value all of this has.
An in-depth comparison of various theories of justice provides certain insights. Indigenous theories of criminal justice often have more in common with Western punitive approaches to criminal justice than is often assumed and therefore also differ sharply from restorative justice theories. Western states have also recognized the merits of restorative approaches to criminal justice and applied them in practice. Restorative justice is itself vulnerable to certain problems in practice. Members of Indigenous communities may also prefer the use of Western concepts of criminal justice to traditional Indigenous justice practices. These insights are interesting in themselves. They also offer possibilities of legal reforms that can both meet the needs of contemporary Indigenous communities and suggest interesting prospects for negotiating with Western states for greater control over criminal justice. The discussion begins by considering the possible contemporary relevance of traditional corporal punishment.

**Reviving Other Traditional Sanctions**

Indigenous communities may want to consider the revival of traditional modes of corporal punishment, if they would not inflict permanent harm (i.e. mutilation) or execution, as alternatives to incarceration. It is not as outrageous as some people might think. Geoffrey Scarre argues that corporal punishment may actually be more humane precisely because it is shorter and avoids the hardening effects associated with spending time in prison. Michael Fay, an American citizen, was sentenced to public caning in Singapore in 1994 for spray painting and egging several cars and possessing stolen public property. President Bill Clinton and thirty-four American senators sent a petition for leniency to the Singaporean Embassy. Many American citizens, however, flooded American radio stations, newspapers, and the Singaporean Embassy with both letters and phone calls expressing support for the caning. A public opinion poll indicated that thirty-eight percent of Americans favored the use of corporal punishment. John Huntsman, a former ambassador to Singapore, suggested that caning was more culturally appropriate to Singapore than America as follows: “Culturally, it’s a far different equation. It is a very traditional, Confucianist society in which the family is still the most important unit . . . a society that believes in the well-being of the whole, not necessarily the individual.”

What is cruel and degrading is in the eye of the beholder, with the view taken by that beholder subject to cultural subjectivity. Consider a contemporary Indigenous society whose ancestors had used corporal punishment. Add to this that many Indigenous people go to prison with the promise of becoming hardened by the experience of incarceration.
An Indigenous community may decide that corporal punishment is a preferable, and less cruel, way to resolve criminal conflicts than incarceration. Such sanctions can in theory also be used as part of restorative resolutions. This can also work in tandem with another area of concern so as to address community safety.

**Addressing Power Imbalance**

Power imbalance can imperil the practice of restorative justice in practice and produce results that are unfair, for either the offender or the victim. The latter result can engage serious concerns about safety in Indigenous communities. Indigenous communities can structure justice processes with a restorative emphasis to address these concerns. If Indigenous communities desire a return to traditional ways, they may still want to consider keeping a feature of Western criminal justice systems, independent judges, who can play an important supervisory role in preventing power abuses. Green stresses that judges must remain vigilant against abuse of power by political elites against unpopular offenders or victims. Another approach to ensure safety and equality in the process to potentially vulnerable parties is by insisting that supporters attend the process with them. Chief Justice Robert Yazzie of the Navajo Supreme Court states: “What, you might say, if the victim is being coerced? That is why we have the victim’s relatives attend.” It is also possible to address power imbalances behind the scenes before a formal process even commences. The Hollow Water Healing Circle program in Manitoba, Canada, was apparently able to generate considerable success against sexual assault recidivism, an offence whose context makes the practice of restorative justice seem especially vulnerable to criticisms of power imbalance in the context of pervasive sexual abuse. One explanation for this was that support teams were assigned to work with both the offender and the victim. The victim and offender would not be brought together into the restorative process until they were both ready to face each other. Even serious power imbalances can be addressed with intervention prior to the restorative process itself.

Contemporary Indigenous approaches can be structured so that pursuing healing and offender reformation does not necessarily come at the expense of other important considerations. Traditional punitive sanctions provide culturally meaningful avenues of deterrence and retribution so that Indigenous justice is not necessarily softer justice. Structuring the processes to address power imbalances in communities prevents abuses against marginalized offenders or vulnerable victims. The two possibilities alongside each other can ensure that harm done to victims is not trivialized and thereby address concerns about safety for the community at large. These factors also offer a new dimension for a dialogue for greater control over justice.
A New Addition to the Dialogue

The starting position of this article is that Indigenous peoples should have full self-determination control over criminal justice. Western states, of course, have tended to accommodate Indigenous approaches only for minor offences. Western states equate protecting society from more serious offences with the use of incarceration. This means reluctance to accommodate Indigenous approaches for more serious offences due to a perception that Indigenous justice often means softer justice. It can even lead to scaling back existing accommodations. William Bradford describes the backlash against the Tlingit pizza bandits episode as follows:

Despite the conciliatory nature of the rhetoric emerging from the Snohomish Superior Court . . . a collective “I told you so!” resounded through the halls of mainstream legal and political institutions. TPM and the American adjudicative system were once again “jostling with one another in a market-place of possibilities” characterized less by mutual understanding of and respect for cultural differences than by majoritarian reactionism.83

This reluctance can be exacerbated when power abuses against vulnerable parties, especially victims, are exposed. Recall that the South Vancouver Island Justice Project was shut down when power abuses against sexual assault victims were exposed.

It is suggested that there is a possible new dimension to dialogues between Indigenous peoples and Western states such that Indigenous communities can attain the power to apply traditional approaches to more serious offences. The idea is to sell traditional punitive sanctions, alongside measures designed to address power imbalances, as alternatives in order to deflate Western concerns over failures to adequately address public safety. Such sanctions, alongside processes that are fair to victims, provide deterrent or retributive alternatives in an earnest pursuit of community safety.

There remains a stumbling block in that Western authorities often perceive corporal punishment as inhumane. President Clinton’s reaction to the caning episode is a case in point. The Correctional Service of Canada relates that Canadian use of corporal punishment as a criminal sanction ended in 1972 and asserts that it is degrading to human dignity.84 There are ways that can possibly counter such sentiment. One can always point to literature produced by Western academics and authorities themselves that question the efficacy, and implicitly the affront to human dignity, of incarceration. Another possible source of counterargument is to suggest that public opinion in the Western
world may not be hostile to the use of corporal punishment. Another possible of counterargument is to suggest that what is inhumane is a matter of cultural subjectivity and that the use of such sanctions can be more culturally relevant to Indigenous peoples.

The use of this sort of proposal as a route to self-determination over criminal justice has no past experience to draw upon and therefore its potential or efficacy is questionable. That it is untried is, in a way, the whole point, though. Indigenous peoples are faced with a status quo that sees only minor accommodations for their approaches to criminal justice. This is as far as the tried-and-true method of appealing to Western recognitions of restorative justice has gotten them. In order to break that status quo, one needs to search for new approaches. It is now time to consider who would make decisions, and how, if and when Indigenous peoples obtain control over criminal justice.

Who Would Make Decisions

How Indigenous control over criminal justice would work is a matter of speculation, since it is not yet a reality. One issue is whether Indigenous self-determination should still leave room for elected chiefs and councils that reflect Anglo political systems, or should revive traditional modes of authority that existed prior to the imposition of the Anglo systems. Whatever form Indigenous authority takes if self-determination becomes reality, it can always articulate and suggest visions for contemporary justice systems. Elected and administrative officials can suggest visions of justice, as can Elders or otherwise culturally important persons.

The word *suggest* is stressed, because it is ultimately the community as a whole that has to decide, through consensus or near consensus, how a contemporary justice system is going to be structured. This necessitates extensive consultations with the community members at large and must include a broad cross section of various factions, interests, and stakeholders in the community. This is important for at least two reasons.

One reason is that some members of the community may be more vulnerable than others during criminal justice processes, victims in particular. This often means that including women, who have frequently been endangered by offences such as sexual assault and domestic violence, is obligatory. Diane Bell relates that Aboriginal women felt that it was absolutely necessary to establish separate consultation processes for both men and women since the women had less power in the communities and were especially vulnerable as the frequent victims of crimes committed by Aboriginal males. Failure to do so can lead to the same kind of scenario that played out with the South Vancouver Island Justice Education Project. A possible outcome of such consultations could be
that certain offences should not be dealt with by a new Indigenous justice system, at least not yet. The Peacemaker Court of the Grand Traverse band in Michigan, for example, does not use peacemaking for domestic assault precisely because it was felt that the Court was not ready to deal with the power imbalance involved.\textsuperscript{88} The Community Council program in Toronto also did not include domestic assault in its mandate after community consultations, for similar reasons.\textsuperscript{89}

Another reason community consultations are necessary is to ascertain if there are any ideological divisions within the community over criminal justice. Significant numbers in a community may not support an adaptation of past approaches. A potential concern is that ideological divisions over criminal justice can result in a deadlock that cannot be worked out, especially if community membership is nearly split down the middle over whether traditional or Western approaches are preferred. It is possible for a series of consultations and negotiations to work out compromises that are acceptable for everyone in the community. For example, if an offender has committed a serious offence, either corporal punishment or imprisonment can be chosen depending on preference. Another example is for the community to use a Western model of criminal justice, with adversarial courtrooms, jails, fines, probation offices, and such as a starting point. The community can also set up an extensive diversionary program that utilizes traditional approaches so that offenders can decide according to preference.

**CONCLUSIONS**

Whether there is truly an ideological struggle between Western criminal justice as punitive justice and Indigenous criminal justice as restorative justice must be answered as partly yes and partly no. Indigenous justice concepts do share parallels with restorative justice, yet also demonstrate marked differences. Those marked demonstrates also suggest forceful approaches to justice that share similarities with Western emphases on punishment. Furthermore, the relationship between contemporary Indigenous communities and Western states is often marked by cooperation grounded in common recognition of restorative justice instead of conflict. Another complication is that it is not a given that an Indigenous community would consider legitimate a justice system based on their ancestors’ traditions. Another important consideration is that there have been problems with restorative justice in practice, particularly with reference to the vulnerability of victims and undermining community safety.

These insights are interesting in themselves, but they also offer possibilities for legal reform. Indigenous societies may wish to revive traditional modes of corporal punishment for contemporary use as alternatives that avoid the worsening effects associated with imprisonment.
They can also be integrated into restorative resolutions. Indigenous communities can also design restorative-type processes to ensure that power imbalances do not occur. This, coupled with the possibility of punitive sanctions, can mean that community safety is not necessarily sacrificed in a lopsided pursuit of healing and rehabilitation. These possibilities can also add a new dimension to the dialogue between Indigenous peoples and Western states. Indigenous communities can propose these possibilities as alternative approaches to furthering community safety through deterrence and retribution that are not necessarily more inhumane in an effort to negotiate for greater control over criminal justice, including more serious offences.

The broad membership of Indigenous communities, not just the leaders, must have a say in how justice systems are structured. This necessitates extensive consultations. The consultations must certainly include those who are vulnerable to certain types of crime, such as women when it comes to sexual or domestic offences. The consultations must also try to ascertain and address ideological divisions over justice if they exist. If they do exist, this may necessitate a process of negotiation and compromise. This may involve structuring a criminal justice system that affords different options to the participants according to their own preferences.

NOTES


10 R.S.C. 1985, c. 46.


17 Royal Commission, Bridging the Cultural Divide, 58.


19 Green, Justice in Aboriginal Communities, 36.

20 Green, Justice in Aboriginal Communities, 19–23.

21 Cayley, The Expanding Prison, 4.


24 Cayley, The Expanding Prison, 3, 98.


26 “Cotler to Table Bills Inspired by Cadman,” The Vancouver Sun (September 28, 2005); Jonathan Fowlie, “Liberals to Ramp up War on Meth,” The Vancouver Sun (December 12, 2005).


31 For thorough descriptions of restorative justice, see John


36 The legislative basis for the conditional sentence is section 742.1 of the Criminal Code.


38 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 104. See also *Inventory of Indigenous Community/Restorative Justice Programs*. Sentencing circle recommendations are not binding by a judge and can be rejected (*R. v. Morin* [1995] 134 Sask. R. 120 (C.A.)). *R. v. Wells* [2000] 1 S.C.R. 207, which considered section 718.2(e), says if an offence requires two years of imprisonment or more or if the offender is a danger to the public then a community-based sentence will not be appropriate and thereby make an Indigenous offender eligible for community-based sentences. There are similar limitations in Australia. The New South Wales Sentencing Court of example, which is geared toward Indigenous offenders facing imprisonment, excludes strictly indictable offences and sexual offences. See Ivan Potas et al., *Circle Sentencing in New South Wales: A Review and Evaluation* (Sydney: Judicial Commission of New South Wales, 2003). The Koori court in

39 Canadian House of Commons Standing Committee on Justice and Solicitor General, Taking Responsibility, 54.

40 Canadian House of Commons Standing Committee on Justice and Solicitor General, Taking Responsibility, 250.

41 Craig Proulx, Reclaiming Aboriginal Justice, Identity, and Community (Saskatoon, Saskatchewan: Purich, 2003).


43 For a general description of this theme, see Michael Coyle, “Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?” Osgoode Hall Law Journal 36 (1998).


47 Cayley, The Expanding Prison, 206. The quote is Cayley’s description of Crnkovich’s views in his words.


50 Bruce Miller, The Problem of Justice: Tradition and Law in the Coast Salish World (Lincoln University of Nebraska Press, 2001), 198–99.

51 Quoted in Cayley, The Expanding Prison, 206.


54 Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide, 269.


58 Miller, The Problem of Justice, 63–64.


60 Fiske and Patrick, Cis Dideen Kat, 97–101.

61 Daniel Kwochka, “Aboriginal Injustice: Making Room for a Re-
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66 Ibid., 618.


68 Asher, *Beyond the Reservation*, 29.


73 *R. v. Joseph Murray Jungarai*, 528; the studies she was referring to are *Justice for the Cree: Communities, Crime and Order* (Nemaska, Quebec: Cree Regional Authority, 1991); and *Exploring the Boundaries of Justice: A Report Prepared for the Department of Justice* (Yukon Territory: First Nations of the Yukon Territory and Justice Canada, 1992).


77 For a similar analysis, see Miller, *The Problem of Justice*, 10–11.


80 Green, "Aboriginal Community Sentencing and Mediation," 114.


82 Green, "Aboriginal Community Sentencing and Mediation," 94–95.


85 Canada imposed the system through the *Indian Act*, R.S.C., 1985, c. 1-5. In the United States, the adoption of the chief and council was highly encouraged by the *Indian Reorganization Act*, 25 U.S.C. 461.

86 These modes of authority varied. In Plains Indian cultures, authority was gradually recognized over time through living an exemplary life that could include bravery in battle, generosity with material goods, and/or wisdom as a spiritual guide. See Olive Patricia Dickason, *Canada’s First Nations* (Toronto, Ontario: Oxford University Press, 1997), 46. Leadership in British Columbia societies involved acquiring a
name that carried with it authority and responsibilities. Names were bestowed through potlatch ceremonies that recognized that the person met the prerequisites of character. See Fiske and Patrick, *Cis Didjen Kat*, 50–51. For an example of an argument that Indigenous self-determination should emphasize past modes of authority instead of elected chief and councils, see Patricia Monture-Angus, *Journeying Forward: Dreaming of First Nations’ Independence* (Halifax, Nova Scotia: Fernwood, 1999), 21–40.


89 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 151.