

A Comparison of Ancient Roman Justice Systems and Canadian Indigenous Justice Systems:
Approaches to Crime and Punishment

By

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Abstract

Canadian law is legally pluralistic and combines common law, civil law, and Indigenous legal traditions. Roman law has contributed largely to both the Canadian common law and civil law traditions while Indigenous law has developed from its own belief system and history. Conflict has arisen within Canada's criminal system with respect to Indigenous offenders due to the retributive nature and positivistic approaches of both the common law and civil law systems in the face of the restorative methodology found in Indigenous approaches to crime. The retributive approach is largely reflective of the legal ideology developed by the Romans and their methods for punishing crime. However, Rome had many different periods of law and the history of Roman law before the classical period has largely been ignored in legal scholarship. By contrasting the two systems, I argue that criticism for Indigenous law as being largely custom is misplaced and that Indigenous law derives force from similar sources of law found in the Roman system. Moreover, I argue that the overincarceration and representation of Indigenous individuals within the Canadian criminal system is partially the result of differences in core values resulting from separate histories and customs. The Canadian criminal system may benefit from adopting smaller organizational structures in order to provide more personal services as is seen in Indigenous systems. Furthermore, the Canadian criminal law system needs to incorporate further aspects of Indigenous law into its structure which represent traditional Indigenous values in order to encourage reconciliation and help heal Canada's Indigenous peoples. However, this presents difficulties given the sizeable population of modern cities and the needs of administering justice over a large population.

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List of Abbreviations

- Amb. *Ep.* – Ambrose *Epistulae*
- Amm. Marc. – Ammianus Marcellinus *Rerum gestarum libri*
- Aristot. *Pol.* – Aristotle *Politeia*
- August. *Ep.* – Augustine *Epistulae*
- C. Just. – Justinian *Codex*
- C. Th. – Theodosian *Codex*
- Cic. *Att.* – Cicero *Epistulae ad Atticum*
- Cic. *Fam.* – Cicero *Epistulae ad familiares*
- Cic. *Inv.* – Cicero *De inventione rhetorica*
- Cic. *Nat. Deor.* – Cicero *De natura deorum*
- Cic. *De. Off.* – Cicero *De officiis*
- Cic. *De Orat.* – Cicero *De Oratore*
- Cic. *Phil.* – Cicero *Orationes Philippicae*
- Cic. *Rep.* – Cicero *De Re Publica*
- Co. Lit. – Sir Edward Coke *Institutes and Commentary on Littleton*
- Collatio – Mosaicarum et Romanarum Legum Collatio* (in *Fontes Iuris Romani Anteiustiniani* vol. 2)
- Cornutus Persius – Cornutus Persius *Theologia*
- D. – Justinian *Digest*
- Dio – Cassius Dio *Historia romana*
- Diod. – Diodorus Siculus *Bibliotheke*
- Dion. Hal. – Dionysius Halicarnassus *Antiquitates romanae*
- Ex.* – *Exodus*
- FIRA – *Fontes Iuris Romani Anteiustiniani* edited by S. Riccobono, J. Baviera, C. Ferrini, J. Furlani, and V. Arangio-Ruiz, 3 vols., 2nd edn. (Florence, 1968)

- Gaius – Gaius *Institutiones*
- Instit.* – Justinian *Institutiones*
- Livy – Livy *Ab urbe condita*
- Mart. Pionii* – *Martyrium Pionii*
- Paul. *Sent.* – Iulius Paulus *Sententiae*
- Plin. *Ep.* – Pliny the Younger *Epistulae*
- Plin. *NH* – Pliny the Elder *Naturalis Historia*
- Plut. *Cic.* – Plutarch *Vitae Parallelae Cicero*
- Plut. *Sull.* – Plutarch *Vitae Parallelae Sulla*
- Polyb. – Polybius *Histories*
- Ps. Quint. *Dec.* – Pseudo Quintilian *Declamationes minores*
- Res Gestae* – Augustus *Res Gestae*
- Roman Statutes* – *Roman Statutes*, edited by M. H. Crawford 2. vols. (London, 1996)
- Sall. *Hist.* – Sallust *Historiae*
- Sall. *Jug.* – Sallust *Bellum Jugurthinum*
- Servius on Verg. *Ecl.* – Commentary by Servius in the *Scholia Danielis* on Virgil's *Eclogues*
- SHA *Severus Alexander* – *Scriptores Historiae Augustae Severus Alexander*
- Stat. *Silv.* – Statius *Silvae*
- Suet. *Aug.* – Suetonius *Divus Augustus*
- Suet. *Calig.* – Suetonius *Gaius Caligula*
- Suet. *Galb.* – Suetonius *Galba*
- Suet. *Iul.* – Suetonius *Divus Iulius*
- Tac. *Ann.* – Tacitus *Annales*
- Tac. *Dial.* – Tacitus *Dialogus de oratoribus*

Introduction

Roman law and Canadian Indigenous law are perhaps an odd comparison. The Roman legal system functioned to regulate an empire which spanned the Mediterranean Sea (at its height) two thousand years ago. We have documentation for it which survives to us today in various forms. It developed and was applied for a span of approximately twelve hundred years. In contrast, Canadian Indigenous law, although also steeped in tradition, can be dated more recently and still develops into modernity. Its end date is yet to be determined. It varied within the communities spanning North America, and less information about this legal system is formally documented; the existing knowledge of such is in danger of being lost. However, both systems act as two sides of parallel coins. Roman law was imposed on annexed provinces to create legal pluralism and developed to allow the Roman state the ability to control such a large and varied population and territory, while Canadian Indigenous law was the existing legal tradition of an indigenous peoples which was altered and repressed by the British settler-colonial state.

Many similarities can be drawn between the Roman Empire and the British Empire. Lord Cromer, during the early twentieth century, stated that the British command of an empire was “the main title which makes us great”.¹ Imperialists at this time were inclined to compare the British empire with the Roman, and to pursue “in the history of imperial Rome for any facts or commentaries gleaned from ancient times which might be of service to the modern empire of which we are so justly proud”.² Both states believed it to be their purpose to rule in the interests of their subjects, and both extended their own forms of law and civilization to the world.³ However, the two empires also had their differences. Rome arguably created a genuine loyalty and unity among some of their provinces and ruled for a period of six hundred years.⁴

¹ Brunt, *Reflections on British and Roman Imperialism*, 267.

² Brunt, *Reflections on British and Roman Imperialism*, 267.

³ Brunt, *Reflections on British and Roman Imperialism*, 267.

⁴ Brunt, *Reflections on British and Roman Imperialism*, 267.

Britain, in contrast, ruled for two hundred years before they had to grant independence to India and their control crumbled away.⁵

The Dominion of Canada separated from Britain as a self-governing entity under the *British North American Act* on July 1, 1867. However, Canada and its relationship with its Indigenous peoples had up to this point been governed by the British and French powers. After separation, Canada's government retained many aspects of their founding nations. As a result, Canada retained aspects of civil law, common law, and Indigenous legal traditions as a tool to organize dispute resolution.⁶ Similarities can be found between each tradition but each are divided by distinctive methods of development and application.⁷ Each tradition is adaptive; it does not solely rest on its historic acceptance.⁸ As such, the robustness of each system does not rest upon how closely each system relies and observes its original form but on how each changes and morphs to remain relevant today.⁹ When each of these systems is given jurisdictional space, resources, and acceptance, each respective legal tradition can function in a modern context.¹⁰

These three traditions come from separate origins. Indigenous law contains the many complex systems developed by the diverse Indigenous communities across North America. These systems, although variable, share core principles which relate them. Canadian common law was adopted from the British system. This system, also known as case law, is based in precedent and bound by the previous reasoning in past cases. Canadian Civil law was adopted from the French system. This system is based in statutes and codified law; it originated from the Roman *Corpus Iuris Civilis*.¹¹ Civil law is a heavily adapted evolution of late Roman law. This gives some more recognizable explanations of how comparing the source of Canadian civil law (the law of the Romans) with Indigenous legal systems might prove useful. However,

⁵ Brunt, *Reflections on British and Roman Imperialism*, 267.

⁶ Borrows, *Canada's Indigenous Constitution*, 8.

⁷ Borrows, *Canada's Indigenous Constitution*, 8.

⁸ Borrows, *Canada's Indigenous Constitution*, 8.

⁹ Borrows, *Canada's Indigenous Constitution*, 8.

¹⁰ Borrows, *Canada's Indigenous Constitution*, 8.

¹¹ Stein, *The Influence of Roman Law on the Common Law*, 165.

civil law is restricted to the province of Quebec and the rest of Canada uses the common law system. Until relatively recently, in the past thirty years of legal scholarship, common law was believed to be separate from civil law, and free from Roman influence.¹² Interestingly, common law can actually be closely connected and tied to Roman law. Additionally, common law today is increasingly moving towards the characteristic features of civil law such as the largely systematized Canadian criminal code.¹³

The legal scholar Peter Stein convincingly argues that the belief that common law is wholly separate from Roman law is misguided.¹⁴ Common law was previously seen by the British nation as a safeguard against undue interference from the state in contrast to the tyranny of the civil law which had such maxims as “what pleases the prince has the force of law” (*Inst.* 1.2.6).¹⁵ Another, less obvious, reason behind this underestimation of Roman legal influence in British common law can be found in the history of who studied common law. During the nineteenth century, scholars were heavily influenced by the Germanistic wing of the German historical school.¹⁶ Germanists at this time viewed Roman law as a kind of disease which was infecting the purity of German law.¹⁷ From the Germanistic perspective, common law was seen as customary law which had succeeded in resisting the taint of Roman law when most of continental Europe and even Scotland had succumbed.¹⁸

However, in reality, the first English systematic statement on law occurred with a thirteenth century treatise written by the cleric and jurist Henry de Bracton titled *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England).¹⁹ Bracton borrowed and adapted from the Roman law as found in

¹² Stein, *The Influence of Roman Law on the Common Law*, 165.

¹³ Stein, *The Influence of Roman Law on the Common Law*, 165. It is important to note that this maxim, in itself, derives from Justinian’s *Institutes*, and is attributed to the Roman jurist Ulpian.

¹⁴ Stein, *The Influence of Roman Law on the Common Law*, 165.

¹⁵ Stein, *The Influence of Roman Law on the Common Law*, 165.

¹⁶ Stein, *The Influence of Roman Law on the Common Law*, 165.

¹⁷ Stein, *The Influence of Roman Law on the Common Law*, 165.

¹⁸ Stein, *The Influence of Roman Law on the Common Law*, 165.

¹⁹ Stein, *The Influence of Roman Law on the Common Law*, 165.

Justinian's corpus and applied English law to a system based in Roman categories.²⁰ He employed Roman language and terms and adopted legal theories and maxims.²¹ From this time, English and common law scholars turned to the contemporary form of Roman law from the continent as a guide for questions in legal theory.²² During the seventeenth century, the Chief Justice, Matthew Hale wrote an *Analysis of the Common Law* which was heavily inspired by humanist models.²³ In the subsequent century, this work was used as the framework of Sir William Blackstone's famous *Commentaries*.²⁴ These served as the foundation of modern common law.²⁵

Overall, common law in its purest form was sufficient in its detailed rules and subtlety of its arguments, but it was found lacking when it was necessary to take a larger view.²⁶ English lawyers have long been attracted by Roman maxims due to their axiomatic nature and many were adapted into common law such as Sir Edward Coke's *Institutes and Commentary on Littelton*.²⁷ Within this text, Latin maxims were quietly adapted such as the maxim *multa in iure communi contra reationem disputandi pro communi utilitate instructa sunt* (Co. Lit. 70b).²⁸ This is taken, word for word, from Justinian's *Digest* and is accredited to the Roman jurist Julian (D. 9.2.31.2).²⁹ However, Coke replaces "iure civile" with "iure communi". Furthermore, Roman influences can be seen and recognized in parts of common law which can be traced back to the Middle Ages.³⁰ For example, English land law, which is grounded in feudal ideas, appears distinct from Roman tradition.³¹ But, the law of easements, the rights *in rem* exercisable over one

²⁰ Stein, *The Influence of Roman Law on the Common Law*, 165-6.

²¹ Stein, *The Influence of Roman Law on the Common Law*, 166.

²² Stein, *The Influence of Roman Law on the Common Law*, 166.

²³ Stein, *The Influence of Roman Law on the Common Law*, 166.

²⁴ Stein, *The Influence of Roman Law on the Common Law*, 166.

²⁵ Stein, *The Influence of Roman Law on the Common Law*, 166.

²⁶ Stein, *The Influence of Roman Law on the Common Law*, 166.

²⁷ Stein, *The Influence of Roman Law on the Common Law*, 166.

²⁸ Stein, *The Influence of Roman Law on the Common Law*, 166.

²⁹ Stein, *The Influence of Roman Law on the Common Law*, 166.

³⁰ Stein, *The Influence of Roman Law on the Common Law*, 168.

³¹ Stein, *The Influence of Roman Law on the Common Law*, 168.

piece of land in favour of another piece of land, was added later to other land laws.³² It was in fact, taken in close to its entirety from the Roman law of praedial servitudes. Therefore, common law was derived from traditional English law but also incorporated much from Roman law. It is in truth most likely a complicated amalgamation of both systems.³³ Therefore, Roman law, especially in the study of large legal theories, can also be connected to a considerable extent to Canadian common law foundations.

Roman law also serves as an interesting comparison point with Canadian Indigenous law for reasons other than the Roman roots that can be found in the common and civil law systems. The history of Roman law begins with the writing down of customary law. It documents a complicated journey from oral law to a complicated codification of statutes. Moreover, Roman law was an early Mediterranean legal system which was documented under the state structures of a republic and an empire. The adaptation of this legal system to both systems provides interesting observations, especially when compared to the different governance structures and law of Canadian Indigenous communities. The study of Roman law can also provide interesting reflections on how this legal system was adapted to deal with annexed provinces and an imperial structure. Furthermore, the Roman empire was initially polytheistic but slowly converted to Christianity in late antiquity. This provides integral insight into a legal system before and after the introduction of the monotheistic Christian religion. The changes in Roman law and attitude after this time create several implications of how the legal system changed to reflect Christian values and ideals. Because Justinian's corpus was created long after Christianity was introduced, most modern systems derived from this source still carry many hidden ideals introduced during this time. The English empire was Christian and these ideals certainly impacted the relationship between colonists and pre-Christian Indigenous peoples in North America.

³² Stein, *The Influence of Roman Law on the Common Law*, 168.

³³ Stein, *The Influence of Roman Law on the Common Law*, 168.

The modern Canadian legal system is an important organizing force within Canadian society.³⁴ But, many varying definitions and disagreements have transpired regarding what does and does not constitute law.³⁵ It has been a source of conflict as increasing efforts have been made for reconciliation between Canada's government and Indigenous peoples.³⁶ This conflict has highlighted the way law can produce peace and chaos for different populations, depending in whose name it is administered as well as from whose perspective it is considered.³⁷ Law has traditionally been determined to include both formal and informal elements.³⁸ It incorporates within its jurisdiction and application deeply complex implicit and explicit beliefs and practices connected to order, respect, and authority.³⁹ Laws result from inter-personal interactions to create expectations and obligations about proper conduct and appropriate behaviour.⁴⁰ Different legal systems are often analyzed by placing them within wider groupings or traditions in order to better comprehend them.⁴¹ J. H. Merryman, a professor of law at Stanford who was largely active in the later half of the twentieth century, states that, "A legal tradition ... is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught".⁴² Therefore, a legal tradition is a feature of general culture.⁴³

However, a legal tradition can be separate from a state's legal system if the nationalized system fails to explicitly recognize its force.⁴⁴ Legal traditions are cultural phenomena found in all societies. They provide cultures with categories into which the 'untidy business of life' may be organized and provide a

³⁴ Borrows, *Canada's Indigenous Constitution*, 7.

³⁵ Borrows, *Canada's Indigenous Constitution*, 7.

³⁶ Borrows, *Canada's Indigenous Constitution*, 7.

³⁷ Borrows, *Canada's Indigenous Constitution*, 7.

³⁸ Borrows, *Canada's Indigenous Constitution*, 7.

³⁹ Borrows, *Canada's Indigenous Constitution*, 7.

⁴⁰ Borrows, *Canada's Indigenous Constitution*, 7.

⁴¹ Borrows, *Canada's Indigenous Constitution*, 7.

⁴² Merryman, *The Civil Law Tradition*, 1.

⁴³ Borrows, *Canada's Indigenous Constitution*, 7.

⁴⁴ See: Hooker, *Legal Pluralism*, 1996.

forum for dispute resolution.⁴⁵ Occasionally, different traditions are able to operate within a single state, or intersect between states.⁴⁶ This is defined as legal pluralism, “the simultaneous existence within a single legal order of different rules applying to identical situations”.⁴⁷ Canada is a legally pluralistic society. However, Canada’s Indigenous peoples have never been convinced that Canada’s legal system and its rule of law captures their experiences with others in this land.⁴⁸ As a result, Canada’s legal system is incomplete. Numerous Indigenous peoples believe that their laws provide significant context and perspective for assessing their relationships with the land, and with each other.⁴⁹ Yet, Indigenous laws are habitually diminished, ignored, or denied as being authoritative or relevant in satisfying these questions.⁵⁰

This has led to significant queries about the sources of Canada’s law, as well as its cultural commitments, interpretive competency, and institutional receptiveness.⁵¹ There is debate taking place in Canada about what comprises ‘law’ and concerns about whether Canadian Indigenous peoples practised law in accordance with this definition prior to colonization.⁵² Some contemporary legal commentators have claimed that North American Indigenous peoples were pre-legal.⁵³ Individuals in this school of thought believe that societies only acquire laws if these laws are proclaimed by a recognized authority that is capable of enforcing such a proclamation.⁵⁴ They believe that Indigenous tradition is solely based in custom, and thus, it does not constitute with legality.⁵⁵ John Austin, the noted English legal theorist, expressed that custom was not law when he penned:

“At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The

⁴⁵ Simpson, *Leading Cases in the Common Law*, 11.

⁴⁶ Borrows, *Canada’s Indigenous Constitution*, 8.

⁴⁷ Arnaud, *Legal Pluralism and the Building of Europe*, 149.

⁴⁸ Borrows, *Canada’s Indigenous Constitution*, 6.

⁴⁹ Borrows, *Canada’s Indigenous Constitution*, 6.

⁵⁰ Borrows, *Canada’s Indigenous Constitution*, 6.

⁵¹ Borrows, *Canada’s Indigenous Constitution*, 6.

⁵² Borrows, *Canada’s Indigenous Constitution*, 12.

⁵³ Editorial, *One Tier Justice*, A19.

⁵⁴ Borrows, *Canada’s Indigenous Constitution*, 12.

⁵⁵ Borrows, *Canada’s Indigenous Constitution*, 12.

custom is transmuted into positive law, when it is adopted by the courts of justice, and when judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.”⁵⁶

For scholars who support legal positivism and who agree with Austin, centralized power and explicit control are required for a legal system to exist. Others, such as the currently active law professor and scholar John Borrows based at the University of Victoria, disagree with this conclusion, contending that Austin’s view relies on inaccurate assumptions about law,⁵⁷ and that law does not always come from a sovereign authority or explicit command.⁵⁸ Austin’s belief is potentially troubling when applied to Indigenous peoples and replicates stereotypes about these societies.⁵⁹ Indigenous law was traditionally derived from many sources of law and not just custom.⁶⁰ Additionally, it is misleading to believe that law derived from custom only holds moral force.⁶¹ In contrast to Austin’s definition, the anthropologist Adamson Hoebel stated, “[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 group possessing the socially recognized privilege of so acting”.⁶² Sometimes customary law is depreciated by legal scholars such as Austin because contemporary societies that are associated with this source of law tend to be inappropriately labelled as “savage” or inferior.⁶³ This perceived inferiority is related to living without subjection because of “ignorance” and “stupidity” in not establishing and submitting to a hierarchical political government.⁶⁴ However, as we will see, Roman law, which serves as at least a partial basis for civil and common law, had

⁵⁶ Austin, *The Province of Jurisprudence Determined*, 176.

⁵⁷ Finnis, *On the Incoherence of Legal Positivism*, 1597.

⁵⁸ Fuller, *Positivism and Fidelity to Law*.

⁵⁹ Borrows, *Canada’s Indigenous Constitution*, 12. One example of this can be found in *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

⁶⁰ Borrows, *Canada’s Indigenous Constitution*, 12.

⁶¹ Hoebel, *The Law of Primitive Man*, 28.

⁶² Hoebel, *The Law of Primitive Man*, 28.

⁶³ Austin, *The Province of Jurisprudence Determined*, 178.

⁶⁴ Austin, *The Province of Jurisprudence Determined*, 178.

at certain times in its history a strong use of customary law as well as the enforcement of law in a less hierarchical system. Therefore, it is important to determine what caused these shifts in Roman law and how it compares to Canadian law.

Viewpoints which discredit Indigenous legal traditions have been very harmful for reconciliation between the Canadian government and Canada's Indigenous peoples. One key Call to Action published by the Truth and Reconciliation Commission in 2015 provides insight as to how to bring about healing:

Section 30: We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.

Section 30 highlights the statistical imbalance of Indigenous peoples among Canadian offenders. For instance, Canada's prison system today is composed of an alarmingly high percentage of Indigenous peoples. In 2010/11, 27% of adults in provincial and territorial custody and 20% of adults in federal custody identified as Indigenous.⁶⁵ This is contrasted by the fact that Indigenous peoples only compose 4% of Canada's total population.⁶⁶ Furthermore, there has been a disproportional expansion of Indigenous incarceration in contrast to the expansion of general incarceration. The Indigenous incarceration rate is ten times higher than the rate for the non-Indigenous population.⁶⁷ Moreover, between 1998 and 2008, the percentage of Indigenous peoples in federal custody increased by 19.7% while the percentage of sentenced Indigenous women increased by 131%.⁶⁸ Robert Nichols explains this exponential carceral expansion as a political choice made because it solidifies control over the state apparatus and creates continuous reterritorialization.⁶⁹ It has not reduced crime.⁷⁰ Rather, Nichols explains this expansion as a new "political formation" in which the state punishes differently with an emphasis on "highly intense sociospatial

⁶⁵ Dauvergne, *Adult Correctional Statistics in Canada, 2012-2011*, 7.

⁶⁶ Dauvergne, *Adult Correctional Statistics in Canada, 2012-2011*, 7.

⁶⁷ Office of the Correctional Investigator, *Good Intentions, Disappointing Results*, 6.

⁶⁸ Office of the Correctional Investigator, *Good Intentions, Disappointing Results*, 6.

⁶⁹ Nichols, *The Colonialism of Incarceration*, 442.

⁷⁰ Nichols, *The Colonialism of Incarceration*, 442.

isolation”.⁷¹ He suggests this shift occurred due to the incarceration of Indigenous peoples becoming increasingly dehistoricized.⁷² Incarceration of Indigenous peoples has become increasingly routinized, bureaucratized and cut off from its history of settler colonialism.⁷³ This is seen as an additional factor specific to Indigenous peoples on top of elements such as poverty and racial bias in policing.

However, I argue this is also the result of the oppression of Canada’s Indigenous people under a foreign legal system which shares no root and is dictated by foreign values. Canada’s Indigenous populations are subjected to a system of laws and policing to which they had never consented.⁷⁴ This has resulted in an unworkable relationship between Indigenous peoples and any form of policing. Patricia Monture-Angus, an Indigenous scholar, confirms this, “Aboriginal people do not view the criminal justice system as a system that represents or respects them”.⁷⁵ Furthermore, Indigenous peoples were initially restricted from participating in Canadian law at all. In a bid to ramp up efforts to enfranchise Indigenous peoples after previous failed attempts, the government added an amendment in 1880 to the *Indian Act* which required compulsory enfranchisement for any Indigenous persons who received a degree:

“Any Indian who may be admitted to the degree of Doctor of Medicine, or to any other degree by any University of Learning, or who may be admitted in any Province of the Dominion to practice law either as an Advocate or as a Barrister or Counsellor, or Solicitor or Attorney or to be a Notary Public, or who may enter Holy Orders, or who may be licensed by any denomination of Christians as a Minister of the Gospel, may upon petition to the Superintendent-General, *ipso facto* become and be enfranchised under the provisions of this Act...”⁷⁶

Thus, if an Indigenous person wished to work in the law, they had to surrender their First Nations status. In doing so, they may gain full Canadian citizenship but at the cost of their traditions and identity. Thus, this effectively barred Indigenous peoples at this time from carving a space for themselves within the developing

⁷¹ Nichols, *The Colonialism of Incarceration*, 443.

⁷² Nichols, *The Colonialism of Incarceration*, 448.

⁷³ Nichols, *The Colonialism of Incarceration*, 448.

⁷⁴ Canada, Ministry of the Solicitor General, *Report of the Task Force on Federally Sentenced Women*, 23.

⁷⁵ Monture, *The Need for Radical Change in the Canadian Criminal Justice System*, 244.

⁷⁶ *Indian Act*, 1876, S.C. 1876, c. 18, s. 86(1).

legal system. This was made worse by the competing religions of Canadian Indigenous peoples and the Christian Canadian government. Christian faith-based settlers and policy makers approached Indigenous creation beliefs and spirituality with dismissiveness.⁷⁷ They considered it their moral prerogative to show the law of Christianity to the “Indian heathens” in order to raise them out of lives of “savagery”.⁷⁸ This affected the creation and application of Canadian law towards Indigenous peoples. This further makes a comparison with Roman law interesting. Roman law functioned under both a Christian and non-Christian government in different periods.

Overall, these causes have greatly affected the ability of Indigenous peoples to function as Canadian citizens. Therefore, approaching Indigenous law and Roman law (the source and foundation of European legal thought) as a comparative study will provide integral insight into the differences of the criminal system between these cultures and how this may contribute to this imbalanced indictment of Indigenous peoples. Furthermore, a possible avenue for reducing the overrepresentation of Indigenous people in the Canadian criminal system may be through implementing more Indigenous law and legal traditions into the system. This conforms with another Call to Action of the Truth and Reconciliation report:

Section 42: We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.

These implemented aspects of Indigenous law would hopefully not just function for Indigenous people, but be open for all Canadians to benefit from them. However, this goal may be an uphill battle. Troubling viewpoints within Canada’s modern legal system may delay progress in this area. One issue is the hierarchy of laws taught in Canadian law schools.⁷⁹ Law students have been traditionally taught that certain legal

⁷⁷ Joseph, *21 Things You May Not Know About the Indian Act*, chap. 5, Kindle.

⁷⁸ Joseph, *21 Things You May Not Know About the Indian Act*, chap. 5, Kindle.

⁷⁹ Borrows, *Canada’s Indigenous Constitution*, 13.

sources are above others and that those on the bottom of the scale of authority must make way for those on the higher levels.⁸⁰ Moreover, in legal literature, Canada is generally considered to be a settled territory.⁸¹ This means that the territory is legally considered vacant when the colonizers settled the land.⁸² Although Indigenous peoples were evidently in the territory prior to colonization, it has been traditionally assumed that their customs and laws were either too primitive or unfamiliar to compel British settlers to obey them.⁸³ This is based in a misguided and ignorant perception of Indigenous law.

Furthermore, it can potentially pose a harmful belief that Indigenous peoples exist lower on the “scale of civilization” because they do not have a European source or organization.⁸⁴ This can be seen in *Calder v. A.G.B.C.*, wherein the Supreme Court of Canada denounced Indigenous customs:

“The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws, or cultures, in effect subhuman species”.⁸⁵

This belief goes directly against the sophisticated structure and many sources used in Indigenous law. I suspect that dismissing Indigenous laws as “custom” is purely a way to support euro-centric and colonial beliefs. This work will explore the many sources of Roman law and possible reasons behind legal codification to determine why the Roman system, and later civil and common legal systems, codified while Indigenous systems remained primarily oral in nature. It is my hope that by reinstating the history of early European law and Canadian Indigenous law, the insight provided can lend credibility to Indigenous law and support the implementation of more legal aspects of Indigenous law into Canada’s system.

⁸⁰ Borrows, *Canada’s Indigenous Constitution*, 13.

⁸¹ Borrows, *Canada’s Indigenous Constitution*, 13.

⁸² Borrows, *Canada’s Indigenous Constitution*, 13.

⁸³ Borrows, *Canada’s Indigenous Constitution*, 16.

⁸⁴ Borrows, *Canada’s Indigenous Constitution*, 16.

⁸⁵ *Calder v. A.G.B.C.*, [1973] S.C.R. 313 at 346–7.

I hope to examine what the Roman and Indigenous systems believed to be criminal actions and the reasons behind this. I further wish to compare both system's approach to punishment. This will be done to observe how both systems define justice and how these differing definitions can create conflict in today's system. After all, how can Indigenous peoples feel that justice is being done under the current criminal system if their concept of justice is wholly different from that served under the Canadian system?

Chapter 1

An Overview of the Roman Legal System

A Brief History of Roman Law:

Roman law is split into five periods by modern scholars: the archaic period (c. 743-250 BC) which spans the regal period and the first two centuries of the Roman Republic; the pre-classical period (c. 250-27 BC) which spans the middle to late Roman Republic including episodes of great social change; the classical period (c. 27 BC-284 CE) which spans the beginnings and continuation of the Roman Empire, a time of great intellectual development and law but also affected by the move from Principate to Dominate; the post-classical period (c. 284-476 CE in the West and c. 284-527 CE in the East) which spans the division of the empire under Diocletian and the unstable political situation in the Western Empire; and the Justinianic period (527-565 CE) which spans the reign of Justinian in the Eastern Empire and codification of laws under the imperial bureaucracy.⁸⁶ The last period is pivotal for our modern understanding of Roman law. The endeavors made by Justinian to assemble all Roman law and redact it into a set of volumes later used by courts and scholars give us an invaluable tool for understanding their law today.⁸⁷ It should be stressed that these periods were created by contemporary scholars of Roman law. These periods are laid out by Andrew Riggsby in his work, *Roman Law and the Legal World of the Romans*, in 2010.⁸⁸ Initially, in the first half of the nineteenth century, three periods were created by Roman legal scholars: archaic, classical, and Byzantine.⁸⁹ Further study of the law and its many changes throughout the history of Rome led to the addition of two other periods.⁹⁰ Paul du Plessis postulates that this was driven by ideology to demonstrate

⁸⁶ Plessis, *Studying Roman Law*, 13-14.

⁸⁷ Plessis, *Studying Roman Law*, 14.

⁸⁸ Riggsby, *Roman Law and the Legal World of the Romans*, 21.

⁸⁹ Pringsheim, *The Unique Character of Classical Roman Law*, 60.

⁹⁰ Riggsby, *Roman Law and the Legal World of the Romans*, 21.

a grand story of continuity and the rise and fall of the Empire.⁹¹ This would explain why the first periodization of Roman legal history divided it merely into the beginning, the classical period (the period of intellectual supremacy of law), and its later restoration in the reign of Justinian.⁹² The other periods are still portrayed as developmental or transient.⁹³

Information is scant about law and court procedure during the archaic period. It is customarily assumed, in common with other ancient agrarian societies, that law at this time comprised unwritten customs which consisted of both legal and religious norms.⁹⁴ An early form of “sacred law” in Rome can be found in the inscription on the Lapis Niger, associated with an ancient shrine in the Roman Forum and dated to the late 6th century BC.⁹⁵ The inscription is heavily damaged but seems to represent ritual law including prescriptions with respect to a sacred place and regulations on the behaviour and conduct of citizens and officials, including the *rex*, in relation to the sanctuary. Additionally, the establishment of institutions such as the senate and popular assemblies, believed to have been created in the regal period, had an impact on law during the Roman Republic.⁹⁶ It is, for the most part, presumed that the king administered justice under the advisement of the Senate.⁹⁷ But, in family matters, family councils were administered by the head of the household (*paterfamilias*), and he held domestic jurisdiction.⁹⁸ After the transition from monarchy to republic, the administration of justice was dealt with by the consuls until the office of praetor was instituted in 367 BC.⁹⁹

After the initial transition from monarchy to republic, the law appears to have remained largely customary.¹⁰⁰ The introduction of the Twelve Tables, a compilation of more controversial parts of Roman

⁹¹ Plessis, *Studying Roman Law*, 14.

⁹² Plessis, *Studying Roman Law*, 14.

⁹³ Plessis, *Studying Roman Law*, 14. Whether this perception is correct is another matter entirely.

⁹⁴ Plessis, *Studying Roman Law*, 16.

⁹⁵ CIL 6.36840.

⁹⁶ Plessis, *Studying Roman Law*, 16.

⁹⁷ Plessis, *Studying Roman Law*, 17.

⁹⁸ Plessis, *Studying Roman Law*, 17.

⁹⁹ Plessis, *Studying Roman Law*, 17.

¹⁰⁰ Plessis, *Studying Roman Law*, 16.

customary law, marks the first effort at an accessible legal system.¹⁰¹ Livy attributes their creation to the years 450-451 BC (Livy 3.34.). The Twelve Tables, although substantial, contained under a hundred clauses,¹⁰² and chiefly covered family, property, and succession law.¹⁰³ The Twelve Tables are said to have been shaped by the Athenian Code of Solon,¹⁰⁴ although there is very little evidence in the laws to back up this direct comparison.¹⁰⁵ It may be the case that this purported Greek influence was introduced during the Hellenistic period in order to link Greek philosophy with the origins of Roman law;¹⁰⁶ however it is probable that there was some general foreign influence.¹⁰⁷ The Twelve Tables laid out a rudimentary court procedure covering summons, trial, and execution of judgment based on ritual 'actions-at-law'.¹⁰⁸ However, it does not clarify the court location or composition.¹⁰⁹ It is important to note that these tables did not encompass Roman law in its entirety at that time,¹¹⁰ but merely set some legal customs into a fixed form, thus eliminating gradual shifts which are common in the use of customary law.¹¹¹ The Twelve Tables have not survived in totality. Today, only a number of citations and references survive. As a result, the countless attempts to reconstruct these Tables as a full text based on these sparse pieces are all highly conjectural. Therefore, they provide insight into what the law may have looked like at this time, but we may ignore part of their content.

The early Republic saw the creation of two representative assemblies with legislative power: the *comitia centuriata* and the *comitia tributa*.¹¹² The former held the greatest importance.¹¹³ However, the real influence came from the magistrates and Senate, as the *comitia* were restricted to rejecting and approving

¹⁰¹ Plessis, *Studying Roman Law*, 16; Ibbetson, *The Cambridge Companion to Roman Law*, 26.

¹⁰² Ibbetson, *The Cambridge Companion to Roman Law*, 26.

¹⁰³ Plessis, *Studying Roman Law*, 16.

¹⁰⁴ Plessis, *Studying Roman Law*, 16; Ibbetson, *The Cambridge Companion to Roman Law*, 26.

¹⁰⁵ Plessis, *Studying Roman Law*, 16.

¹⁰⁶ Plessis, *Studying Roman Law*, 16.

¹⁰⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 26.

¹⁰⁸ Plessis, *Studying Roman Law*, 17.

¹⁰⁹ Plessis, *Studying Roman Law*, 17.

¹¹⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹¹ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹² Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹³ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

proposals put before them by the magistrates.¹¹⁴ After 287 BC, enactments from the *concilium plebis* also gained the same legally binding authority.¹¹⁵ The *concilium plebis* could create important pieces of private legal legislation known as plebiscites.¹¹⁶ In the three hundred and fifty years preceding the establishment of the Twelve Tables, there is only reference to one piece of legislation enacted per year on average. Epigraphically, the first attested *lex* can be dated to a few years before 110 BC but these early examples are mainly just one-off determinations (i.e., to declare war or make peace) or involve matters of constitutional importance;¹¹⁷ very few dealt with private law.¹¹⁸ Thus, a heavy dependence on custom still was employed for most issues. However, the lack of references regarding private disputes may also be explained by the interest of our sources. These ancient sources were more concerned with political and military matters. Talk of private law may only have arisen when it came to a political trial.

Legal processes were based on *legis actiones*, a set of highly ritualized oral *formulae* wherein any legal claim had to be framed.¹¹⁹ There were five types of *legis actiones*, determined by reference to the solution sought by the one bringing the charge (i.e. plaintiff) instead of by reference to the claim.¹²⁰ This was sometimes reinforced by a wager or an oath.¹²¹ The decision to the dispute was decided by a single judge or group of judges.¹²² These judges were laymen: they held no technical legal expertise nor were their decisions based in any externally identifiable legal rules.¹²³ Their decisions were primarily dependent on the judges' opinion of what was right and wrong.¹²⁴

¹¹⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹¹⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹²⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹²¹ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹²² Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹²³ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

¹²⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 27.

The earliest interpreters of the law were members from the College of Pontiffs.¹²⁵ In a system where a great deal of the law was unrecorded custom and religion was closely related to justice, it is not surprising that religious officials also served as judicial leaders.¹²⁶ The pontiffs also had authority on other ritual forms such as the appropriate way to enter into a recognized marriage.¹²⁷ The pontiffs would individually provide answers (*responsa*), either concerning the law or other similar formalized rituals, to citizens.¹²⁸ The majority of these pontiffs came from the patrician class and monopolized the law which formed part of the narrative of the struggle of the orders.¹²⁹ This helped to create the need for the more controversial aspects of Roman customary law to be recorded and publicly displayed through the Twelve Tables. Even after this, aspects of the law remained unclear and continued to be subject to pontifical interpretation.¹³⁰ During the Republic, the statesman Appius Claudius, a clerk for one of the pontiffs at the time, is said to have stolen a document containing details of these obscure actions-at-law and published it.¹³¹ In this period as well the first ‘jurist’ emerged, Tiberius Corunacianus, who was at the time the Pontifex Maximus (D. 1.2.2.35; 38).¹³² It is said that he was the first plebeian holder of the office of pontiff and that he was the first to offer his legal advice to members of the public in a public place (D. 1.2.2.35; 38).¹³³ Yet, the validity of this account may be questionable. Information dated to this early period of Roman history were mostly reconstructions of much later authors who had very limited access to direct sources. These late authors were also influenced by their own agendas and bias.

The period which followed (c. 250-27 BC) was turbulent in Roman history and featured Rome’s initial attempts to annex territory outside of Italy.¹³⁴ It began with the Punic Wars and ended with the bloody

¹²⁵ Plessis, *Studying Roman Law*, 17.

¹²⁶ Plessis, *Studying Roman Law*, 17.

¹²⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹²⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹²⁹ Plessis, *Studying Roman Law*, 17.

¹³⁰ Plessis, *Studying Roman Law*, 18.

¹³¹ Plessis, *Studying Roman Law*, 18.

¹³² Plessis, *Studying Roman Law*, 18; Ibbetson, *The Cambridge Companion to Roman Law*, 38.

¹³³ Plessis, *Studying Roman Law*, 18; Ibbetson, *The Cambridge Companion to Roman Law*, 38.

¹³⁴ Plessis, *Studying Roman Law*, 18.

civil wars which led to the fall of the Republic.¹³⁵ The violent events which plagued this period resulted in a general movement away from unwritten custom towards statute law.¹³⁶ The legal procedure developed into a formulary system, a remedial framework which provided the basis of claims with a stronger designation.¹³⁷ Statute law was originally passed by the council of the plebs and other *comitia*;¹³⁸ later, it was passed through decisions of the Senate.¹³⁹ It is traditionally accepted that very little statute law from this period has been preserved.¹⁴⁰ Before this period, the office of *praetor urbanis* was created in 367 BC which became a part of the *cursus honorum*.¹⁴¹ A single praetor presided over the courts which were only accessible to Roman citizens.¹⁴² These courts applied Roman law alone, predominantly in the scope of private law (*ius civile*).¹⁴³ But the new acquisition of territory during this period led to the creation of a second praetorship, the peregrine praetor, in 242 BC.¹⁴⁴ By this time, a number of foreigners had also settled within Roman territory along with the indigenous populations of the newly taken lands.¹⁴⁵ A parallel court system developed which was not forced to follow the formalism of the early Roman law and court procedure.¹⁴⁶ It is likely that an entirely new procedure was created in comparison to the *legis actio* in the third century so that cases which concerned foreigners who could not swear the necessary oaths could be properly addressed.¹⁴⁷ This new procedure proved so successful that, by 150 BC, the *Lex Aebutia* was enacted which allowed Roman citizens to use this more flexible system in Roman courts (but at first it may have been restricted to certain areas of law).¹⁴⁸ This statute eventually led to the replacement of the system

¹³⁵ Plessis, *Studying Roman Law*, 18.

¹³⁶ Plessis, *Studying Roman Law*, 19.

¹³⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹³⁸ Plessis, *Studying Roman Law*, 19.

¹³⁹ Plessis, *Studying Roman Law*, 19.

¹⁴⁰ Plessis, *Studying Roman Law*, 19.

¹⁴¹ Plessis, *Studying Roman Law*, 19.

¹⁴² Plessis, *Studying Roman Law*, 19.

¹⁴³ Plessis, *Studying Roman Law*, 19.

¹⁴⁴ Plessis, *Studying Roman Law*, 19.

¹⁴⁵ Plessis, *Studying Roman Law*, 19.

¹⁴⁶ Plessis, *Studying Roman Law*, 19.

¹⁴⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁴⁸ Plessis, *Studying Roman Law*, 19.

of procedure in every Roman court by the end of this period.¹⁴⁹ In this system, the plaintiff's claim still was required to be framed in a predetermined form.¹⁵⁰ However, contrary to the *legis actio* procedure, the forms were shaped by the cause of action: the plaintiff established why they were entitled to a remedy and not by what remedy was requested.¹⁵¹ The remedies were supplied by the praetors who could invent new remedies, if needed, quite liberally.¹⁵² But, by the end of the Republic, these remedies were largely set in stone with little innovation.¹⁵³

This new period of Roman law is often described as 'scientific'. Concepts such as natural law and the law of nations began to appear in Roman legal sources.¹⁵⁴ This occurred to some extent as a result of the influence of Greek philosophy which had a heavy, formative impact over Roman society at this time.¹⁵⁵ This was presumably spurred by a need to interact with the legal systems and mentalities found within the Hellenistic states. The praetors began to produce edicts, statements of principle and a list of remedies which governed their term in office, at the start of year in which they presided.¹⁵⁶ The edict progressively built upon the predecessor's edict and gave a framework for the start of the analysis of private law.¹⁵⁷ When the civil procedure became less formalized, these edicts began to have a greater and more direct impact on the legal system.¹⁵⁸

Praetors did not act alone: they were often assisted by men who were knowledgeable in the law known as jurists.¹⁵⁹ The jurists, as a profession, first took form directly from the role that pontiffs had played and jurists continued to provide *responsa*.¹⁶⁰ Jurists first emerged in the late second and early first centuries

¹⁴⁹ Plessis, *Studying Roman Law*, 19.

¹⁵⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁵¹ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁵² Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁵³ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁵⁴ Plessis, *Studying Roman Law*, 20.

¹⁵⁵ Plessis, *Studying Roman Law*, 20.

¹⁵⁶ Plessis, *Studying Roman Law*, 19; Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁵⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁵⁸ Plessis, *Studying Roman Law*, 19.

¹⁵⁹ Plessis, *Studying Roman Law*, 20.

¹⁶⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 28; 38.

BC.¹⁶¹ Jurists were mostly patricians who followed after the example of Tiberius Coruncanius and offered legal advice for free.¹⁶² However, secular jurists were distinct from pontiffs in two ways: they produced written texts and they did not bear the same level of authority; the religious position of pontiff had given their predecessors more status.¹⁶³ By the end of this period, there were many jurists in Rome and its provinces.¹⁶⁴ They were no longer solely of patrician order and came from a diverse set of backgrounds.¹⁶⁵ They also began to ply their trade for payment.¹⁶⁶ Jurists' activities included advising officials and clients regarding the law, teaching students in an informal apprenticeship style, and writing treatises on the law.¹⁶⁷ However, it is important to note that they did not represent their clients in court.¹⁶⁸ Instead, advocates such as Cicero performed this function.¹⁶⁹ Men trained in rhetoric would undertake to convince a lay judge of the truth of the client's case by employing rhetorical techniques.¹⁷⁰

Cicero writes on the function of jurists. He recounts a discussion over dinner regarding a legal point in which the opinions of Manius Manilius, Sextus Aelius, and Marcus Brutus (on one side) and Scaevola and Testa (on the other) are debated (Cic. *Fam.* 7.22.). This indicates that the level of judgements on matters of law by this time depended on criteria of reason which permitted the conclusions of various jurists to be evaluated.¹⁷¹ Cicero also relates that jurists were experts in matters of written law (*lex*) and custom (Cic. *De Orat.* 1. 212). As far as Cicero was concerned, the skill of the jurist was in the ability to interpret the texts.¹⁷² In terms of custom, the jurist's expertise lay in their ability to identify general social practices and

¹⁶¹ Ibbetson, *The Cambridge Companion to Roman Law*, 34.

¹⁶² Plessis, *Studying Roman Law*, 20.

¹⁶³ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

¹⁶⁴ Plessis, *Studying Roman Law*, 20.

¹⁶⁵ Plessis, *Studying Roman Law*, 20.

¹⁶⁶ Plessis, *Studying Roman Law*, 20.

¹⁶⁷ Plessis, *Studying Roman Law*, 20.

¹⁶⁸ Plessis, *Studying Roman Law*, 20.

¹⁶⁹ Plessis, *Studying Roman Law*, 20.

¹⁷⁰ Plessis, *Studying Roman Law*, 20.

¹⁷¹ Ibbetson, *The Cambridge Companion to Roman Law*, 29.

¹⁷² Ibbetson, *The Cambridge Companion to Roman Law*, 29.

also to use these techniques as reasoning by analogy in order to draw conclusions that went beyond the general understanding of a citizen.¹⁷³

The classical period witnessed the transition from republic to empire and a gradual reduction of republican structures so as to prevent any challenges to the authority of the emperor.¹⁷⁴ The Julio-Claudian dynasty, Flavian dynasty, and the Severan emperors all saw a further consolidation of the emperor's power.¹⁷⁵ But, after Alexander Severus was murdered in 235 CE, the crisis of the third century brought instability along with constant hostility around the borders of the Empire.¹⁷⁶ The Empire experienced economic upheaval as taxes were raised to fund the increased military spending and many emperors and pretenders ruled for short periods of time.¹⁷⁷ Order was not restored again until 284 BC when Emperor Diocletian came to power.¹⁷⁸

Although the classical period is touted as the high point of legal development, there are few important statutes dating to this time,¹⁷⁹ the majority of which were enacted in the beginning of the era.¹⁸⁰ The most noteworthy of these are the Augustan marriage laws: the *Leges Iuliae* in 18-17 BC, *Lex Aelia Sentia* in 4 CE, and the *Lex Papia Poppaea* in 4 CE.¹⁸¹ These laws criminalized adultery and imposed various financial and social sanctions on cohabitators.¹⁸² The laws also reduced the amount of slaves an owner could free at one time.¹⁸³ It is important to keep in mind that statute law was approved and enacted by the old popular voting assemblies.¹⁸⁴ As the republican structures declined, so too did statute law whilst the emperor and his bureaucracy gained authority as a direct source of law.¹⁸⁵ Two important, later edicts

¹⁷³ Ibbetson, *The Cambridge Companion to Roman Law*, 29.

¹⁷⁴ Plessis, *Studying Roman Law*, 20.

¹⁷⁵ Plessis, *Studying Roman Law*, 21.

¹⁷⁶ Plessis, *Studying Roman Law*, 21.

¹⁷⁷ Plessis, *Studying Roman Law*, 21.

¹⁷⁸ Plessis, *Studying Roman Law*, 21.

¹⁷⁹ Plessis, *Studying Roman Law*, 21.

¹⁸⁰ Plessis, *Studying Roman Law*, 21.

¹⁸¹ Plessis, *Studying Roman Law*, 21.

¹⁸² Plessis, *Studying Roman Law*, 21.

¹⁸³ Plessis, *Studying Roman Law*, 21.

¹⁸⁴ Plessis, *Studying Roman Law*, 21.

¹⁸⁵ Plessis, *Studying Roman Law*, 21.

should also be mentioned. First, an imperial decree under the order of Hadrian, set in motion in 135 CE, began the codification of the Praetorian Edict.¹⁸⁶ Second, the *Constitutio Antoniniana*, an imperial decree in 212 CE, was issued under Emperor Caracalla.¹⁸⁷ It granted Roman citizenship to almost all of the free inhabitants who lived within the Roman Empire.¹⁸⁸ The latter was of great legal significance. Before, Roman citizenship functioned as a determinant of whether the person in question was entitled to use Roman law in a Roman court.¹⁸⁹ This edict allowed the use of Roman law throughout the Empire such as Egypt where a prior, sophisticated legal culture had already existed before its annexation.¹⁹⁰ It can be assumed that the effect of the decree resulted in an amplification of existing legal pluralism.¹⁹¹

As each emperor attempted to consolidate power, the old republican assemblies waned to the point that, by 200 CE, the senate was merely a sounding board for the emperor.¹⁹² It was not just statute law that was affected by this.¹⁹³ The praetorian edict and juristic writings were also altered.¹⁹⁴ The praetorian edict, at the start of the period, was a substantial document that incumbent praetors were expected to adopt with little alteration.¹⁹⁵ After Hadrian's decree, it was redacted into a final form.¹⁹⁶ With the continuous movement towards increased centralized, bureaucratic procedure created by imperial tribunals, the formulary procedure followed by the praetorian edict fell into disuse.¹⁹⁷ It faced increased restriction by both imperial tribunals and province and was officially abolished in the mid-fourth century CE.¹⁹⁸ This gradual progression must have affected the way in which the praetorian edict functioned as a source of law.

¹⁸⁶ Plessis, *Studying Roman Law*, 21.

¹⁸⁷ Plessis, *Studying Roman Law*, 21.

¹⁸⁸ Plessis, *Studying Roman Law*, 21.

¹⁸⁹ Plessis, *Studying Roman Law*, 21.

¹⁹⁰ Plessis, *Studying Roman Law*, 21.

¹⁹¹ Plessis, *Studying Roman Law*, 21.

¹⁹² Plessis, *Studying Roman Law*, 22.

¹⁹³ Plessis, *Studying Roman Law*, 22.

¹⁹⁴ Plessis, *Studying Roman Law*, 22.

¹⁹⁵ Plessis, *Studying Roman Law*, 22.

¹⁹⁶ Plessis, *Studying Roman Law*, 22.

¹⁹⁷ Plessis, *Studying Roman Law*, 22.

¹⁹⁸ Plessis, *Studying Roman Law*, 22.

In terms of the jurists' written works, the prosperous, independent legal culture morphed into a culture of regulation as the Romans transitioned from republic to empire.¹⁹⁹ Jurists employed a more sophisticated form of reasoning toward the approach to law than had previously been applied.²⁰⁰ Augustus enacted a system of official regulation by which some jurists were given the right to produce authoritative responses (*ius respondendi*) (D. 1.2.2.49).²⁰¹ The criteria used to grant this privilege is unknown.²⁰² Pomponius states that it served to grant greater authority to the law, combatting the self-proclaimed jurists who gave contradictory opinions to judges and litigants and thus led the law into disrepute.²⁰³ It has also been suggested that the granting of the right may have involved the jurist's promise of political allegiance.²⁰⁴ This right lent prestige to the jurist and gave his opinion in law during litigation more weight.²⁰⁵ This is to the extent whereby, if all jurists who had been given this privilege were consulted and agreed on a point of law, the court was obligated to follow it.²⁰⁶ The jurists continued their former activities but they began to organize themselves into factions or schools known as the Proculians and Sabinians (on which see the next section).²⁰⁷ Jurists also began to be appointed to advise the emperor on matters of law and serve on imperial councils.²⁰⁸ This leads to the assumption that they were being increasingly employed by the imperial bureaucracy which ultimately led to the downfall of the profession of the jurist.²⁰⁹ Hadrian terminated this practice of *ius respondendi* and instead gave imperial enactments in his own name and within his own authority.²¹⁰

¹⁹⁹ Plessis, *Studying Roman Law*, 22.

²⁰⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 28.

²⁰¹ Plessis, *Studying Roman Law*, 22; Ibbetson, *The Cambridge Companion to Roman Law*, 38.

²⁰² Plessis, *Studying Roman Law*, 22.

²⁰³ Ibbetson, *The Cambridge Companion to Roman Law*, 38.

²⁰⁴ Plessis, *Studying Roman Law*, 22.

²⁰⁵ Plessis, *Studying Roman Law*, 22.

²⁰⁶ Plessis, *Studying Roman Law*, 22.

²⁰⁷ Plessis, *Studying Roman Law*, 22.

²⁰⁸ Plessis, *Studying Roman Law*, 22.

²⁰⁹ Plessis, *Studying Roman Law*, 22.

²¹⁰ Plessis, *Studying Roman Law*, 22; Ibbetson, *The Cambridge Companion to Roman Law*, 38.

During the late second and early third centuries CE, Roman legal theory reached its apex with the three greatest of the jurists: Paul, Papinian, and Ulpian.²¹¹ A large portion of these jurists' works survives in Justinians's *Digest*, attesting to their status in the Byzantine world.²¹² They all had a distinct approach to the law. Paul liked to seek the essences of legal concepts, Papinian was interested in outlining the fine distinctions in the law, and Ulpian preferred the pursuit of equity.²¹³ Nevertheless, they were all analytically flexible and they approached the law with imaginative adaptability.²¹⁴ The *responsa* system at this time also became more concrete as the law on a particular point could take advantage of the imperial rescripts.²¹⁵ Both Ulpian and Papinian probably served *a libellis* for the emperor and were tasked with writing these rescripts.²¹⁶ Rescripts however became increasingly problematic: rescripts determined the legal point definitively because they were, in theory, the decisions of the emperor.²¹⁷ Meanwhile, the jurists produced legal opinions which only gained similar authority when conclusive agreement occurred between them all.²¹⁸ As more and more rescripts were produced, the more problematic the scientific approach of the jurists became.²¹⁹ Each rescript had to be incorporated into the legal system, no matter how difficult its fit.²²⁰ After the murder of Ulpian in 223 CE, the development of reflective legal works fell into disuse.²²¹ Partly to blame for this was that the political unrest provided little time to 'discover' the law through the exercise of reason.²²² No jurist is named after 284 CE, ostensibly because their function was subsumed into the imperial bureaucracy.²²³

²¹¹ Ibbetson, *The Cambridge Companion to Roman Law*, 38-39.

²¹² Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹³ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²¹⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²²⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²²¹ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²²² Ibbetson, *The Cambridge Companion to Roman Law*, 39.

²²³ Plessis, *Studying Roman Law*, 22.

Emperor Diocletian came into power in 284 CE as sole emperor and started to implement substantial changes in reaction to the instability in the previous decades.²²⁴ He divided the empire into a Tetrarchy and began the start of the Dominate period, causing an even further movement towards bureaucratization.²²⁵ In this time, the emperor and his bureaucracy became the only source of lawgiving and legal authority.²²⁶ Constantine succeeded Diocletian (albeit not directly) and reformed the empire under his singular rule.²²⁷ He continued the bureaucratic reforms intended to stabilize the empire which were started by his predecessor.²²⁸ A significant change occurred when Constantine ended the Christian persecution under the Edict of Milan in 313 CE.²²⁹ Under Emperor Theodosius I, Christianity became the official religion of the Roman empire.²³⁰ The importance of Rome decreased as Constantine shifted the capital to Byzantium and renamed it Constantinople.²³¹

The Dominate was characterized by a centralized approach to both government and law.²³² The emperor, by this point, was no longer the first among equals but the supreme ruler of the Roman empire, anointed by divine right.²³³ The formulary procedure had long since declined into obscurity and was replaced by the more bureaucratic form of procedure known as *cognition*.²³⁴ As mentioned previously, juristic work shifted away from the making of scientific literature and towards the production of rescripts under the imperial bureaucracy.²³⁵ The treatment of juristic writings shifted and a sharper focus on custom took form.²³⁶ Judges now received salaries and were in the employment of the state.²³⁷ The formulary

²²⁴ Plessis, *Studying Roman Law*, 23.

²²⁵ Plessis, *Studying Roman Law*, 23.

²²⁶ Plessis, *Studying Roman Law*, 23.

²²⁷ Plessis, *Studying Roman Law*, 23.

²²⁸ Plessis, *Studying Roman Law*, 23.

²²⁹ Plessis, *Studying Roman Law*, 23.

²³⁰ Plessis, *Studying Roman Law*, 24.

²³¹ Plessis, *Studying Roman Law*, 24.

²³² Plessis, *Studying Roman Law*, 24.

²³³ Plessis, *Studying Roman Law*, 24.

²³⁴ Plessis, *Studying Roman Law*, 24.

²³⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²³⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²³⁷ Plessis, *Studying Roman Law*, 24.

procedure was formally eliminated in 342 CE.²³⁸ The emperor, in the effort to assert further authority over the judicial system, also formalized a system of appeals which created a hierarchy of courts.²³⁹ After the Empire's conversion to Christianity, bishops also slowly began to gain jurisdiction over particular parts of the law, mostly in law concerning the family.²⁴⁰ This resulted in the growth of bishop's courts and the steady fragmentation of state jurisdiction within secular and religious spheres.²⁴¹

Private law (*ius civile*), coming from statutes and jurists' writings, experienced 'vulgarization'.²⁴² Independent juristic activity came to an end in the third century CE as courts adapted a doctrine to deal with the existing writings of the jurists.²⁴³ In 426 CE, a legislation called the Law of Citations was created to regulate the proper applications of the sources of the classical period.²⁴⁴ The application of these writings became mechanical, very different from the intellectual vibrancy found in the classical period. Due to this loss of independent juristic activity on top of this trend towards bureaucratization, the move towards codification is unsurprising. In 438 CE, Emperor Theodosius II undertook legal codification titled the Theodosian Code.²⁴⁵ The Theodosian Code has only been preserved in an incomplete version of the text.²⁴⁶ It appears to have been based on two earlier unofficial codes: the *Codex Gregorianus* and *Codex Hermogenianus*.²⁴⁷ These Codes have not been preserved and little is known about them other than an index page.²⁴⁸ The Theodosian Code focuses on the imperial law spanning from the reign of Hadrian until Theodosius II's own respective reign.²⁴⁹ It involves public law and mentions a proposed future project on

²³⁸ Plessis, *Studying Roman Law*, 24.

²³⁹ Plessis, *Studying Roman Law*, 24.

²⁴⁰ Plessis, *Studying Roman Law*, 24.

²⁴¹ Plessis, *Studying Roman Law*, 24.

²⁴² Plessis, *Studying Roman Law*, 24.

²⁴³ Plessis, *Studying Roman Law*, 25.

²⁴⁴ Plessis, *Studying Roman Law*, 25.

²⁴⁵ Plessis, *Studying Roman Law*, 25.

²⁴⁶ Plessis, *Studying Roman Law*, 25.

²⁴⁷ Plessis, *Studying Roman Law*, 25.

²⁴⁸ Plessis, *Studying Roman Law*, 25.

²⁴⁹ Plessis, *Studying Roman Law*, 25.

private law.²⁵⁰ However, it does not appear that this project was ever undertaken.²⁵¹ This led to further codification of law under the Emperor Justinian who compiled four law books: The *Codex Constitutionum*, the *Digests*, the *Institutiones*, and the *Novellae Constitutiones Post Codicem*.

Justinian's *Institutiones* was substantially derived from the text of the same name by Gaius (which will be discussed in further detail in due course).²⁵² The jurists' writings still had its influence. However, Justinian's *Digest* quantitatively shows the decline of juristic texts. Within the *Digest*, there are approximately three thousand extracts from Ulpian and two thousand extracts from Paul.²⁵³ This is in sharp contrast to the tiny handful of extracts accredited to around six post-Severan jurists.²⁵⁴ The only exception to this was the jurist Hermogenianus who dates to the fourth century CE and has around a hundred extracts attributed to him.²⁵⁵ The title of his work, *Iuris Epitomarum Libri*, is informative: the text was not founded on independent thinking but rather a compendium of writings from the century previous by jurists such as Ulpian and Paul.²⁵⁶

The jurists did not die out in the fourth century CE.²⁵⁷ However, the successors to these jurists changed, working as part of the imperial bureaucracy and preparing rescripts instead of *responsa*.²⁵⁸ This function is similar to the way in which jurists worked to help guide the praetors and then the emperors while also working independently.²⁵⁹ This shift, in fact, reveals that the jurist's opinions took on a greater degree of authority.²⁶⁰ Rescripts created binding rules.²⁶¹ In the end of the third century CE, compilations of these imperial constitutions were created such as the *Codex Gregorianus* and *Codex Hermogenianus*.²⁶² These

²⁵⁰ Plessis, *Studying Roman Law*, 25.

²⁵¹ Plessis, *Studying Roman Law*, 25.

²⁵² Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²⁵³ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²⁵⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²⁵⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²⁵⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²⁵⁷ Honoré, *Emperors and Lawyers*, 71-185.

²⁵⁸ Honoré, *Emperors and Lawyers*, 71-185.

²⁵⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 40.

²⁶⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁶¹ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁶² Ibbetson, *The Cambridge Companion to Roman Law*, 41.

formed a corpus of unchanging legal rules.²⁶³ The works of the jurists before this time were not binding but could be cited in courts as a substantiation of what the law was.²⁶⁴ This procedure reached its zenith with the *Lex Citandi* in 426 CE, limiting citation in courts to five jurists: Gaius, Paul, Modestinus, Papinian, and Ulpian (C. Th. 1.4.3).²⁶⁵ The popularity of these jurists was due to a long lapse of time which occurred between this law and the “great jurists of the second century”.²⁶⁶ Furthermore, the later jurists of the third century CE had many differences of opinion.²⁶⁷ Discord arose from these differences.²⁶⁸ If the jurists’ were in consensus or there was a majority on the point of interest, this view prevailed.²⁶⁹ If they were evenly split, Papinian’s opinion was followed.²⁷⁰ The Roman legal scholar Austin credits this position to the extreme respect accorded to Papinian.²⁷¹ It is likely that this position was also due the fact that three of the other four jurists called upon in the *Lex Citandi*, Ulpian, Paulus, and Modestinus, were pupils of Papinian.²⁷² If the jurists were split and Papinian was silent on the issue, it was up to the judge to exercise his own discretion.²⁷³

This period has traditionally been viewed as the low point of Roman jurisprudence by modern scholars.²⁷⁴ The period following is perceived as having a lack of development and forward momentum as a result of the *Lex Citandi*.²⁷⁵ By this time, although the Romans followed the previous works of the jurists, the ability to reason when it came to issues in law was no longer a source of legal validity. As this process continued, the work of the men under the imperial bureaucracy became very distant reflections to the work

²⁶³ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁶⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁶⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁶⁶ Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, 148.

²⁶⁷ Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, 148.

²⁶⁸ Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, 148-9.

²⁶⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁷⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁷¹ Austin, *The Law of Citations and Seriatum Opinions*, 25.

²⁷² Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, 132.

²⁷³ Ibbetson, *The Cambridge Companion to Roman Law*, 41.

²⁷⁴ Austin, *The Law of Citations and Seriatum Opinions*, 22.

²⁷⁵ Austin, *The Law of Citations and Seriatum Opinions*, 22.

of jurists during the Late Republic and Early Empire. As such, they could no longer be considered jurists.²⁷⁶ Furthermore, after Christianity became the official religion of the empire in 325 CE, theology became the primary pursuit of learned men.²⁷⁷

Roman Legal Sources:

Roman law can be said to traditionally derive from a certain number of finite sources, resembling modern law in this way. The first of these is Roman statutes, which dealt with specific issues instead of a broad reiteration of the law.²⁷⁸ Statute law was largely dominant during the Republic; the Empire focused more so around the authority of the emperor and his bureaucracy.²⁷⁹ But many of the republican statutes carried sufficient force and were still taken into account during this period.²⁸⁰ Roman statutes often include highly formalized language.²⁸¹ Take, for example, the *Lex Iulia de maritandis ordinibus* from Augustus' reign, "Whoever is <or shall be> a senator or whoever is or shall be a son of any of them or a grandson through a son or a great-grandson through <a grandson> born to a son, none of them, knowingly with wrongful deceit, is to have as fiancée or wife a freedwoman <or someone> who herself is or shall have been an actress or whose father or mother is or shall have been an actor or actress. . . ."²⁸² In general, this law was influenced by the concept of patrilineal relationships (*agnatio*), which was an important aspect of the Roman law of persons.²⁸³ Moreover, the law aimed at including a wide number of potential unsuitable marriages by covering third-generation descendants of senators (and therefore most families of high standing at the time). It not only included women of one sort but of many; it banned marriage not only to

²⁷⁶ Plessis, *Studying Roman Law*, 22.

²⁷⁷ Austin, *The Law of Citations and Seriatum Opinions*, 23.

²⁷⁸ Plessis, *Studying Roman Law*, 26. For more on Roman statutes, see: C. G. Bruns, *Fontes Iuris Romani Antiqui*, 5th edn., ed. Th. Mommsen (Freiburg in Breisgau 1887); S. Riccobono et. al. (eds) *Fontes Iuris Romani Anteiustiniani*, 3 vols (Florence 1941-3); M. Crawford (ed.) *Roman Statutes*, 2 vols (London 1996).

²⁷⁹ Plessis, *Studying Roman Law*, 26.

²⁸⁰ Plessis, *Studying Roman Law*, 26.

²⁸¹ Plessis, *Studying Roman Law*, 26.

²⁸² Translated by Crawford II, 807.

²⁸³ Plessis, *Studying Roman Law*, 27.

freedwomen under these specifications but also to any woman who can be directly associated with a profession the upper-class Romans perceived as vulgar.

Two points must be acknowledged when evaluating statutes. First, these statutes had a very narrow purpose:²⁸⁴ they were meant to change a specific point of the law.²⁸⁵ Therefore, what the initial law was on this point prior to the statute as well as the assumed motivation for this change must be borne in mind.²⁸⁶ Second, these statutes tended to be interpreted conservatively by the Romans.²⁸⁷ It was common for Roman jurists to comment on a piece of legislation and therefore it is helpful to ascertain which jurists wrote specifically on this law.²⁸⁸ Further, it should be established whether it was integrated into the *Digest* of Justinian.²⁸⁹

The most abundant source for information on law from the classical period comes from Roman jurists. The most complete example, the *Institutes* of Gaius, was a textbook for law students written during the second half of the second century CE.²⁹⁰ The manual did not cease to be used until it was superseded by the *Institutes* of Justinian.²⁹¹ It was written by an unknown jurist (presumably with the praenomen of Gaius) from the eastern provinces of the Roman Empire.²⁹² It exemplifies the tradition of Roman legal writing during the period in which these jurists excelled.²⁹³ It begins by citing its own sources of law, “The laws [*iura*] of the Roman people consist of *leges*, plebiscites, *senatusconsulta*, imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned” (Gaius 1.2).²⁹⁴ The book has a number of notable features. Gaius gives and distinguishes the difference between a *lex* and a plebiscite,

²⁸⁴ Plessis, *Studying Roman Law*, 27.

²⁸⁵ Plessis, *Studying Roman Law*, 27.

²⁸⁶ Plessis, *Studying Roman Law*, 27.

²⁸⁷ Plessis, *Studying Roman Law*, 27.

²⁸⁸ Plessis, *Studying Roman Law*, 27. A useful source is F. Schulz, *Roman Legal Science* (Oxford 1954).

²⁸⁹ Plessis, *Studying Roman Law*, 27.

²⁹⁰ Plessis, *Studying Roman Law*, 29; Ibbetson, *The Cambridge Companion to Roman Law*, 29.

²⁹¹ Ibbetson, *The Cambridge Companion to Roman Law*, 29.

²⁹² Plessis, *Studying Roman Law*, 29.

²⁹³ Plessis, *Studying Roman Law*, 29.

²⁹⁴ Translated by Ibbetson, *The Cambridge Companion to Roman Law*, 29.

“A *lex* is a command and ordinance of the *populus*. A plebiscite is a command or ordinance of the *plebs*. The *plebs* differ from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *lex Hortensia* was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*” (Gaius 1.3).²⁹⁵

The fact that, for Gaius, *lex* took the most prominent position is revealing. Gaius’ notion of the law (*ius*) revolved around consciously laid down deliberation.²⁹⁶ Law was not a concept waiting to be immanently discovered, but something that existed in paradigm form and could be formed through human act.²⁹⁷ In the excerpt, Gaius also creates the hierarchy in which the *leges* of the three representative comitia came before the plebiscites.²⁹⁸ Plebiscites developed authority later than *leges* and only gained this authority through secondary legislation.²⁹⁹ Gaius makes his reasoning clear for this distinction: *leges* were enacted by the entire citizenry while plebiscites were only enacted by the plebeian subset.³⁰⁰ This emphasizes the continuity of legal thinking throughout the political caesura during the shift from republic to empire.³⁰¹

Gaius also defines *senatusconsulta*: “a *senatusconsultum* is a command and ordinance of the senate; it has the force of *lex* though this has been questioned” (Gaius 1.4). Again, there is a determinative force given to *lex* as a defining measurement. *Senatusconsulta* are not just binding to all Roman people but also equivalent to *lex* itself.³⁰² The ambiguity surrounding this binding force is peculiar; Gaius does not share what the doubt is nor is it explained elsewhere in the *Institutes*.³⁰³ It questions whether, during the Republic, the Senate in all its political power was really seen as having the authority to legislate for Rome (legislation

²⁹⁵ Translated by Ibbetson, *The Cambridge Companion to Roman Law*, 29.

²⁹⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

²⁹⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

²⁹⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

²⁹⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

³⁰⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

³⁰¹ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

³⁰² Ibbetson, *The Cambridge Companion to Roman Law*, 30.

³⁰³ Ibbetson, *The Cambridge Companion to Roman Law*, 30.

for Roman provinces would have been a separate matter).³⁰⁴ The Senate was able to make proposals to other bodies with the expectation that these proposals would be adopted, but it doesn't seem it could do more than that.³⁰⁵ During the early Empire however resolutions of the Senate were referred to as law, although this effect was given through clauses in the praetor's edict.³⁰⁶ For example, the *senatusconsultum Silianum* or the *senatusconsultum Macedonianum* was passed under Vespasian.³⁰⁷ It is merely a matter of semantics as to whether the *senatusconsultum* or the provision by the edict is the source of authority;³⁰⁸ thus, it can be suggested that this is the doubt referred to by Gaius.³⁰⁹ However, by the reign of Hadrian, *senatusconsulta* were self-standing beginning with the *senatusconsultum Tertullianum*.³¹⁰ The text of the edict at this time had been changed which prevented the changing in the law through this route.³¹¹ During this time, the text of the edict was changed so as to prevent the changing of the law in this way.³¹² This modification was a logical move at the time; the Senate was in all reality doing little else other than ratifying the proposals made on behalf of the emperor (D. 2.15.8).³¹³ The authority in the *senatusconsultum* did not come from the Senate's resolution but from the emperor's *oratio* (D. 2.15.8).³¹⁴ Gaius' textbook most likely presents the contemporary reality and procedure in 150s CE to 160s CE.³¹⁵

The final legislative source is an imperial constitution. "An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* through a *lex*" (Gaius 1.5).³¹⁶ This definition proves

³⁰⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 30-31.

³⁰⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³⁰⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³⁰⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³⁰⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³⁰⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 31. This is attributed to Hadrian by Justinian in *Inst.* 3.3.2.

³¹¹ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹² Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹³ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹⁶ For more on imperial constitution, see F. Millar, *The Emperor in the Roman World* (London, 1977) 228-259; J.P. Coriat, *Le Prince Législateur* (Rome, 1997).

problematic. Imperial constitutions were believably binding in the middle of the century. But through Gaius' inventory of legislative sources, the authority and force is again described with reference to *lex*.³¹⁷ According to Gaius, "A *lex* is a command and ordinance of the *populus*" (Gaius 1.3) This creates the notion that the *lex* is the ideal source of law, placing greater emphasis on the laws created by the whole rather than laws created by the emperor.³¹⁸ Gaius also does not just state that imperial constitutions are comparable in force to *leges*, he ascribes their authority, and by extension the emperor's power, to a *lex*,³¹⁹ the law in question being the *lex regia*, the resolution of the Roman people to recognize him as emperor.³²⁰ This begs the question, does Gaius carry an outdated sense of republicanism? Another jurist, Ulpian, provides this exact reasoning in his own works half a century later (D. 1.4.1).³²¹ Reasonably, this belief can be explained as the complex ideology created in the law and the continuity found between the republican constitution and the Empire.³²²

Imperial constitutions had three forms: decrees (*decreta*), letters (*epistulae*), and edicts (*edicta*).³²³ These three forms were simply the different methods in which the emperor and his bureaucracy could create legal legislation.³²⁴

Decrees (*decreta*) were rules resulting from the orders of the emperor sitting as a judge.³²⁵ Beginning in the reign of Augustus, the emperor had the right to make a decision outside of the normal progression of legal procedure.³²⁶ The emperor could do this by taking cognizance of a lawsuit.³²⁷ This procedure was known as the *cognitio extraordinaria*.³²⁸ The emperor would be accompanied by an advisory

³¹⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³¹⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 31.

³²⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 31-32.

³²¹ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³²² Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³²³ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³²⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³²⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 32. On decrees, see F. Millar, 228-240; T. Honoré, *Emperors and Lawyers*, 2nd edn. (Oxford, 1994), 28.

³²⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³²⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³²⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

consilium but it was the emperor alone who made the decisions.³²⁹ However, there is record of members of the advisory *consilium* being able to change the emperor's mind (D. 36.1.76.1; D. 4.2.13).³³⁰ There is another account in which the emperor followed the view of the jurist Papinian instead of the counsel of Paul (D. 36.1.76.1; D. 4.2.13).³³¹ The ruling by the emperor bound both parties but could also become a general rule;³³² for example, Marcus Aurelius passed the decision that violence did not necessarily have to involve any wounding (D. 4.2.13).³³³ During the beginning of the third century, the jurist Paul compiled three books of *decreta*, which survive in snippets in Justinian's *Digest*.³³⁴

The letters (*epistulae*), is a term used for all communications from the emperor.³³⁵ A subset of these letters were addressed to officials.³³⁶ But they were more often addressed to private individuals.³³⁷ These letters dealt with answers to petitions (*libelli*) and rescripts (*rescripta*) with the reply below the request.³³⁸ *Libelli* and rescripts replied to a question of law posed with imperial backing, unlike *responsa* which were merely the legal views and opinions of a question posed to *pontifices* or jurists.³³⁹ Rescripts found in Justinian's *Codex* mainly appealed to points of law in advance of a case being heard.³⁴⁰ However, they could deal with a range of issues, some of which were not necessarily legal.³⁴¹ They generally were formal letters sent from the office of the *ab epistulis* answering an official.³⁴² It is known that Julius Caesar followed this procedure with such petitions; it is plausible that this imperial practice was a perpetuation of Caesar's example.³⁴³ The jurist Papinian cites a rescript of Tiberius concerning adultery by public officials

³²⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³³⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³³¹ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³³² Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³³³ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³³⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³³⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³³⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³³⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³³⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³³⁹ Robinson, *The Sources of Roman Law*, 26.

³⁴⁰ Robinson, *The Sources of Roman Law*, 27.

³⁴¹ Robinson, *The Sources of Roman Law*, 27.

³⁴² Robinson, *The Sources of Roman Law*, 27.

³⁴³ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

(D. 48.5.39.10). Around the reign of Hadrian, there was a considerable increase of rescripts issued.³⁴⁴ This was most likely due to the increased legalization of government and resulted in the rising importance of *epistulae* as a source of law.³⁴⁵ The rescripts always gave the name of the emperor, presumably after having taken the advice from his *consilium*.³⁴⁶ By the start of the third century, however, the individual input of the emperor subsided and the drafting of rescripts was delegated to jurists who were part of the imperial bureaucracy,³⁴⁷ in particular to the *a libellis*, a principal secretary.³⁴⁸ Rescripts were largely dependent on the truth of the facts presented for imperial ruling, and therefore not verifiable.³⁴⁹ This meant they were less robust than *decreta*.³⁵⁰

The final category, Imperial edicts (*edicta*), were rules deliberately issued to create new law or modify the old; they were legislation in its strictest form.³⁵¹ Provincial governors and analogous magistrates had the authority to enact these edicts in the Republic.³⁵² This authority was then absorbed by the emperor, due to his magistral powers.³⁵³ The earliest imperial edicts seemed to have had limited application, they were limited to certain localities or particular individuals or groups.³⁵⁴ There was nothing stipulating that these edicts could not introduce general rules so, as time progressed, the edicts began to become more widespread.³⁵⁵ In 212 CE, Roman citizenship was granted to all free people within the Empire's territory and thus, all who lived in this territory were subject to the edicts (D. 1.5.17).³⁵⁶ By the end of the third

³⁴⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³⁴⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³⁴⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³⁴⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³⁴⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 33.

³⁴⁹ Robinson, *The Sources of Roman Law*, 27.

³⁵⁰ Robinson, *The Sources of Roman Law*, 27.

³⁵¹ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵² Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵³ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 32. However, this was not included in Gaius' work.

century, this practice was pervasive.³⁵⁷ It should also be mentioned that other administrative instructions to officials, *mandata*, were analogous to imperial edicts.³⁵⁸

Interestingly, Gaius does not incorporate custom into his sources of law,³⁵⁹ but it still cannot be ignored. In the *Institutes*, he does refer to a procedure of succession to property, which he relates was not produced by the XII Tables or the praetor's edict (Gaius 3.82).³⁶⁰ Rather, it was "received by common consent" (Gaius 3.82).³⁶¹ Gaius' teacher, Julian, also refers to custom based law in similar terms, but framed in a way predisposed to more general application (D. 1.3.31).³⁶²

Gaius also gives a short sketch of Roman jurists. "The answers of the learned are the decision and opinions of those who are permitted to establish the laws. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is free to follow whichever decision he pleases. This is declared by a rescript of the divine Hadrian" (Gaius 1.7). This raises some interesting points. First, unanimous juristic opinion, when provided without anonymity, shaped a new rule equal to a *lex*.³⁶³ Considering jurists were not appointed in any way and did not carry any religious authority like their pontifical predecessors, this is surprising.³⁶⁴ Nevertheless, it is appropriate that over the process of centuries, juristic opinion would be given such force.³⁶⁵ Jurists went from recording and applying custom to creating it. It is also important to note that at the time Gaius was writing his text, if the jurists disagreed, the judge had the liberty to decide how he pleased.³⁶⁶ Realistically, there would have been a lot of room for disagreement and therefore this would have been a frequent situation.³⁶⁷ It is hard to believe that jurists

³⁵⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 32.

³⁵⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 29; 39.

³⁶⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

³⁶¹ Ibbetson, *The Cambridge Companion to Roman Law*, 39.

³⁶² Ibbetson, *The Cambridge Companion to Roman Law*, 39.

³⁶³ Ibbetson, *The Cambridge Companion to Roman Law*, 35.

³⁶⁴ Ibbetson, *The Cambridge Companion to Roman Law*, 35.

³⁶⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 35.

³⁶⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 35.

³⁶⁷ Ibbetson, *The Cambridge Companion to Roman Law*, 35.

would have accepted this lack of influence without some qualification.³⁶⁸ Their activity beginning in the Late Republic implies the opposite of this.³⁶⁹ Therefore, Gaius' statement should be understood with more nuance; when the law created juristic disagreement, the law was as yet undefined.³⁷⁰ The judge had no obvious law he was required to follow but should still heed the advice of the jurists and employ his own reason to ascertain the 'true' rule and apply it.³⁷¹

Gaius' text is conceptually split into three sections: persons, things, and actions.³⁷² Although these sections will not be covered within this chapter, these divisions have had a lasting impact on Western jurisprudence.³⁷³ An example passage from the *Institutes* text concerns the law of testate succession: "wills properly made may be invalidated if the testator changes his mind. But it is clear that a will does not become invalid merely because the testator wants to rescind it. Why, even if he cuts the thread holding it together it is still valid by state law [read: civil law]. Indeed, even if he destroys or burns the will, what was written in it is no less valid, although proof of what that was may be difficult" (Gaius 2.151).³⁷⁴ This branch of law falls into Gaius' classification of the law of 'things', inheritance was a way to acquire ownership of 'things'.³⁷⁵ This passage gives us a clue of a Roman will's physical form; it is held together by a thread. When we add this information with other sources, we know that a Roman will was a scroll sealed with a thread to maintain the confidentiality of what is written inside.³⁷⁶ The main legal point emphasized by Gaius is that a testator is allowed to modify his wishes after the will was made.³⁷⁷ The authority of this law does

³⁶⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 35.

³⁶⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 36.

³⁷⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 36.

³⁷¹ Ibbetson, *The Cambridge Companion to Roman Law*, 36.

³⁷² Plessis, *Studying Roman Law*, 29.

³⁷³ Plessis, *Studying Roman Law*, 29.

³⁷⁴ Translation by Gordon/Robinson, *non vidi*; Plessis, *Studying Roman Law*, 30. Testate succession involves inheritance based on a valid will which includes the wishes of the deceased.

³⁷⁵ Plessis, *Studying Roman Law*, 30.

³⁷⁶ Plessis, *Studying Roman Law*, 30.

³⁷⁷ Plessis, *Studying Roman Law*, 30.

not lie in any statute, but grew organically from Roman civil law.³⁷⁸ It came out of legal custom and was augmented by legal practice.³⁷⁹

Second, Gaius' *Institutes* was written in advance of the widespread endowment of Roman citizenship to almost all of the free inhabitants of the Empire in 212 CE.³⁸⁰ Its focus revolves around Roman law in the sense of the *ius civile* which was only available to Roman citizens.³⁸¹ Little attention is paid to the legal position of non-citizens (who did not have access to Roman civil law) living within the boundaries of the Empire at the time.³⁸² It is also clear that Gaius was also concerned with the history of Roman law and frequently mentions institutions and rituals which had fallen into disuse by his time.³⁸³ Therefore, the *Institutes* of Gaius can give us insight into earlier periods of Roman legal history. Lastly, Gaius is known to have been a follower of the Sabinian school of jurists.³⁸⁴

During the classical period, Roman jurists had started to affiliate themselves with one of the two 'schools', the Proculians and the Sabinians.³⁸⁵ It is not quite clear where these schools differed. Some modern scholars believe that the differences were philosophical.³⁸⁶ Others argue that one 'school' held republican sympathies and the other imperial.³⁸⁷ Another theory is that they were two educational schools since individual jurists, ostensibly, engaged in teaching.³⁸⁸ Gaius sides with the Sabinian 'school' on most matters of legal controversy. Since we have so much information which has survived to us in his *Institutes* and Justinian's *Digest*, differences between these two 'schools' can be located but they are few in

³⁷⁸ Plessis, *Studying Roman Law*, 30.

³⁷⁹ Plessis, *Studying Roman Law*, 30.

³⁸⁰ Plessis, *Studying Roman Law*, 29.

³⁸¹ Plessis, *Studying Roman Law*, 29.

³⁸² Plessis, *Studying Roman Law*, 29. See W.M. Gordon and O.F. Robinson. *The Institutes of Gaius* (London 1988) for an English translation and a modern critical edition of the Latin text.

³⁸³ Plessis, *Studying Roman Law*, 29.

³⁸⁴ Plessis, *Studying Roman Law*, 29.

³⁸⁵ Plessis, *Studying Roman Law*, 29; Ibbetson, *The Cambridge Companion to Roman Law*, 37.

³⁸⁶ Plessis, *Studying Roman Law*, 29; Ibbetson, *The Cambridge Companion to Roman Law*, 37.

³⁸⁷ Plessis, *Studying Roman Law*, 29; Ibbetson, *The Cambridge Companion to Roman Law*, 37.

³⁸⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 37.

number.³⁸⁹ During the middle of the second century CE, the ‘schools’ declined: Gaius is the last jurist to have his allegiance recorded.³⁹⁰ Afterwards, juristic disagreement continued only at an individual level.³⁹¹

An important source of juristic works is Justinian’s *Digest*, different in format than Gaius’ *Institutes*. It was anthologized in the fifth century CE in a great project under Emperor Justinian to compile a manageable *corpus* of Roman law.³⁹² It contains information on juristic literature from both the classical period and the period during Justinian’s reign.³⁹³ The *Digest* was put together by a commission of seventeen men, instructed to review the books of thirty-eight jurists from the classical period.³⁹⁴ These thirty-eight jurists were the most important of their time and awarded the *ius respondendi*;³⁹⁵ Gaius was one of them.³⁹⁶ Two thousand books composed by these thirty-eight jurists were assessed and redacted into thematic titles by the commission.³⁹⁷ Within these thematic titles, extracts of the original texts were arranged in an order which reflected the practices of the commission.³⁹⁸ These texts include Sabinus’ *Ius Civile*; collections of real or hypothetical cases; the praetor’s edict; and monographs which concern a variety of subjects such as criminal law, military law, and testamentary trusts (*fideicommissa*) which did not fall under the purview of the edict.³⁹⁹ Within the jurists’ own works, there are references to each other, sometimes in agreement and sometimes in disagreement.⁴⁰⁰

For example, “D. 23.2.31 Ulpian, *Lex Iulia et Papia*, book 6. Where a senator is given imperial permission to marry a freedwoman, she will be his lawful wife”.⁴⁰¹ This excerpt is found under the title

³⁸⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 37.

³⁹⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 38.

³⁹¹ Ibbetson, *The Cambridge Companion to Roman Law*, 38.

³⁹² Plessis, *Studying Roman Law*, 30; Ibbetson, *The Cambridge Companion to Roman Law*, 37.

³⁹³ Plessis, *Studying Roman Law*, 30; Ibbetson, *The Cambridge Companion to Roman Law*, 37. For a translation, see A. Watson (ed.) *The Digest of Justinian*, rev. edn. 4 vols (Philadelphia 2009).

³⁹⁴ Plessis, *Studying Roman Law*, 30.

³⁹⁵ Plessis, *Studying Roman Law*, 30-31.

³⁹⁶ Plessis, *Studying Roman Law*, 31.

³⁹⁷ Plessis, *Studying Roman Law*, 31.

³⁹⁸ Plessis, *Studying Roman Law*, 31.

³⁹⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 37.

⁴⁰⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 37.

⁴⁰¹ Translated by A. Watson. Plessis, *Studying Roman Law*, 31.

‘formation of marriage’.⁴⁰² Here the compilers of the *Digest* list the provenance and specific work of the section, as they do throughout the *Digest*.⁴⁰³ By identifying the author and work, we are able to date the excerpt.⁴⁰⁴ Ulpian, cited frequently in the *Digest*, lived during the 3rd century CE. From this, we can draw conclusions of what the state of the law was like during that period.⁴⁰⁵ Roman jurists composed many different kinds of works: theoretical works, collections of legal advice, and commentaries on statutes.⁴⁰⁶ By looking at this statement attributed to Ulpian, we can assume the effect of this statute could have been avoided through the consent of the emperor to marry a freedwoman.⁴⁰⁷ Theoretically, it is possible to at least partially recreate Ulpian’s original book by compiling all of the excerpts from the *Digest* together.⁴⁰⁸ However, there are two complications resulting from these texts. First, the format used in these works and employed by the classical jurists would have been nearly three centuries old by the time they were compiled in the *Digest*;⁴⁰⁹ it is not clear whether the format was standardized by the compilers and thus changed from the original.⁴¹⁰ Second, it is possible the compilers changed the texts in order to replicate the law of the Justinianic period.⁴¹¹ But it is largely assumed that most of these possible changes were purely cosmetic.⁴¹²

Another historical source concerns law from the classical period: the praetorian edict. As examined earlier, praetors were responsible for the administration of justice in Rome.⁴¹³ Every year, an edict would be produced which laid out the new legal grounds by which praetors were willing to provide legal relief.⁴¹⁴ Gaius describes these types of legislation in his *Institutiones*: “the right of issuing edicts is possessed by

⁴⁰² Plessis, *Studying Roman Law*, 31.

⁴⁰³ Plessis, *Studying Roman Law*, 31.

⁴⁰⁴ Plessis, *Studying Roman Law*, 31.

⁴⁰⁵ Plessis, *Studying Roman Law*, 31.

⁴⁰⁶ Plessis, *Studying Roman Law*, 31. The *Lex Iulia et Papia* was most likely a commentary on the statute for which it was named. The aim of the statute was to ban intermarriage between the suitable Romans and the ‘unsuitable’.

⁴⁰⁷ Plessis, *Studying Roman Law*, 31.

⁴⁰⁸ Plessis, *Studying Roman Law*, 31. An attempt has been made to do this by Otto Lenel in a multi-volume work: *Palingenesia Iuris Civilis* (Leipzig 1899).

⁴⁰⁹ Plessis, *Studying Roman Law*, 32.

⁴¹⁰ Plessis, *Studying Roman Law*, 32.

⁴¹¹ Plessis, *Studying Roman Law*, 32.

⁴¹² Plessis, *Studying Roman Law*, 32.

⁴¹³ Plessis, *Studying Roman Law*, 27.

⁴¹⁴ Plessis, *Studying Roman Law*, 27.

magistrates of the Roman people. Very extensive law [*ius*] is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar and consequently the aedilician edict is not published there” (Gaius 2.151).⁴¹⁵ Praetors had started to produce *formulae* structuring lawsuits in the third century BC and these *formulae* were redacted into each edict by the first century BC.⁴¹⁶ By the Principate, succeeding praetors had followed this tradition for approximately a hundred and fifty years.⁴¹⁷ These edicts provided a litany of available civil law defenses and remedies.⁴¹⁸ By the end of the Republic, however, the edict ceased to be an innovative medium for legislation.⁴¹⁹

During the reign of Hadrian, the emperor commissioned the paramount jurist at the time, Julian, to redact a definitive form of the edict.⁴²⁰ It was established that the preceding praetors were bound by this final text (the Edict),⁴²¹ and no further changes could be made by an emperor thereafter (C. Just. 18).⁴²² The Edict listed the *formulae* of actions created by successive praetors who came to adopt the preceding edicts of former praetors while eliminating failed remedies.⁴²³ The Edict also included the *formulae* for other forms of summary relief such as interdicts.⁴²⁴ Through the study of the structure of the Edict, it can be determined when certain remedies were initiated by a praetor into the law and possibly what factors caused this new inclusion.⁴²⁵ An example excerpt from the Edict is the formula of letting and hiring estates (*actio locati*): “Whereas Aulus Agerius [plaintiff] let to Numerius Negidius [defendant] the plot of land in question

⁴¹⁵ Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴¹⁶ Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴¹⁷ Plessis, *Studying Roman Law*, 27.

⁴¹⁸ Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴¹⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴²⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴²¹ Plessis, *Studying Roman Law*, 27; Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴²² Ibbetson, *The Cambridge Companion to Roman Law*, 34.

⁴²³ Plessis, *Studying Roman Law*, 27.

⁴²⁴ Plessis, *Studying Roman Law*, 27.

⁴²⁵ Plessis, *Studying Roman Law*, 27. A possible reconstruction of the Edict is recorded by O. Lenel, *Das Edictum Perpetuum*, 2nd improved edn. (Leipzig, 1907).

which is the object of the lawsuit, whatever on those grounds the defendant ought to do or give to the plaintiff in accordance with good faith, I instruct you, O judge, to condemn the defendant or if it cannot be proven to acquit him.”⁴²⁶ An interesting aspect of this formula is that good faith was an important part of assessing the measure of the condemnation.⁴²⁷

The praetorian Edict was a public document and consequently displayed in the forum.⁴²⁸ These *formulae* would have been seen by any litigants who wished to sue on these bases.⁴²⁹ It stipulated the framework in which the parties had to state their claim in law.⁴³⁰ These *formulae* would have been adapted by the litigant to include the specifics of the case in front of the praetor during the first stage of the lawsuit.⁴³¹ The parties would then have the ability to add these claims and defenses to the *formulae* until all legal issues had been set out in the claim.⁴³² Habitually, both parties would have sought advice from jurists before this stage.⁴³³ Once both parties as well as the praetor were content with the *formulae*, a judge would have been appointed and the lawsuit would have progressed to the second stage.⁴³⁴

The praetorian Edict is not just an essential source for reconstructing classical Roman law, but exhibits the relationship between legal theory and legal practice. Many of the holders of the praetorship had no expertise in the field of law.⁴³⁵ It is assumed that jurists advising the praetor were the creators of the technical nature of the *formulae* within the Edict.⁴³⁶ This raises questions about the role of jurists to this extent and their relationship to legal practice, since the praetor was not technically a lawmaker and could not change the *ius civile*.⁴³⁷ The jurists also wrote commentaries on the Edict,⁴³⁸ and studying their

⁴²⁶ Translation from Lenel, 111; Plessis, *Studying Roman Law*, 28.

⁴²⁷ Plessis, *Studying Roman Law*, 28.

⁴²⁸ Plessis, *Studying Roman Law*, 28.

⁴²⁹ Plessis, *Studying Roman Law*, 28.

⁴³⁰ Plessis, *Studying Roman Law*, 28.

⁴³¹ Plessis, *Studying Roman Law*, 28.

⁴³² Plessis, *Studying Roman Law*, 28.

⁴³³ Plessis, *Studying Roman Law*, 28.

⁴³⁴ Plessis, *Studying Roman Law*, 28.

⁴³⁵ Plessis, *Studying Roman Law*, 28.

⁴³⁶ Plessis, *Studying Roman Law*, 28.

⁴³⁷ Plessis, *Studying Roman Law*, 28.

⁴³⁸ Plessis, *Studying Roman Law*, 28.

comments on certain points of the Edict allows us to gain insight into methods of analysis and interpretation of these *formulae* during the classical period of Roman law.⁴³⁹

An additional Roman law source from the classical period is imperial ‘constitutions’, compiled in part in Justinian’s *Codex Iustinianus*.⁴⁴⁰ Imperial constitutions were previously discussed in the context of Gaius’ work. Here, there is a slightly different approach written later in the progression of Roman Law. To understand this text, several comments must be made about the changing nature of law during the Principate. Throughout the Republic, a statutory convention required that a statute could not be passed if a certain legislative procedure had already been completed in the voting assemblies.⁴⁴¹ But during the Principate, the enactment of statute law by voting assemblies declined in exchange for new forms of legislation.⁴⁴² Beginning in the reign of Hadrian, the Senate acquired the force of law which continued into the Dominate. After this, the ‘constitutions’ of the emperor, created through his bureaucracy, progressively came to have the force of law.⁴⁴³ The term ‘constitutions’ encompasses three forms of imperial law in Justinian’s work. Edicts, which referred to the aforementioned legally binding directives issued under his authority as a supreme magistrate, were continuous until altered by a successive emperor.⁴⁴⁴ Missives to imperial governors and other officials which were known as *mandata*.⁴⁴⁵ *Mandata* were administrative orders to subordinates and did not answer a particular question previously posed.⁴⁴⁶ These *mandata*, along with the other *epistula* to individual citizens were technically only applicable during the reign of the emperor who created them.⁴⁴⁷ The last form was *decreta*.⁴⁴⁸ *Decreta* occurred when the emperor ruled in a

⁴³⁹ Plessis, *Studying Roman Law*, 28-29.

⁴⁴⁰ See Fred Blume for a good English language translation.

⁴⁴¹ Plessis, *Studying Roman Law*, 32.

⁴⁴² Plessis, *Studying Roman Law*, 32.

⁴⁴³ Plessis, *Studying Roman Law*, 32.

⁴⁴⁴ Plessis, *Studying Roman Law*, 32.

⁴⁴⁵ Plessis, *Studying Roman Law*, 32.

⁴⁴⁶ Robinson, *The Sources of Roman Law*, 26.

⁴⁴⁷ Plessis, *Studying Roman Law*, 32.

⁴⁴⁸ Plessis, *Studying Roman Law*, 32.

legal dispute brought before him, these rulings were binding in perpetuity and changed the law.⁴⁴⁹ Another version, *rescripta*, as seen earlier, were written responses in answer of petitions from individuals or legal officials on points of law.⁴⁵⁰ They too were binding and changed the law.⁴⁵¹ *Rescripta* are the most common form of law in the *Codex Iustinianus*.⁴⁵²

An example of imperial constitutions can be found in the *Codex Iustinianus*, “C. 4.65.3 The Emperor Antoninus to Flavius Callimorphus. You should not be expelled, against your will, from the room which you say you hired, if you pay the rent to the owner of an apartment house, unless such owner proves that it is necessary for his own use, or that he wants to improve it, or that you conducted yourself badly in the rented room.”⁴⁵³ Similar to the *Digest*, the ‘constitutions’ in the codex were organized into thematic titles and were arranged chronologically within the title from earliest to latest.⁴⁵⁴ Each text contains the name of author as well as the petitioner (although this was often listed as unknown) and the date.⁴⁵⁵ The place of promulgation is also usually given.⁴⁵⁶ It is important to compare these ‘constitutions’ to the juristic law on this matter.⁴⁵⁷ This helps to determine whether the emperor had changed the law through his bureaucracy.⁴⁵⁸

Custom was also a recognized formal source of law. This is reflected in the treatment of sources of law in the *Institutes* of Justinian (*Inst.* 1.2.3-9).⁴⁵⁹ There is a basic division made between unwritten and written law.⁴⁶⁰ Sources of written law laid out in the *Institutes* are similar to those given by Gaius: *lex*, *senatusconsulta*, plebiscites, magisterial edicts, imperial constitutions, and the opinions of jurists.⁴⁶¹

⁴⁴⁹ Plessis, *Studying Roman Law*, 32.

⁴⁵⁰ Plessis, *Studying Roman Law*, 33.

⁴⁵¹ Plessis, *Studying Roman Law*, 33.

⁴⁵² Plessis, *Studying Roman Law*, 33.

⁴⁵³ Section dated to January 6th, 214 CE. Translation by F. Blume.

⁴⁵⁴ Plessis, *Studying Roman Law*, 33.

⁴⁵⁵ Plessis, *Studying Roman Law*, 33.

⁴⁵⁶ Plessis, *Studying Roman Law*, 33.

⁴⁵⁷ Plessis, *Studying Roman Law*, 33.

⁴⁵⁸ Plessis, *Studying Roman Law*, 33.

⁴⁵⁹ Ibbetson, *The Cambridge Companion to Roman Law*, 42.

⁴⁶⁰ Ibbetson, *The Cambridge Companion to Roman Law*, 42.

⁴⁶¹ Ibbetson, *The Cambridge Companion to Roman Law*, 42.

However, greater force is given to imperial constitutions; the text beginning with Ulpian's statement that what pleases the prince carries the force of *lex* (*Inst.* 1.2.6).⁴⁶² However, this is offset by the unwritten law (i.e. custom) which derives its force from the tacit consent of the people, "The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute" (*Inst.* 1.2.9).⁴⁶³ Custom was also listed as a source by Cicero. For Cicero, custom was the *mores maiorum*, the ancestral tradition.⁴⁶⁴ It served as an appeal to the jury who has to be persuaded on his point of view.⁴⁶⁵ Custom was a coherent concept to the Romans, paternal power seems to have been simply a customary growth and has no perceived origin.⁴⁶⁶ Robinson, a historian of Roman law, believes that Gaius did not interpret custom as a source of law, because he believed it was subsumed in the jurists' interpretations.⁴⁶⁷ Before the praetorship was created, custom was accepted as so traditional that it did not require any specific authority.⁴⁶⁸

Another source for Roman law, *negotia*, are written records of legal practice which have been preserved on papyrus or wax tablets.⁴⁶⁹ Many of these have only come to light in the past fifty years.⁴⁷⁰ For example, "TPSulp. 45. I, Diognetus, slave of Gaius Novius Cypaerus, have written: By order of my master Cypaerus and in his presence I have leased to Hesychus, slave of Tiberius Iulius Evenus, imperial freedman, Bunker No. 12 on the middle level of the publicly owned Bussian warehouses in Puteoli, ..."⁴⁷¹ The importance of this document lies in the fact that slaves were permitted to conduct transactions on behalf of

⁴⁶² Ibbetson, *The Cambridge Companion to Roman Law*, 42.

⁴⁶³ Ibbetson, *The Cambridge Companion to Roman Law*, 42. Translated by J.B. Moyle, *Project Gutenberg's The Institutes of Justinian*.

⁴⁶⁴ Robinson, *The Sources of Roman Law*, 28.

⁴⁶⁵ Robinson, *The Sources of Roman Law*, 28.

⁴⁶⁶ Robinson, *The Sources of Roman Law*, 28.

⁴⁶⁷ Robinson, *The Sources of Roman Law*, 28.

⁴⁶⁸ Robinson, *The Sources of Roman Law*, 28.

⁴⁶⁹ Plessis, *Studying Roman Law*, 33. Most *negotia* can be found in Riccobono (ed.), vo.3.

⁴⁷⁰ Plessis, *Studying Roman Law*, 33.

⁴⁷¹ Translation by Jones, *The Bankers of Puteoli*, (2006) 95. This selection comes from the Sulpichii archive, a collection of financial documents found in Puteoli which belonged to the Sulpichii banker family.

their masters.⁴⁷² These documents, in general, give a better understanding of Roman law in action and how the abstract rules of Roman law, considered by jurists in their works, were applied in reality.⁴⁷³

In addition to *negotia*, there are a massive amount of papyri found in Egypt which record legal traditions from the period of Roman occupation.⁴⁷⁴ However, there is a limit to their effectiveness as sources for Roman law. Roman provinces such as Egypt previously had a sophisticated Indigenous legal system prior to Roman annexation which was, in turn, a synthesis of Egyptian and Greek traditions.⁴⁷⁵ In many instances, the new Roman authorities were happy to conduct a legal pluralism by which local courts were left to operate with local laws.⁴⁷⁶ Thus, it is difficult when assessing a law laid out in a papyrus to determine whether it is Roman or of local origin.⁴⁷⁷

A final source used when studying Roman law can be found in the vast body of Latin literature which originates from the classical period.⁴⁷⁸ Well-known authors such as Cicero, Horace, Pliny the Elder, Pliny the Younger, Celsus, and Quintilian provide valuable information on the law.⁴⁷⁹ Two things must be kept in mind when assessing statements in Latin literature. First, each author wrote in a particular genre (i.e., history, philosophical treatises, moralistic works) and thus the statements regarding the law had to fit in with the work's genre.⁴⁸⁰ Therefore, when Cicero remarks that law is a discipline with which one occupies oneself in old age, it should not be taken as a literal statement but rather as a quip about the worth of the law for a professional advocate.⁴⁸¹ Second, it should be kept in mind that these authors were not professional

⁴⁷² Plessis, *Studying Roman Law*, 33. This transaction seems to bind his master completely to the agreement.

⁴⁷³ Plessis, *Studying Roman Law*, 33-34.

⁴⁷⁴ Plessis, *Studying Roman Law*, 34.

⁴⁷⁵ Plessis, *Studying Roman Law*, 34.

⁴⁷⁶ Plessis, *Studying Roman Law*, 34.

⁴⁷⁷ Plessis, *Studying Roman Law*, 34.

⁴⁷⁸ Plessis, *Studying Roman Law*, 34.

⁴⁷⁹ Plessis, *Studying Roman Law*, 34. Most Latin works can be found in a standardised form in the Loeb series.

⁴⁸⁰ Plessis, *Studying Roman Law*, 34.

⁴⁸¹ Plessis, *Studying Roman Law*, 34.

jurists with a special interest in the law.⁴⁸² Their statements are at times incomplete or incorrect.⁴⁸³ They show only the aspect of law that they wanted to reveal in the context of their narrative.⁴⁸⁴

Roman law is an extensive history spanning 743 BC to 565 CE. Throughout this time, the law continuously became codified and, by the third century CE, was largely dependent on previously established law. Legal experts initially were members of the pontifical priesthood but this role was subsumed by jurists, members of the affluent classes who studied justice as a paradigm. Gradually, these jurists and their works became a part of the empirical bureaucracy. Law could be found in various sources. The initial sources of law developed from the people: *leges* and plebiscites. The elites gained law-making power through *senatusconsulta* and could give non-binding legal opinions through *responsa*.⁴⁸⁵ The praetorship was created and the praetorian edict produced annually, which was later formalized into a final form, also carried the force of law. As the Republic shifted to Principate, imperial constitutions were developed which had three forms: decrees (*decreta*), letters (*epistulae*), and edicts (*edicta*). These three forms of law were merely the different methods in which the emperor and his bureaucracy could create legal legislation. Custom also served as an important form of law, especially at the beginning of the Roman legal tradition.

⁴⁸² Plessis, *Studying Roman Law*, 34.

⁴⁸³ Plessis, *Studying Roman Law*, 34.

⁴⁸⁴ Plessis, *Studying Roman Law*, 34.

⁴⁸⁵ Elites would have largely held the role of pontifex or jurist.

Chapter 2

Roman Criminal Law and Punishment

Roman criminal law developed from the central principle of *vindicatio* (related to the Italian *vendetta*).⁴⁸⁶ Cicero considered this principle to be a part of natural law, a subset of the moral principles from which all human conduct had its basis (Cic. *Inv.* 2.66). *Vindicatio* is the instinct which repels violence and insult from ourselves or loved ones by means of self-defense and revenge. During the early phases of criminal law, we see two other governing principles, *religio* and *pietas*: respect for the divine and for fatherland and parents.⁴⁸⁷ As the Roman Republic developed, reward of virtue and punishment of vice began to be observed as a critical function of social coherence. On this, Polybius noted,

“There is, however, a part left to the people, and it is a most important one. For the people is the sole fountain of honour and of punishment; and it is by these two things and these alone that dynasties and constitutions and, in a word, human society, are held together: for where the distinction between them is not sharply drawn both in theory and practice, there no undertaking can be properly administered, as we might expect when good and bad are held in exactly the same honour.” (Polyb. 6.14)

Lack of criminal legal procedure contributed to civil strife in the late Republic.⁴⁸⁸ Furthermore, the underdevelopment of legal procedure within a criminal sphere may indicate that punishment was not as prominent as we believe. Therefore, as Augustus reformed Rome’s laws, he extended the criminal law as part of his commission from the senate.⁴⁸⁹ This helped him to supervise the morality of the people and to buttress control of the people’s behavior in the efforts to legally reinforce his newfound, monarchical

⁴⁸⁶ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁴⁸⁷ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁴⁸⁸ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁴⁸⁹ Lintott, *The Cambridge Companion to Roman Law*, 302.

position.⁴⁹⁰ Other principles also arose during this time: the ethos of *humanitas*, the civilizing instinct, and cognate notions of *clementia* (mercy) and *aequitas* (fairness).⁴⁹¹ But these values needed to be balanced with the *utilitas publica* (public interest).⁴⁹²

Initially, there was no systematic criminal code,⁴⁹³ and the Roman criminal system, like other systems of classical antiquity, had no public prosecutor. Criminal law in Rome began with the need to control private retaliation and manage ritual pollution.⁴⁹⁴ Early Rome consisted of nuclear families, under the power of a *paterfamilias*, which were themselves related to larger kin groups. Certain laws ascribed to various Roman kings defined one who committed the intentional murder of a free man as *paricida* (kin-murderer).⁴⁹⁵ Therefore, the *paricida* was open to the same punishments as they would have been if they had murdered within their kin group.⁴⁹⁶ Romulus is accredited with having allowed the death penalty for any woman who drank wine or committed adultery (Dion. Hal. 2.25.6).⁴⁹⁷ However, he did not ordain this penalty as it fell under the jurisdiction of the family court.⁴⁹⁸ Numa provided that involuntary homicide, on the other hand, resulted in the murderer conducting a public sacrifice of a ram for the kin of the victim (Servius on Verg. *Ecl.* 4.43; Livy 1.265-6).⁴⁹⁹ Tullus Hostilius is attributed with changing this punishment: the guilty party was now to be fixed to an ‘infertile tree’ and beaten to death on the charge of treason.⁵⁰⁰ Assaults on parents by sons or daughters-in-law severe enough to cause a cry for help resulted in the assailant’s consecration to the familial gods.⁵⁰¹ This essentially equated to social death if not bodily death,

⁴⁹⁰ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁴⁹¹ Baumen, *Crime and Punishment in Ancient Rome*, 5.

⁴⁹² Baumen, *Crime and Punishment in Ancient Rome*, 5.

⁴⁹³ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁴⁹⁴ Lintott, *The Cambridge Companion to Roman Law*, 303. This progression seems identical to the development of criminal law in other cultures such as ancient Athens. They developed their homicide laws under Draco as a way to halt blood feuds and regulate *miasma*.

⁴⁹⁵ Lintott, *The Cambridge Companion to Roman Law*, 303.

⁴⁹⁶ Lintott, *The Cambridge Companion to Roman Law*, 303.

⁴⁹⁷ Baumen, *Crime and Punishment in Ancient Rome*, 7.

⁴⁹⁸ Baumen, *Crime and Punishment in Ancient Rome*, 127.

⁴⁹⁹ Baumen, *Crime and Punishment in Ancient Rome*, 7; Lintott, *The Cambridge Companion to Roman Law*, 303.

⁵⁰⁰ Baumen, *Crime and Punishment in Ancient Rome*, 7.

⁵⁰¹ FIRA I pp. 9, 13–4, 17; Lintott, *The Cambridge Companion to Roman Law*, 303.

it removed the assailant from both their kin and the people as a whole. Further, an offender convicted of setting fire to a barn or heap of grain was subject to being burned alive and an offender convicted of casting a spell on someone or charming away his crops was to be beaten to death (Plin. *NH* 18.12; D. 47.9.9; Cic. *Rep.* 4.12; Cornutus Persius 1.137; Plin. *NH* 28.17.).⁵⁰²

The linear progression of punishment outlined by ancient sources is suspect. It is perhaps heavily influenced by the “evolutionary” concepts lauded by these ancient authors: the earliest eras of Roman history take on a semi-mythical quality in which punishments are extreme and largely capital, even for relatively minor crimes. As time progresses, more subtle distinctions between offenses are realized and more lenient penalties are introduced. The resemblance found in the “judicial prehistory” of the Romans and that of the Greeks is revealing.⁵⁰³ Certainly, the Romans of the late Republic and early Imperial period held no sound knowledge of the early, Roman legal culture under the first (mythical) kings and lawgivers. However, they conceived that there were few, simple laws with respect to very basic issues which are required for the preservation of a functional community, and very harsh punishments were employed for transgressors. Thus, the severe capital punishment for women found imbibing in wine or caught *in flagrante delicto* becomes understandable. In this fictional and idealized time, the founder of the Roman people needed to defend the stability of the family which was the basic unit of society, rendering these severe penalties necessary. But, it is unlikely that a Roman woman in the 8th century BC risked capital punishment if caught drinking.⁵⁰⁴ In fact, many female burials dated to the 8th century contain wine cups.⁵⁰⁵ It is intriguing that instances of adultery and female wine drinking were similarly seen as a great concern for other mythical and semi-mythical lawgivers of antiquity. This view is retrospective, not historical information. Moreover, in the case of Dionysius of Halicarnassus, this belief and story served to explain

⁵⁰² Baumen, *Crime and Punishment in Ancient Rome*, 7.

⁵⁰³ For more on the cultural significance of female wine drinking in Greek society, see: O. Murray, “Symptotic history” in O. Murray (ed.) *Symptotica*, 1990, 3-13.

⁵⁰⁴ For more on the controversy about women and wine drinking see: M. Bettini, “Le donne romane, che non bevono vino” in *Vicende e figure femminili in Grecia e a Roma*, 1995, 531-536.

⁵⁰⁵ Colonna, *Graeco more bibere. L'iscrizione della tomba 115 dell'Osteria dell'Osa*, 51-55.

and justify the new legislation of Augustus, the new founder of the Roman people, on family and adultery. Augustus' legislation held these issues with equal concern as Romulus, but presented more moderate and humane methods of punishment.

The criminal courts migrated through three obvious phases: (i) *iudicium populi*- trial by the magistrate (most often a tribune of the plebs) and the people.⁵⁰⁶ A preliminary investigation would be conducted by the magistrate,⁵⁰⁷ after which, the magistrate would bring the accused in front of the popular assembly, suggest a penalty, and preside while speeches from either side were given. The assembly would then vote on the proposal.⁵⁰⁸ This process was used until the mid-first century BC.⁵⁰⁹ The second phase was (ii) *iudicium publicum*- a trial by jury which began to be used in the mid-second century BC.⁵¹⁰ This was a series of permanent courts conducted by a magistrate and a jury of approximately fifty men.⁵¹¹ The penalties were no longer undefined suggestions but were *poena legis*, laid down by statute.⁵¹² This procedure was widely used into the Principate but gradually declined until it was obsolete in the third century CE.⁵¹³ Thirdly, (iii) *cognitio extraordinaria*- introduced at the beginning of the Principate by Augustus, in which the senate conducted trials as well as the emperor, who could delegate his trials to his bureaucracy,⁵¹⁴ the most important members of which being the urban prefects, praetorian prefects, and provincial governors.⁵¹⁵ This court had more freedom than the jury-courts. As a result of their inherent authority, the senate and emperor could depart from the laws and penalties already laid down and could mitigate or intensify existing statutes.⁵¹⁶ The emperor himself could even introduce new legislation by way of his constitutions.⁵¹⁷

⁵⁰⁶ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵⁰⁷ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵⁰⁸ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵⁰⁹ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹⁰ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹¹ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹² Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹³ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹⁴ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹⁵ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹⁶ Baumen, *Crime and Punishment in Ancient Rome*, 4.

⁵¹⁷ Baumen, *Crime and Punishment in Ancient Rome*, 4.

The Roman Republic:

The Twelve Tables, crafted in the fifth century BC, chiefly focused on civil actions.⁵¹⁸ Within these Tables provisions on crimes can be found, but they concentrate on individual problems rather than marking out an area of criminal law.⁵¹⁹ This took the form of regulated self-help: the injured party, or the family and friends of the injured party, could bring the accused before a magistrate.⁵²⁰ For example, personal injury to the extent of maiming a limb allowed exact retaliation (*lex talionis*, an eye for an eye; *Roman Statutes* I.13–15; *Ex.* 21.23; *Diod.* 12.17.4).⁵²¹ Conversely, the two parties could avoid this result if they came to an agreement for appropriate compensation and avoid further bloodshed.⁵²² Should one have been set upon by a thief with a weapon (by night or day), they could kill the thief on the spot if they first cried out (*plorare*) to summon neighbours and friends to help and act as witness to the just execution.⁵²³ Penalties for other convicted forms of theft resulted in a range of punishments such as subjection as a bondsman to the wronged party (*addiction*; *Roman Statutes* I.17–21).⁵²⁴ Three allusions in the Tables list particular forms of execution for murder and capital offences but say nothing of procedure (*Roman Statutes*, VIII.5–6, 12). Traditionally, it is thought that such capital prosecutions were conducted with an intricate procedure before a popular assembly.⁵²⁵ We know this is how they tried crimes committed against the community.⁵²⁶ But a modern, competing view suggests that capital crimes were prosecuted through private action before a magistrate (perhaps the consul who at the time held the title of praetor) or the *quaestor parricidii* ('instigator of the homicide').⁵²⁷

⁵¹⁸ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁵¹⁹ Lintott, *The Cambridge Companion to Roman Law*, 302.

⁵²⁰ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵²¹ Lintott, *The Cambridge Companion to Roman Law*, 304. A parallel can be drawn between *lex talionis* and the same stipulation for injury in the Old Testament. Additionally, we know of a similar, contemporary provision in the law code from the Greek city of Thurii in Southern Italy.

⁵²² Lintott, *The Cambridge Companion to Roman Law*, 304. Lesser instances of assault resulted solely in financial penalties.

⁵²³ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵²⁴ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵²⁵ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵²⁶ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵²⁷ Lintott, *The Cambridge Companion to Roman Law*, 304.

It is first necessary to examine a particular area of Roman society related to the *iudicium populi*. As previously mentioned, a citizen was required to call out to his neighbours for help (*plorare*) when threatened by a malefactor.⁵²⁸ This custom, which was similarly found in Greece, functioned in several practical ways: a murderer was not able to claim after the crime to be a victim acting in self-defense, and, in less serious instances, there were witnesses summoned by the cry who could later verify the versions of events given by both parties. Intervention of neighbours in this way also served a crucial function in a society devoid of a police service to maintain both a level of safety and to diffuse potentially violent conflicts. A citizen might similarly cry out to his fellow citizens for help (*provocare*) when being treated unjustly by an authority.⁵²⁹ Cicero relates that this custom can be traced back to the regal period,⁵³⁰ however, it more likely resulted from the conflict between the patricians and plebeians which occurred after the establishment of the Republic.⁵³¹ *Provocatio*, the right of a Roman citizen to appeal to the people (functioning as an appeal to the tribunes of the plebs) when a magistrate exceeded his authority while conducting trials and doling out punishment was ascribed to the first year of the Republican period.⁵³² However, modern scholarship is skeptical of this. A statute in 300 BC declared execution in defiance of *provocatio* to be illegal, but it was not backed by any particular sanction.⁵³³ There is no evidence for *provocatio* trials.⁵³⁴ However, by the late Republic, this appeal was considered to be a necessary foundation of the liberty of an individual Roman citizen.⁵³⁵ Therefore, it is probable that *provocatio* functioned to influence the nature of capital criminal crimes during the early Republic,⁵³⁶ except that it was probably not a requirement that such trials had to be conducted in a public assembly.⁵³⁷ A manifestly guilty criminal

⁵²⁸ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵²⁹ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵³⁰ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵³¹ Lintott, *The Cambridge Companion to Roman Law*, 304.

⁵³² Lintott, *The Cambridge Companion to Roman Law*, 305; Baumen, *Crime and Punishment in Ancient Rome*, 8.

⁵³³ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵³⁴ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵³⁵ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵³⁶ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵³⁷ Lintott, *The Cambridge Companion to Roman Law*, 305.

would not have garnered support among the people if he appealed for their help; therefore it would be a redundant step.⁵³⁸

Cicero describes what he claims to be the traditional process for capital trials before the assembly when he argued that his rival Clodius had not used due legal process when driving him into exile.⁵³⁹ A magistrate would hold three public investigations of the accused (*contiones*).⁵⁴⁰ However, this process could have been more general. There is evidence that during these investigations, a non-capital charge could be switched to a capital one and vice versa (Livy 26.1.9-3.12; 2.52.3-5).⁵⁴¹ During such, a witness could be called and the accused was allowed to reply.⁵⁴² After this, a final accusation occurred and a vote was held by a formal assembly on the same day.⁵⁴³ Livy reports that on certain occasions, a single accusation and vote was sufficient (Livy 25.3.12-18; 4.7-11). Due to these competing, described procedures, it is hard to determine the earliest process of an assembly trial.⁵⁴⁴ However, it is important to note that, other than deciding whether the penalty was capital or not, the sentence was dictated by custom, it received the people's *imprimatur* through their vote.⁵⁴⁵

An interesting principle of criminal law are conveyed by Cicero in his works. Cicero believes it to be a cardinal principle of punishment that the sins of the father should never be visited upon his children.⁵⁴⁶ Justice, divine or human, does not tolerate the punishing of descendants of a man who escaped his own punishment through his death (Cic. *Nat. Deor.* 3.90).⁵⁴⁷ By “escaping punishment through dying”, Cicero refers to suicide.⁵⁴⁸ This concept held well into the Principate and can be seen in some of the laws enacted

⁵³⁸ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵³⁹ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵⁴⁰ Lintott, *The Cambridge Companion to Roman Law*, 305; Baumen, *Crime and Punishment in Ancient Rome*, 8.

⁵⁴¹ Baumen, *Crime and Punishment in Ancient Rome*, 8.

⁵⁴² Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵⁴³ Lintott, *The Cambridge Companion to Roman Law*, 305. In Bantia, Italy, a comparable law, said to have been modelled from Roman practice, incorporated this process but with four preliminary investigations, not three.

⁵⁴⁴ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵⁴⁵ Baumen, *Crime and Punishment in Ancient Rome*, 9.

⁵⁴⁶ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁵⁴⁷ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁵⁴⁸ Baumen, *Crime and Punishment in Ancient Rome*, 29.

by Hadrian.⁵⁴⁹ Cicero, following this concept, believed it to be far more commendable to act for the defence rather than for the prosecution (Cic. *De. Off.* 2.49-51).⁵⁵⁰ The role of prosecution should only be taken when it is done in the public interest and, even then, an individual should not act as prosecution in too many capital prosecutions.⁵⁵¹ This could be seen as inhumane behaviour.⁵⁵² Furthermore, according to Cicero, a capital charge should never be brought against an individual whose guilt is questionable.⁵⁵³ In contrast, an individual could act in defense of a guilty party with no stigmatization so long as the offender was neither impious or depraved.⁵⁵⁴ Cicero believes this principle is sanctioned by custom, and accepted as a part of *humanitas*.⁵⁵⁵

Cicero also describes a clause in the Twelve Tables which forbade the proposal of laws which were directed against an individual and voting on the life (*caput*) of a citizen except when conducted by the ‘greatest’ assembly.⁵⁵⁶ Cicero interpreted this to mean the military assembly (*comitia centuriata*) which conducted the final vote for a capital trial, an assembly organized into centuries of military origin and distributed in a way which privileged age and wealth.⁵⁵⁷ Yet this could be conversely interpreted as a well-attended assembly (a quorate assembly).⁵⁵⁸ Moreover, there is evidence for capital decisions being made in other assemblies during the Republican period.⁵⁵⁹ These assemblies organized citizens simply into voting divisions (*tribus*; Polyb. 6.14.7-8; Livy 25.3-4).⁵⁶⁰ It is likely that Cicero’s claim was a misinterpretation caused by the contemporary practice at the time.⁵⁶¹

⁵⁴⁹ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁵⁵⁰ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁵⁵¹ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁵⁵² Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁵⁵³ Baumen, *Crime and Punishment in Ancient Rome*, 30.

⁵⁵⁴ Baumen, *Crime and Punishment in Ancient Rome*, 30.

⁵⁵⁵ Baumen, *Crime and Punishment in Ancient Rome*, 30.

⁵⁵⁶ Lintott, *The Cambridge Companion to Roman Law*, 305.

⁵⁵⁷ Lintott, *The Cambridge Companion to Roman Law*, 305-6.

⁵⁵⁸ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁵⁹ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁰ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶¹ Lintott, *The Cambridge Companion to Roman Law*, 306.

According to Roman tradition, the tribunes of the plebs were created to be the spokesmen of the plebeians in 494 BC.⁵⁶² The plebs took an oath that their representative, the tribunes, should be sacrosanct, they were immune from physical violation.⁵⁶³ If anyone should physically assault a tribune, they were liable to vengeance from the plebs.⁵⁶⁴ Due to this immunity, the tribunes were able to protect ordinary citizens (*auxilium*) and to veto the actions of other magistrates (*intercessio*).⁵⁶⁵ But there is also a tradition in the annals which records that tribunes used their status to prosecute enemies of the plebs before assemblies of the people.⁵⁶⁶ It has been suggested in previous scholarship that such prosecutions by the plebs were prevented by the clause in the Twelve Tables cited by Cicero.⁵⁶⁷ This relies on the assumption that Cicero understood the clause correctly. Andrew Lintott, a Classics professor at the University of Oxford, finds it likely that although trials in front of assemblies for offences against the community as a whole were conducted as a feature of Roman criminal justice in the early Republic (and perhaps even during the Roman monarchy), the creation and activities of the tribunes of the plebs served in the development of criminal trials.⁵⁶⁸ Therefore, after due course, rather than other magistrates, it became customary for the tribunes to prosecute in capital cases.⁵⁶⁹ It is uncertain who was designated to prosecute these cases before the tribunes:⁵⁷⁰ there is a formula known in the late Republic wherein the prosecutors for treason (*perduellio*) were a commission of two men (*duumviri*),⁵⁷¹ but this could have been a special measure and not the ordinary procedure used in the early Republic.⁵⁷²

⁵⁶² Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶³ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁴ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁵ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁶ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁷ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁸ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁶⁹ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁷⁰ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁷¹ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁷² Lintott, *The Cambridge Companion to Roman Law*, 306.

Another important role was played by aediles in the *iudicium populi*. The tribunician jurisdiction dealt with areas such as corruption, extortion, brutality, and dereliction of duty.⁵⁷³ The aediles, as market-masters, dealt with market-related offences.⁵⁷⁴ Aediles could impose a fine for breaking the law in a market-related way and generally used the proceeds from this fine for a *munus*, a public service for the people which would stand as a monument to the aedile's term in office as well as a benefit to the community.⁵⁷⁵ One aedile fined multiple patrician women for trading as prostitutes and used this money to build a Temple of Venus which was still standing in Livy's time (Livy 10.31.9).⁵⁷⁶ Nevertheless, this source must be questioned, as a distortion may have occurred either through Livy or his sources.

Despite the many uncertainties of the early development of Roman criminal law, there are some probable suggestions about procedure during the middle Republic. Prosecutions of capital crimes (i.e., murder or arson) against private individuals were likely conducted by private initiative before a magistrate.⁵⁷⁷ If these prosecutions led to an appeal against the magistrate (*provocatio*), there may have been recourse by an assembly with either a magistrate presiding or a tribune who gave support to the appeal, but not otherwise.⁵⁷⁸ Public matters were ostensibly tried by the assembly, mounted by tribunes and aediles in non-capital cases.⁵⁷⁹ If the nature of the offence had to be established, this might have involved three or more investigative hearings before a final accusation and vote were leveled.⁵⁸⁰ If not, it was completed within a day.⁵⁸¹ There is also evidence for justice being executed by the *triumviri capitales*, a board of three men who were in charge of the prison and executions.⁵⁸² The *triumviri capitales* had absorbed the function of the *triumviri nocturni*, a former board which maintained the night watch against thieves, runaway slaves,

⁵⁷³ Baumen, *Crime and Punishment in Ancient Rome*, 10.

⁵⁷⁴ Baumen, *Crime and Punishment in Ancient Rome*, 10.

⁵⁷⁵ Baumen, *Crime and Punishment in Ancient Rome*, 10.

⁵⁷⁶ Baumen, *Crime and Punishment in Ancient Rome*, 10.

⁵⁷⁷ Lintott, *The Cambridge Companion to Roman Law*, 306.

⁵⁷⁸ Lintott, *The Cambridge Companion to Roman Law*, 306-7.

⁵⁷⁹ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁵⁸⁰ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁵⁸¹ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁵⁸² Lintott, *The Cambridge Companion to Roman Law*, 307.

fires, and other malefactors.⁵⁸³ The *triumviri capitales* also received denunciations for murder and carrying an offensive weapon, but it is unclear exactly how far the matters could proceed beyond accepting or rejecting the charge.⁵⁸⁴ They may have been able to incarcerate those who appeared guilty of homicide. They possibly could have gone so far as executing slaves or free men of inferior status with crimes such as murder.⁵⁸⁵

Permanent Tribunals:

Knowledge of criminal courts during the late Republic and early Principate largely derives from Justinian's *Digest* and other juristic sources.⁵⁸⁶ The Roman judicial process consisted largely of a trial (*quaestio*) and punishment (*supplicium*).⁵⁸⁷ As the Roman state emerged from the expansion wars as a budding empire, postwar Italy was turbulent with violent protest and in need of reform.⁵⁸⁸ It was clear that the legal system set up to deal with a small city-state was no longer sufficient to govern an empire.⁵⁸⁹ A series of special commissions (*quaestiones*) were set up, allowing magistrates to investigate and punish without the confirmation of the people.⁵⁹⁰ A lengthy text of a statute, *the lex Calpurnia*, passed by Lucius Calpurnius Piso, still survives today, albeit incomplete.⁵⁹¹ It establishes a permanent tribunal (*quaestio perpetua*) in 149 BC to investigate money that was supposed to be recovered (*de repetundis*) after suspected extortion by Romans in positions of authority.⁵⁹² The statute was inscribed on fragments of a bronze tablet.⁵⁹³ Other bronze fragments also survive recording statutes of this sort.⁵⁹⁴ The goal of these statutes

⁵⁸³ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁵⁸⁴ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁵⁸⁵ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁵⁸⁶ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁵⁸⁷ Harries, *Law and Empire in Late Antiquity*, 135.

⁵⁸⁸ Baumen, *Crime and Punishment in Ancient Rome*, 16.

⁵⁸⁹ Baumen, *Crime and Punishment in Ancient Rome*, 16.

⁵⁹⁰ Baumen, *Crime and Punishment in Ancient Rome*, 16.

⁵⁹¹ Lintott, *The Cambridge Companion to Roman Law*, 308; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁵⁹² Lintott, *The Cambridge Companion to Roman Law*, 308; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁵⁹³ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁵⁹⁴ Lintott, *The Cambridge Companion to Roman Law*, 308.

was restitution but also to introduce a fixed penalty for the crime.⁵⁹⁵ Under the *lex Calpurnia*, the penalty was *infamia*, the loss of legal protections and social standing enjoyed by a Roman citizen.⁵⁹⁶ But under a subsequent law, the *lex Acilia*, the offender also had to pay double the amount exacted in the offence.⁵⁹⁷ From this, we see the beginning of the *poena legis*, the penalty of the law.⁵⁹⁸

During the middle Republic, *ad hoc* tribunals were established to deal with special circumstances of mass lawbreaking such as treason by a group of people in war.⁵⁹⁹ Investigation of the crime and administration of the sentence was left to a magistrate, special commission, or the senate, although the assembly still gave its fiat to the procedure.⁶⁰⁰ The tribunal investigations, *quaestiones*, became common in the second century BC to deal with capital or non-capital public cases.⁶⁰¹ These were established by a statute or decree of the senate and one or more magistrates conducted an inquiry.⁶⁰² These tribunals eventually expanded: by 142 BC a permanent tribunal was established concerning assassins (*quaestio de sicariis*).⁶⁰³

This procedure was a factor in the establishment of the *lex Calpurnia*. Another factor was that private procedure had initially been set up for the recovery of money by non-Romans.⁶⁰⁴ The hearing was conducted in front of a jury of *recuperatores* (recoverers) and not an individual judge.⁶⁰⁵ This procedure was characterized by strict time parameters and the continuous supervision of a magistrate.⁶⁰⁶ A particular version of this procedure was employed by the senate in 171 BC to the advantage of Spanish plaintiffs against former Roman magistrates.⁶⁰⁷ The case was supervised by the praetor appointed to govern Spain at

⁵⁹⁵ Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁵⁹⁶ Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁵⁹⁷ Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁵⁹⁸ Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁵⁹⁹ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁶⁰⁰ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁶⁰¹ Lintott, *The Cambridge Companion to Roman Law*, 307.

⁶⁰² Lintott, *The Cambridge Companion to Roman Law*, 307.

⁶⁰³ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁶⁰⁴ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁶⁰⁵ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁶⁰⁶ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁶⁰⁷ Lintott, *The Cambridge Companion to Roman Law*, 308.

the time and five *recuperatores* were appointed for each defendant.⁶⁰⁸ Two of the defendants deserted their bail and went into exile before a verdict was imposed, and the other defendant was acquitted.⁶⁰⁹ Substantial recovery of extorted money was exhausted and exhibited the inadequacy of a purely civil procedure in criminal cases.⁶¹⁰

The first suit provided by Piso's law for the *quaestio de repetundis* was a traditional form of civil action, the *legis actio sacramento*, which could only be used by Roman citizens.⁶¹¹ If other allies or foreigners desired to use this form, they had to go through a Roman patron.⁶¹² The panel of jurors was not very large and the jurors were of senatorial rank;⁶¹³ conviction resulted in simple restitution.⁶¹⁴

Prosecution fell under the term *petitio* (suit) with respect to civil action and *nominis delatio* (denunciation) with respect to the laying of information on a criminal to the tribunal of inquiry.⁶¹⁵ The right to prosecute fell first to the victims themselves and their kin.⁶¹⁶ By 103 BC, men who acted for an allied king or community, or a fellow citizen of good repute in the community itself, were granted the right to prosecute.⁶¹⁷ Legal representatives such as these were called *cognitores*.⁶¹⁸ This was the beginning of the right of public accusation.⁶¹⁹ Once the denunciation was accepted, the court could award the prosecutor the help of a Roman patron (*patronus*).⁶²⁰ The principle behind this move was that a wronged foreigner could now have direct access to the Roman criminal court.⁶²¹

⁶⁰⁸ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁶⁰⁹ Lintott, *The Cambridge Companion to Roman Law*, 308.

⁶¹⁰ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶¹¹ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶¹² Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶¹³ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶¹⁴ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶¹⁵ Lintott, *The Cambridge Companion to Roman Law*, 309; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶¹⁶ Lintott, *The Cambridge Companion to Roman Law*, 309; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶¹⁷ Lintott, *The Cambridge Companion to Roman Law*, 309; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶¹⁸ Lintott, *The Cambridge Companion to Roman Law*, 309; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶¹⁹ Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶²⁰ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²¹ Lintott, *The Cambridge Companion to Roman Law*, 309.

Assembling a jury was an elaborate procedure.⁶²² The praetor in office was required to select and register a panel of 450 jurors annually.⁶²³ The jurors were recorded on an *album* (a white board) and had to fall within the ages of thirty and sixty, settled within a particular range of the city of Rome.⁶²⁴ It is unclear what the qualifications for this panel were, but it is probable that they were members of the *equites* (knights) or owned a set amount of property.⁶²⁵ Senators and their relatives were barred from sitting on the jury, along with those who had served in a minor magistracy and former senators' relatives who were stripped of their rank due to disgraceful conduct.⁶²⁶ This was done to eliminate any who were likely to hold sympathies or connections to the accused.⁶²⁷ This concept was further reinforced in that the defendant of a case was required to disclose to prosecution anyone on the panel of the jury who was connected to them through kinship.⁶²⁸ The qualification of kinship includes cousins, stepsons, stepfathers, relatives by marriage, and members of the same *collegium* (guild) or *sodalitas* (association).⁶²⁹ The defendant was then offered by the prosecution one hundred jurors who were not connected to himself.⁶³⁰ The defendant next selected fifty (perhaps up to seventy-five) of the prospective jurors.⁶³¹ If the defendant failed to do so in a timely manner, the praetor selected the candidates on his behalf.⁶³² These steps were done publicly, the names on the panel and jury were both made available for copying, and the praetor and parties concerned in the affair took oaths publicly that they were acting in accordance with the law.⁶³³

⁶²² Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²³ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²⁴ Lintott, *The Cambridge Companion to Roman Law*, 309; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶²⁵ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²⁶ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²⁷ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²⁸ Lintott, *The Cambridge Companion to Roman Law*, 309.

⁶²⁹ Lintott, *The Cambridge Companion to Roman Law*, 309-10.

⁶³⁰ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶³¹ Lintott, *The Cambridge Companion to Roman Law*, 310; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶³² Lintott, *The Cambridge Companion to Roman Law*, 310; Baumen, *Crime and Punishment in Ancient Rome*, 17.

⁶³³ Lintott, *The Cambridge Companion to Roman Law*, 310.

The praetor had to use his authority to aid the collection of evidence and summon witnesses from Italy.⁶³⁴ A non-Italian prosecutor was required to bring foreign witnesses with him.⁶³⁵ Not much detail survives on trial procedure, but it is clear that the praetor could ask questions.⁶³⁶ However, the verdict was decided by the jury alone.⁶³⁷ It was up to the praetor to ask if enough of the jury had come to an agreement in order to enable a vote to be taken.⁶³⁸ If over a third of the jury said *non liquet* ('the matter is not clear'), the hearing was prolonged until two thirds of the jury were ready to vote.⁶³⁹ If an individual juror declined to vote on more than two occasions, he was fined 10,000 sesterces.⁶⁴⁰ This was a considerable sum, even for a wealthier citizen.⁶⁴¹ The vote by the jury was conducted by ballot with tablets inscribed with *A*(*bsolvo*) on one side and *C*(*ondemno*) on the other.⁶⁴² The juror had to delete one of these, or both if he wished to abstain from the vote.⁶⁴³ The vote was concealed on the ballot by the juror and he placed it in a collection box, but the juror also had to keep his arm bare to ensure no one was stuffing the box with illegal ballots.⁶⁴⁴ The defendant received a guilty verdict if there was more 'C' votes than 'A' votes,⁶⁴⁵ but the number of 'C' votes also had to exceed the number of 'no vote' ballots.⁶⁴⁶

When a defendant was condemned, he was forced to either give guarantors to the praetor for the sum he was liable to provide or he had to submit to the seizure of his property.⁶⁴⁷ The estimation of damages (*litis aestimatio*), was up to the jury to determine and was to be awarded to the injured party.⁶⁴⁸ The damages

⁶³⁴ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶³⁵ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶³⁶ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶³⁷ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶³⁸ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶³⁹ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴⁰ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴¹ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴² Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴³ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴⁴ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴⁵ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴⁶ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴⁷ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁴⁸ Lintott, *The Cambridge Companion to Roman Law*, 310; Baumen, *Crime and Punishment in Ancient Rome*, 17.

were penal, and were calculated to be double the loss sustained by the victim.⁶⁴⁹ The exception to this was crimes committed prior to the institution of the law.⁶⁵⁰ Additionally, the victims could be awarded, in reparation, full Roman citizenship if they wished or could alternatively receive the right of *provocatio* and freedom from serving in the military and public duties in their respective communities.⁶⁵¹ The former reward was probably intended for non-Roman citizens while the latter reward was probably intended to be offered to Roman citizens.⁶⁵² A statute prohibited the use of appeal or *provocatio* in contradiction of the court's ruling.⁶⁵³ Additionally, there is an entrenchment clause (*sanctio*) mentioned, but not preserved, which seems to have threatened anyone who sought to frustrate the working of the law with penalties.⁶⁵⁴ Because this system was developed to help deal with new Roman subjects, it became an impressive example of *humanitas*.⁶⁵⁵ The system treated not just citizens in a civilized fashion, but subjects as well.

Jury selection and composition gradually transformed through the subsequent years due to changing statutes. By 70 BC, panels were composed of two thirds non-senators, and one third senators,⁶⁵⁶ selected from the *album* by lot.⁶⁵⁷ The procedure for bringing charges was also altered.⁶⁵⁸ after the initial prosecution was made, further prosecutors could now come forward and the jury was required to choose the most appropriate one in a process labeled *divinatio*.⁶⁵⁹ The selected prosecutor was then permitted to investigate the charges abroad (*inquisitio*). In practice, most cases came to be undertaken by Roman citizens who practiced advocacy.⁶⁶⁰ The provision which allowed for two extensions of a hearing without penalty shifted to a compulsory two-part trial (*comperendinatio*).⁶⁶¹ A new procedure was also introduced which

⁶⁴⁹ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁵⁰ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁵¹ Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁵² Lintott, *The Cambridge Companion to Roman Law*, 310.

⁶⁵³ Lintott, *The Cambridge Companion to Roman Law*, 310-1.

⁶⁵⁴ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁵⁵ Baumen, *Crime and Punishment in Ancient Rome*, 18.

⁶⁵⁶ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁵⁷ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁵⁸ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁵⁹ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁰ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶¹ Lintott, *The Cambridge Companion to Roman Law*, 311.

was devised to pursue money which the guilty party had passed on to others (*quo ea pecunia pervenerit*).⁶⁶² The centrality of compensation awarded to the victim was reduced as the remit to the court was extended to the receipt of liberally given bribes, including those causing judicial corruption.⁶⁶³ Also, new crimes came to be treated as capital offence (such as the receipt of money in return for an unjust capital conviction).⁶⁶⁴

The *quaestio de repetundis* was one of the most direct means to procure the downfall of a prominent Roman.⁶⁶⁵ As a result, it became a matter of political controversy because its procedure was an avenue for corruption.⁶⁶⁶ Despite this, it became a model for other permanent criminal courts.⁶⁶⁷ In 103 or 100 BC, Lucius Saturninus seems to have imitated this procedure when he introduced a tribunal to deal with the ‘diminution of the majesty of the Roman people’ (*de maiestate populi Romani minuta*).⁶⁶⁸ This covered instances of military incompetence, unconstitutional behaviors, and treason— a wide variety of political misconduct.⁶⁶⁹ Sulla later introduced legislation in 82-81 BC which reformed existing tribunals concerning electoral bribery (*de ambitu*), assassins (*de sicariis*), embezzlement (*de peculatu*), and poisoners (*de veneficis*) based on this model.⁶⁷⁰ New tribunals were also established to deal with assault or insulting behavior (*de iniuriis*), forgery (*de falsis*) and political violence (*de vi*).⁶⁷¹ The court which dealt with assassins was also in charge of trials for *parricidium* (which by this point meant the murder of either parent).⁶⁷² *Parricidium* was punished with the dreadful sack penalty (*poena cullei*): the guilty party was thrust into a sack with a viper, rooster, and monkey and dropped into a body of water.⁶⁷³ This elaborate

⁶⁶² Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶³ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁴ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁵ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁶ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁷ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁸ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁶⁹ Lintott, *The Cambridge Companion to Roman Law*, 311.

⁶⁷⁰ Lintott, *The Cambridge Companion to Roman Law*, 311-2.

⁶⁷¹ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁷² Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁷³ Lintott, *The Cambridge Companion to Roman Law*, 312; Baumen, *Crime and Punishment in Ancient Rome*, 23. Cicero stresses this punishment in his defense speech of Sextus Roscius in 80 BC after Roscius was accused of

procedure should not be considered purely a punitive measure. In fact, it may have functioned more as a religious act than a criminal penalty.⁶⁷⁴ The sack served as a ritual to remove a malefactor whose actions were not simply illegal but also served to offend the gods and ritually pollute the community. The *parricida* was an unclean “thing” and the community had to dispose of the source of pollution: putting something in a sack and tossing it into water was a common method for disposing of garbage. Moreover, the number and variety of animals thrust into the sack with the criminal varied within the sources. The animals chosen carried symbolic meaning and may have even acted as vectors of pollution that the community was attempting to remove. It appears Sulla wanted these permanent tribunals to gain control over the application of criminal justice in Rome and, if the crime was capital, over the communities of Italy proper.⁶⁷⁵ Furthermore, the powers of the tribunes were restricted and they could no longer legislate or prosecute before an assembly.⁶⁷⁶ In 70 BC, the tribunes had their powers partially restored, but there is only one prosecution of a tribune recorded after this.⁶⁷⁷

Evidence on the law of the late Republic provides further information on the operation of criminal tribunals.⁶⁷⁸ The presidency of these tribunals was allotted in part to praetors in their year of office, and in part to ‘judges of the inquiry’ (*iudices quaestionis*), a group of senators just below the rank of praetor on the *cursus honorum* who had formerly served as aediles.⁶⁷⁹ After 70 BC, three divisions of jurors were created: senators, knights, and tribunes of the treasury (*tribune aerarii*), wealthy men who did not possess

killing his father. In 55 or 52 BC, Pompey extended this crime to include the murder of any close relative or patron, but left the punishment of the sack for the criminals who confessed to this crime and had been caught in the act (D. 48.9.1).

⁶⁷⁴ For more on the relationship between the *poena cullei* and its ritual symbolism see Florike Egmond, “The Cock, the Dog, the Serpent, and the Monkey: Reception and Transmission of a Roman Punishment, or Historiography as History” in the *International Journal of the Classical Tradition*, 1995, 159–192.

⁶⁷⁵ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁷⁶ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁷⁷ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁷⁸ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁷⁹ Lintott, *The Cambridge Companion to Roman Law*, 312.

the status of knight.⁶⁸⁰ Each *album* had around three hundred members, which were reduced through alternating rejection by the parties to number around fifty and seventy-five.⁶⁸¹

In courts other than the *quaestio de repetundis*, there was no selection of a prosecutor and the trial was expected to occur on the tenth day following the acceptance of the original accusation as legitimate.⁶⁸² The prosecutor was still generally a member of the elite (either cadet members of the senators or members of the equestrian order who had specialized in advocacy). But now, the connection between the injured party and prosecution was either through friendship, patronage or an enmity with the defendant.⁶⁸³ The prosecution for murder was habitually carried out by professional advocates on behalf of the victim's kin.⁶⁸⁴ By the late Republic, informing on a crime had become a profession, and prosecutors would generally receive evidence from members of the accused's household, including the slaves.⁶⁸⁵ Defence "counsel" was played by the best advocates and the most eminent senators that the accused could acquire.⁶⁸⁶ Cicero even recounts that it is more commendable for an orator to undertake the defence rather than the prosecution (Cic. *Off.* 2.49-51).⁶⁸⁷ He stipulates that the role of prosecutor should only be adopted when it was in the public interest and, notwithstanding this, conducting too many capital prosecutions even in the public interest could be denounced as inhumane behavior.⁶⁸⁸ The reasoning behind this was that a capital charge should never be brought if the accused may be innocent.⁶⁸⁹ In comparison, Cicero had no objection to acting as defense for the guilty party so long as he was not depraved or impious.⁶⁹⁰

⁶⁸⁰ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁸¹ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁸² Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁸³ Lintott, *The Cambridge Companion to Roman Law*, 312.

⁶⁸⁴ Lintott, *The Cambridge Companion to Roman Law*, 312-3.

⁶⁸⁵ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁸⁶ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁸⁷ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁶⁸⁸ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁶⁸⁹ Baumen, *Crime and Punishment in Ancient Rome*, 29.

⁶⁹⁰ Baumen, *Crime and Punishment in Ancient Rome*, 29.

The prosecution and defense speeches occurred before the examination of the witnesses.⁶⁹¹ However, summaries of the witnesses' testimonies were required to be deposited with the court in advance and closed with the seals of the jury.⁶⁹² Witnesses were then examined and cross-examined after the speeches, followed by a debate (*altercatio*) between the parties concerning the reliability of the evidence and its implications.⁶⁹³ Some testimonies for the defence were merely praise in support of the defendant's character.⁶⁹⁴ Largely, a witness statement was not an impartial statement of fact.⁶⁹⁵ It was expected to result in a conclusion by the witness about the accused's guilt or innocence so as to contribute directly to the case of the prosecution or defence.⁶⁹⁶ Similarly, advocates were not just servants of the court. Prosecutors often had a personal interest in the case and the defence did not just lend their ability as orators but also afforded their status to the client in friendship.⁶⁹⁷ A defence counsel, in effect, also acted as witness to the accused's character.⁶⁹⁸

During the trial, a defendant along with his friends and family wore mourning clothing.⁶⁹⁹ This move was deployed in the last minute to the jury as they voted as personal appeals for the defence.⁷⁰⁰ Appeal to the assembly during cases of violence and treason was only instated by Mark Antony after Caesar's death.⁷⁰¹ A person could not be accused of the same charge twice, unless it could be proven that the prosecution had been collusive, and therefore deliberately ineffectual (*praevaricatio*).⁷⁰²

In a *de repetundis* trial (recovery), a considerable amount of time could elapse between prosecution and verdict.⁷⁰³ This period owed to the allocation of time for the investigation by the prosecutor abroad and

⁶⁹¹ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹² Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹³ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹⁴ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹⁵ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹⁶ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹⁷ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹⁸ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁶⁹⁹ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰⁰ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰¹ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰² Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰³ Lintott, *The Cambridge Companion to Roman Law*, 313.

the two-part trial.⁷⁰⁴ In comparison, trials by the *quaestiones* procedure seem to have often been confined to ten hours between the first and eleventh hour of the day.⁷⁰⁵ However, there were limitations imposed on the duration of a speech in trials for *repetundis* under Sulla's legislation and onwards.⁷⁰⁶ Efforts towards expediency were made to preserve the court's resources. It was still possible though that the hearings of witnesses could be exceedingly time-consuming.⁷⁰⁷ When Pompey set up special tribunals for bribery and violence, he intentionally compressed the timeline of the trials.⁷⁰⁸ The first three days of the trial were dedicated to the hearing of the witnesses' testimonies, and only once this was complete would the written versions be sealed.⁷⁰⁹ The fourth day was reserved for the speeches- the prosecution began with an allotted two hours followed by three hours for the defence.⁷¹⁰ The vote was held on that day.⁷¹¹

The common consequences of a guilty verdict during the early Republic after private prosecution was either subjection to the injured party as a bondsman, a financial penalty, or execution in a prescribed fashion.⁷¹² However, the defendant was habitually allowed to escape into exile before the decision of the critical voting division was proclaimed.⁷¹³ The exile of the offender was formally recognized but he was interdicted from 'fire and water' on Roman land, the two necessities of life.⁷¹⁴ In reality, this meant that if the offender were to return to Roman soil, he was killed on sight as an outlaw.⁷¹⁵ During the late Republic, statutes which regulated criminal tribunals began to prescribe exile through this ban on fire and water as a regular form of the capital penalty.⁷¹⁶ Prior to the unification of Italy under Roman rule, exile could be only

⁷⁰⁴ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰⁵ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰⁶ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰⁷ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰⁸ Lintott, *The Cambridge Companion to Roman Law*, 313.

⁷⁰⁹ Lintott, *The Cambridge Companion to Roman Law*, 313-4.

⁷¹⁰ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷¹¹ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷¹² Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷¹³ Lintott, *The Cambridge Companion to Roman Law*, 314; Baumen, *Crime and Punishment in Ancient Rome*, 12. However, this option was not open to a man convicted of *parricidium* (Cic. *Inv.* 2.149).

⁷¹⁴ Lintott, *The Cambridge Companion to Roman Law*, 314; Baumen, *Crime and Punishment in Ancient Rome*, 21.

⁷¹⁵ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷¹⁶ Lintott, *The Cambridge Companion to Roman Law*, 314.

a day's journey from Rome.⁷¹⁷ The offender could relocate in neighboring cities such as Praeneste or Tibur.⁷¹⁸ However, in the late Republic, exile meant (theoretically) banishment from the entire Italian peninsula and could even be extended to include a specific distance from Rome.⁷¹⁹ Cicero was himself banished from Rome by four to five hundred miles and was also forbidden from Sicily and Malta (Cic. *Att.* 3.4; Plut. *Cic.* 32.11; Dio 38.17.7).⁷²⁰

By the end of the Republic, many malefactors were still prosecuted by the injured parties or their kin through civil actions.⁷²¹ The scope of criminal law had grown, and the new permanent criminal tribunals were a convenient medium with which Roman citizens could pursue crimes against individuals and crimes against the community.⁷²² Interestingly, an examination of the known outcomes of trials for recovery (*questio de repetundis*) indicates a conviction rate of approximately fifty percent.⁷²³ Capital and non-capital offences were definitively separated. Non-capital offences could result in temporary expulsions (*relegatio*), civil disabilities (*infamia*), and fines (*multae*), but there was still experimentation going on with regards to these punishments.⁷²⁴ Imprisonment was not used as a penalty, but only a prelude to execution or trial.⁷²⁵

⁷¹⁷ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷¹⁸ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷¹⁹ Lintott, *The Cambridge Companion to Roman Law*, 314; Baumen, *Crime and Punishment in Ancient Rome*, 21. Interdiction seems to have even functioned as a penalty for the crime of *parricidium*, but a total loss of property was also added on (Suet. *Jul.* 42.3). However, it appears the penalty of the sack was re-introduced at one point or was always an available option. Modestinus, writing in the third century CE, reports that for the murder of a family member, the offender was to be thrashed, sewn into a sack with the select animals, and thrown into the sea (D. 48.9.9). He further stipulates that if the sea was not an available option, a constitution of Hadrian stipulates to throw the accused to the beasts (D. 48.9.9).

⁷²⁰ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷²¹ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷²² Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷²³ Lintott, *The Cambridge Companion to Roman Law*, 314.

⁷²⁴ Baumen, *Crime and Punishment in Ancient Rome*, 22.

⁷²⁵ Baumen, *Crime and Punishment in Ancient Rome*, 22.

Reforms under Augustus and the Principate:

Julius Caesar enacted a statute about recovery which was immensely complex and included specific rules regarding the behavior of provincial governors.⁷²⁶ Under his dictatorship, Caesar limited service as a judge or juror to senators and knights.⁷²⁷ He also reformed the tribunals for violence and treason.⁷²⁸ The penalty for either was determined to be exile with a loss of property (Suet. *Iul.* 41.2; 42.3; 44.1; Cic. *Phil.* 1.23).⁷²⁹ An accusation of treason was leveled at Quintus Ligarius during his dictatorship;⁷³⁰ Caesar exercised criminal jurisdiction in the Forum under the authority of his position and also tried King Deiotarus for a similar charge in his own residence.⁷³¹ These actions set a precedent for what would occur under the Principate.⁷³² After the death of Caesar, Mark Antony enacted legislation in 44 BC to create an additional division of jurors who were not of equestrian status but had met a certain wealth qualification.⁷³³ In 43 BC, this was rescinded but it seems a third division was most likely restored by the triumvirs.⁷³⁴

In the *Res Gestae*, Augustus stated that in both 19 and 11 BC, he was offered the position of ‘curator of laws and morals with supreme power and without colleague’ but did not accept this position as there was no precedent (*Res Gestae* 6.1-2).⁷³⁵ He instead carried out the required processes through his tribunician power (*Res Gestae* 6.1-2).⁷³⁶ He employed his tribunician power to legislate through the plebeian assembly which seems to have formed ensuing reforms under his rule.⁷³⁷ He enacted general statutes of procedure in private and public trials (the *lex Iulia de iudiciis privatis* and *de iudiciis publicis*) but only scattered references and allusions have survived.⁷³⁸ More substantial evidence exists for his reforms to the permanent

⁷²⁶ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷²⁷ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷²⁸ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷²⁹ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³⁰ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³¹ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³² Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³³ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³⁴ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³⁵ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³⁶ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³⁷ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷³⁸ Lintott, *The Cambridge Companion to Roman Law*, 315.

criminal tribunals.⁷³⁹ It seems that these reforms were effectively building upon the late-Republican foundation, but there were also further changes made which resulted in a revolution in court procedure.⁷⁴⁰ Augustus adopted Julius Caesar' approach and used his precedent to preside over certain trials in Rome through his *imperium*.⁷⁴¹ Moreover, through his tribunician power, he also judged the cases on appeal (Dio 51.19.6).⁷⁴²

Originally, under Augustus, there were three divisions (*decuriae*) of judges and members of the jury.⁷⁴³ It appears two *alba* from these divisions were drawn each year, one for public cases and the other for private.⁷⁴⁴ These candidates were entirely of senatorial or equestrian status;⁷⁴⁵ a fourth division was later added to include men with an inferior property qualification.⁷⁴⁶ These men could only judge private cases with smaller quantities of money at stake.⁷⁴⁷ A fifth division was also added by Caligula; Galba is said to have drawn the line and refused to add a sixth (Suet. *Aug.* 32.3; *Calig.* 16.2; *Galb.* 14.3).⁷⁴⁸ The members of these divisions may have initially been selected by the emperor but by the end of Augustus' reign, the task of reviewing the membership of the senate, and drawing up the equestrian list, was given to a special senatorial commission (Suet. *Aug.* 37; Tac. *Ann.* 3.30).⁷⁴⁹ The minimum age to sit as a juror was reduced to twenty-five, and the members of the *alba* were required to be available for the entire designated period of judicial business (*rerum actus*).⁷⁵⁰ There were thirty days made available for judicial business on days designated for recently created festivals (although none of these were festivals relating to the imperial family) and November and December were a judicial vacation.⁷⁵¹

⁷³⁹ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴⁰ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴¹ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴² Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴³ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴⁴ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴⁵ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴⁶ Lintott, *The Cambridge Companion to Roman Law*, 315.

⁷⁴⁷ Lintott, *The Cambridge Companion to Roman Law*, 315-6.

⁷⁴⁸ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁴⁹ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁰ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵¹ Lintott, *The Cambridge Companion to Roman Law*, 316.

The process for accusation was solidified and no longer necessitated an initial summons before the head of the court but was carried out through a written denunciation (*subscriptio* or *libellus*).⁷⁵² If the written denunciation was accepted, the accuser was given a period to collect evidence (*inquisitio*) and was required to notify the defendant with the date chosen for the trial.⁷⁵³ Emperor Claudius later complained that the accusers, once the charge had been accepted, were negligent in actually bringing the case to court.⁷⁵⁴ Another change ascribed to Augustus was that witnesses could not be compelled to testify against kin by blood or marriage to the degree of cousin (D. 22.5.4).⁷⁵⁵ Moreover, neither party of the case were permitted to enter the house of a juryman while the trial was ongoing (D. 48.14.1.4).⁷⁵⁶ These rules may have existed before Augustus and only were reformed by him.⁷⁵⁷ However, Augustus did increase the number of permitted defence counsel to twelve.⁷⁵⁸

New laws were enacted for existing crimes: embezzlement (*peculatus*), electoral bribery (*ambitus*), and violence (*vis*).⁷⁵⁹ These changes were mainly a matter of categorizing certain illegal behaviors.⁷⁶⁰ *Peculatus* covered explicitly the retention of money received for a public transaction or public purpose for one's own private use.⁷⁶¹ The crime of public violence now included improper official brutality, the coercion of Roman citizens through flogging or bonds or their execution against *provocatio*.⁷⁶² However, exceptions were made for the coercion of actors and other *infames* (because of their lowly profession), confessed or condemned criminals, and those subject to military discipline (D. 46.6.7; Paul. *Sent.* 5.26.1-2).⁷⁶³ *Provocatio* was, by this time, interpreted as an appeal to the emperor.⁷⁶⁴ Augustus was also responsible

⁷⁵² Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵³ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁴ FIRS I no.68, V, 116-8; Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁵ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁶ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁷ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁸ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁵⁹ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁶⁰ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁶¹ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁶² Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁶³ Lintott, *The Cambridge Companion to Roman Law*, 316.

⁷⁶⁴ Lintott, *The Cambridge Companion to Roman Law*, 317.

for the creation of tribunals for new crimes. One new tribunal dealt with fraud in connection to the corn-supply, conspiracy to raise prices, or interference with it (*de annona*):⁷⁶⁵ this was significant in that it shifted the criminal law to matters which had earlier been left to self-help and family justice.⁷⁶⁶ The corn supply of Rome, by this time, was a matter of public interest and was of major political importance due to its impact on the daily life of the citizenry, especially of the plebeians. Issues with the corn supply led to protests and riots and thus had to be supervised by authorities.

During the period of the Republic, sometimes particular blatant sexual offences such as adultery were prosecuted by aediles before an assembly (Livy 8.22.2-3; 10.31.9; 25.2.9).⁷⁶⁷ But it seems that most of these offences were dealt with by the fathers and husbands, who, preferably after holding a family council, were permitted to chastise the women of the family and their lovers through physical means and could even execute them.⁷⁶⁸ Some Republican laws were put in place to limit this (Sall. *Hist.* 1.61; Plut. *Sull.* 41.3; *Collatio* 4.2.2).⁷⁶⁹ Augustus instituted the *lex Iulia de adulteriis* in 18 BC to regulate the form of self-help used in cases of adultery.⁷⁷⁰ After this law was enacted, a father could kill his daughter and her lover, but he could only do so if he caught them *in delicto flagrante* and he killed them both at once in his or his son-in-law's residence.⁷⁷¹ A similar law could be found in the Athenian code.⁷⁷² The reasoning behind such laws required that the homicide be spontaneous in reaction to a very grave violation of the sanctity within the household by external forces. It could not be premeditated or committed as an act of revenge. Presumably, the provision that necessitated the killing of the woman along with the adulterer operated to avoid any family from using a woman within their household to lure an enemy within the home and killing

⁷⁶⁵ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁶⁶ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁶⁷ Lintott, *The Cambridge Companion to Roman Law*, 317. The act of adultery in Rome (*adulterium*) included more than just intercourse: it was used for any sort of illicit sexual act (*stuprum*).

⁷⁶⁸ Lintott, *The Cambridge Companion to Roman Law*, 317; Baumen, *Crime and Punishment in Ancient Rome*, 24.

⁷⁶⁹ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁷⁰ Lintott, *The Cambridge Companion to Roman Law*, 317; Baumen, *Crime and Punishment in Ancient Rome*, 25.

⁷⁷¹ Lintott, *The Cambridge Companion to Roman Law*, 317; Baumen, *Crime and Punishment in Ancient Rome*, 25.

⁷⁷² Gagarin, *Telling Stories in Athenian Law*, 197-8.

the enemy without risk of repercussion. Such a plot would not occur if it meant one of their own would lose their life as well. The woman also had to be legally under his power (*potestas*) or under the power of her husband (D. 48.5.23;24).⁷⁷³ The husband was restricted further. He was not allowed to kill his wife, but he could kill her lover.⁷⁷⁴ if the two were found in his house and the lover fell into one of the categories of degraded persons (*infames*) (D. 48.5.25).⁷⁷⁵ These categories included freedmen of the family, slaves, dancers, actors, and prostitutes (D. 48.5.25).⁷⁷⁶ Under these circumstances, slaves were allowed to give testimony against their masters and mistresses (Tac. *Ann.* 3.25).⁷⁷⁷ However, this effort should not be interpreted as criminalizing offences against individuals and their household. Rather, when put into context with Augustus' other measures about marriage, it was likely an effort to bolster the sanctity of the institution of family and the family home.⁷⁷⁸

The law of *maiestas* (treason which damaged the majesty of Rome), was plausibly introduced by Julius Caesar as dictator.⁷⁷⁹ The earliest surviving example of a trial for *maiestas* concerned Cassius Severus, an orator and pamphleteer, who had been accused of defaming distinguished men and women in his writings (Tac. *Ann.* 1.72; 4.21; Tac. *Dial.* 19.1; 26.4).⁷⁸⁰ But both the crime and penalty shifted under the emperors.⁷⁸¹ A decree given in 20 CE which related to the condemnation of Gnaeus Piso made it clear that *maiestas* now included the majesty of the imperial household and not just the Roman state.⁷⁸² The trials for this charge were not conducted by a permanent tribunal. The trials were conducted by the senate which could impose penalties exceeding those prescribed in the *lex Iulia*.⁷⁸³ Whereas under Augustus the emperor

⁷⁷³ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁷⁴ Lintott, *The Cambridge Companion to Roman Law*, 317; Baumen, *Crime and Punishment in Ancient Rome*, 25.

⁷⁷⁵ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁷⁶ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁷⁷ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁷⁸ Lintott, *The Cambridge Companion to Roman Law*, 317.

⁷⁷⁹ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸⁰ Lintott, *The Cambridge Companion to Roman Law*, 319.

⁷⁸¹ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸² Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸³ Lintott, *The Cambridge Companion to Roman Law*, 319-20.

conducted most new legal activity, under Tiberius the senate gained further legal jurisdiction.⁷⁸⁴ The procedure used in the senate was similar to the example afforded by the criminal tribunal (*quaestio perpetua*), but was not entirely analogous due to the nature of the senate as a massive jury.⁷⁸⁵ All members of the senate could propose penalties and could voice their opinion when it came to the verdict.⁷⁸⁶ The senate could also prosecute men while they still were in office, a feature not found in the *quaestio perpetua*.⁷⁸⁷ The accuser could also be a magistrate and the emperor himself frequently participated in senate trials.⁷⁸⁸

The charge of *de repetundis* was, in effect, absorbed as *maiestas*.⁷⁸⁹ The senate decree regarding the trial of Gnaeus Piso for *maiestas* successively refers to speeches given by Piso's accusers.⁷⁹⁰ It is quite similar in form to other criminal trials. Tacitus further tells us of features of a trial for *de repetundis*, which came close in outline to a regular criminal tribunal. Four speakers for the prosecution were assigned for two days and three days for three speakers on behalf of the defence (Tac. *Ann.* 3.10-11;13).⁷⁹¹ These periods seem to have involved the hearing of witnesses and reading of documents.⁷⁹² Evidence (*probationes*) was given after the call and answer of the prosecution and defence (Plin. *Ep.* 2.11.14-18; 4.9.3-15).⁷⁹³

The trials for *maiestas* conducted by the senate were theoretically designed for especially heinous crimes against the regimes.⁷⁹⁴ However, in the century preceding the institution of the Principate, this seems to have extended to regular crimes which were covered by laws of the criminal tribunal if the chief defendants were senators or important members of the equestrian order.⁷⁹⁵ Senatorial procedure was

⁷⁸⁴ Baumen, *Crime and Punishment in Ancient Rome*, 44.

⁷⁸⁵ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸⁶ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸⁷ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸⁸ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁸⁹ Lintott, *The Cambridge Companion to Roman Law*, 319.

⁷⁹⁰ Lintott, *The Cambridge Companion to Roman Law*, 320.

⁷⁹¹ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹² Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹³ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹⁴ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹⁵ Lintott, *The Cambridge Companion to Roman Law*, 321.

adapted to enable them to conduct these trials, but the basic principle remained- complete consultation of all present.⁷⁹⁶ Senators were aware of the Republican and Augustan statutes previously imposed. But the senate also asserted the right to decide what was, in its view, justice, even if this measure had not yet been introduced in legal practice.⁷⁹⁷ A good deal of innovative *senatusconsulta* generated from the trial of a particular case.⁷⁹⁸ For example, a decree by the senate made provincial governors responsible for the conduct of their wives which arose from the trial of Gaius Silius in 24 CE.⁷⁹⁹

Criminal investigations by a magistrate or magistrates assisted by a *consilium* of advisors became a new procedure which gained traction called *cognitio*.⁸⁰⁰ This procedure took place before the establishment of criminal tribunals.⁸⁰¹ Its use continued in Rome intermittently during the late Republic to deal with special offences such as the receipt of bribes from King Jugurtha in 100 BC, the *quaestio Mamilia* (Sall. *Jug.* 40).⁸⁰² It also was used as a regular form for in-person criminal trials which took place before a provincial governor, assuming the matter was not referred to one of the courts in the province.⁸⁰³ With the establishment of the Roman emperor, who was granted *proconsulare imperium maius*, *cognitio* was the form used in cases referred to him on appeal or directly.⁸⁰⁴ Augustus exercised his justice at the first instance in certain cases, although this caused unrest among the elite when this was later copied by Claudius.⁸⁰⁵ The *cognitio* was designed to “liberate” the criminal trials from *ordo iudiciorum publicorum*.⁸⁰⁶ The process allowed more discretion in determining the definition of crimes as well as the scale of the punishments.⁸⁰⁷ Gradually, *cognitio* came to replace the operations of the permanent criminal tribunals in Italy.⁸⁰⁸ However,

⁷⁹⁶ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹⁷ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹⁸ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁷⁹⁹ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁸⁰⁰ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁸⁰¹ Lintott, *The Cambridge Companion to Roman Law*, 321.

⁸⁰² Lintott, *The Cambridge Companion to Roman Law*, 321.

⁸⁰³ Lintott, *The Cambridge Companion to Roman Law*, 321-2.

⁸⁰⁴ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸⁰⁵ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸⁰⁶ Baumen, *Crime and Punishment in Ancient Rome*, 39.

⁸⁰⁷ Baumen, *Crime and Punishment in Ancient Rome*, 39.

⁸⁰⁸ Lintott, *The Cambridge Companion to Roman Law*, 322; Baumen, *Crime and Punishment in Ancient Rome*, 39.

this was not achieved by simply multiplying the trials in front of the emperor; rather it necessitated the delegation of judicial powers to magistrates and other appointees.⁸⁰⁹ *Cognitio* proved an efficient way to deal with mass offences along with an investigation of behaviors which did not fit neatly within the lines drawn in the statutes governing criminal tribunals.⁸¹⁰ Furthermore, the action required to denounce an offender through this avenue required less action and commitment than the procedure required for a permanent tribunal.⁸¹¹ This helped to deal with those of inferior status who lacked the proper patrons required to bring a case to a permanent tribunal.⁸¹²

It is hard to determine how quickly *cognitio* replaced the *quaestiones perpetuae*. Augustus devised the *praefectus urbi* somewhat as a minister of public security, hence the command given to the office of urban cohorts (Tac. *Ann.* 14.41).⁸¹³ However, in 61 CE, under Nero's reign, the prefect's jurisdiction had become completely established in certain criminal cases.⁸¹⁴ Tacitus records that a man was sentenced to exile by the senate for bringing accusations before a *quaestio perpetua* so as to avoid having to be heard by the prefect of the city (Tac. *Ann.* 14.41).⁸¹⁵ His plan was to mishandle the prosecution during the *quaestio* and thus prevent the defendant having to be tried again; this was a form of *praevaricatio* (Tac. *Ann.* 14.41).⁸¹⁶ Rutilius Gallicus, the prefect in 90 CE under the rule of Domitian, is praised by the poet Statius (Stat. *Silv.* 1.4.9-16; 39-48).⁸¹⁷ The content of his praise suggests that the prefect's jurisdiction was by this time especially exercised over common criminals who had violently disturbed the peace in Italy.⁸¹⁸ This includes offenders who committed crimes that warranted a fairly severe penalty such as flogging or

⁸⁰⁹ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹⁰ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹¹ Lintott, *The Cambridge Companion to Roman Law*, 322; Baumen, *Crime and Punishment in Ancient Rome*, 39.

⁸¹² Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹³ Lintott, *The Cambridge Companion to Roman Law*, 322; Baumen, *Crime and Punishment in Ancient Rome*, 39.

⁸¹⁴ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹⁵ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹⁶ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹⁷ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸¹⁸ Lintott, *The Cambridge Companion to Roman Law*, 322.

imprisonment.⁸¹⁹ Under Trajan, Pliny the Younger served as assessor to the prefect in a case which featured two promising orators on either side (Plin. *Ep.* 6.11).⁸²⁰ This suggests that the case was of some importance such as violence or murder (Plin. *Ep.* 6.11).⁸²¹ In the early third century CE, Ulpian wrote his work *On the Duties of the Prefect of the City*.⁸²² By this time, the prefect had morphed into a universal criminal magistrate for any case within one hundred miles from the city of Rome (D. 1.12.1).⁸²³ The prefects now had the authority of punishment appropriate for persons of high rank (D. 1.12.1).⁸²⁴

The prefect of the watch (*praefectus vigilum*) gained limited jurisdiction which was inferior to that of the city prefect. These jurisdictions mainly related to fires and thefts (D. 1.15.3.1,5; D. 47.2.57.1), and perhaps corn-supply (D. 48.2.13; D. 48.12.3.1).⁸²⁵ Judicial powers were also significantly granted to the prefects of the guard (*praefecti praetorio*).⁸²⁶ The first prefect of the guard said to have acted as judge in Rome was Q. Marcius Turbo under Hadrian (Dio 69.18.3-4).⁸²⁷ Dating to the reign of Marcus Aurelius, an inscription from Saepinum records a warning by the prefects serving as prefect of the guard. Basseus Rufus and Macrinus Vindex, threatening the local magistrates with an inquiry and punishment due the magistrates' interference with flocks belonging to the imperial treasury (FIRA I no. 61).⁸²⁸

In time, the prefects became scapegoats for the emperor.⁸²⁹ They were burdened with the responsibility for the emperor's unpopular sentences.⁸³⁰ From this, a new feature arose: public criticism.⁸³¹ During the Republic, it was normal to have open debate, and the senate's proceedings were sometimes

⁸¹⁹ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸²⁰ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸²¹ Lintott, *The Cambridge Companion to Roman Law*, 322.

⁸²² Lintott, *The Cambridge Companion to Roman Law*, 322-3.

⁸²³ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸²⁴ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸²⁵ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸²⁶ Baumen, *Crime and Punishment in Ancient Rome*, 39.

⁸²⁷ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸²⁸ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸²⁹ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁰ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³¹ Baumen, *Crime and Punishment in Ancient Rome*, 40.

published to allow this.⁸³² Criticism probably existed, but was muffled.⁸³³ But under the rule of one, the emperor could become the focus of juristic and literary attacks.⁸³⁴ Crimes being dealt with through case law became higher profile during the Principate, especially around the second century CE.⁸³⁵ This was the result of two elements: the changed political environment and the improved machinery.⁸³⁶ In the Principate, time-servers and sycophants increased, ever aware of the imperial presence looming over them.⁸³⁷ But having orators droning on about what were (in comparison to the trials of Cicero), boring charges such as common theft was a positive improvement in the public's eyes,⁸³⁸ and indicated the shift from pyrotechnical displays to proper criminal jurisprudence.⁸³⁹

It is assumed that, in general, *cognitio* had taken over the operations of the permanent criminal tribunals in Rome by the era of the great classical jurists from the third century CE, known to us through Justinian's legal corpus.⁸⁴⁰ Pliny the Younger seems to have known a praetor in charge of a *quaestio perpetua* (Plin. Ep. 5.9.3).⁸⁴¹ The jurist Paul records in the third century the written form used for accusation of adultery.⁸⁴² it included two alternative addressees, a praetor (who, by this time, must have been the one in charge of the criminal tribunal) or a proconsul (the provincial authority) (D. 48.2.3).⁸⁴³ Therefore, it should be assumed that the *quaestio de adulteriis* was still operational at this time. There are three thousand alleged accusations for adultery under legislation from Septimius Severus which is reported by Dio Cassius (Dio 77.16.4).⁸⁴⁴ He relates that he saw these inscribed accusations on an *album* when he served as consul

⁸³² Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³³ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁴ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁵ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁶ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁷ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁸ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸³⁹ Baumen, *Crime and Punishment in Ancient Rome*, 40.

⁸⁴⁰ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴¹ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴² Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴³ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴⁴ Lintott, *The Cambridge Companion to Roman Law*, 323.

in 205 CE (Dio 77.16.4).⁸⁴⁵ Whether Dio was considering them for a hearing in the senate or not, it is plausible that these were initially addressed to the appropriate praetor.⁸⁴⁶

Other developments in the Principate included a change in the treatments of statutes from the late Republic and Augustus' reign. These statutes were extended and redefined by decisions of the senate and emperor.⁸⁴⁷ For example, the extortion or recovery law (*de repetundis*) began to be used for the activities of those who were neither senators nor Roman magistrates (D. 48.10).⁸⁴⁸ New categories of violence were created and made actionable under the statute. Under two rescripts of Hadrian, the homicide law (*de sicariis et veneficis*) was re-interpreted to include wounding with the intention of killing as well as killing, perhaps unintentionally, but with culpable negligence.⁸⁴⁹ A decree by the senate refined Sulla's law on forgery in 16 CE with regards to wills and later by other measures (D. 48.10).⁸⁵⁰ This was also done with the provisions against collusive and false accusation (*praevaricatio* and *calumnia*) under a decree by the senate in 61 CE (D. 48.16).⁸⁵¹

Interestingly, as time went on, the criminal law extended to include matters previously left to civil actions or matters which had not been subject to any legal action before.⁸⁵² By the beginning of the third century CE, the procedure of *cognitio* was used to investigate not just offences actionable to prosecution before one of the criminal tribunals, but also those outside of this field.⁸⁵³ This may have been through a step by step process or a piecemeal development through a series of rescripts and imperial edicts.⁸⁵⁴ Men convicted of hoarding goods and foodstuffs (*dardanarii*) were 'relegated' to do public works as a penalty

⁸⁴⁵ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴⁶ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴⁷ Lintott, *The Cambridge Companion to Roman Law*, 323.

⁸⁴⁸ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁴⁹ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵⁰ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵¹ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵² Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵³ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵⁴ Lintott, *The Cambridge Companion to Roman Law*, 324.

(D. 47.11.6).⁸⁵⁵ The term *stellionatus* came to be used to describe various, sophisticated types of fraud, such as corrupt practice in selling goods and granting security (D. 47.20).⁸⁵⁶ Violating graves also became a crime (D.47.12).⁸⁵⁷ Particular, defined types of theft were distinguished as crimes, such as theft by night or with a weapon (in the Twelve Tables these crimes were capital offences), looting, house-breaking, cattle-rustling, and theft from baths (D. 47.17.18).⁸⁵⁸

The capital penalty, by the time of Caesar's death, seems to have generally become banishment in the form of interdiction of fire and water in the statutes governing criminal tribunals.⁸⁵⁹ This penalty was said to have originated from the third century BC, but was not fully developed or as well used until this point (Livy 25.3.8-4.9). Its mainstream beginning is attributed to Sulla (the *lex Cornelia de sicariis et veneficis*) and solidified by Caesar.⁸⁶⁰ This was a conditional death penalty. If the offender remained in Rome, he would die, but if he left, he was free to live.⁸⁶¹ This can alternatively be described as a compulsory exile.⁸⁶² This was a balance of *humanitas* and *utilitas publica*.⁸⁶³ Sulla made this the penalty for homicide and testamentary fraud while Caesar also made it the penalty for political crimes. (D. 48.10.33)⁸⁶⁴

A full capital penalty would still be exacted for certain treasonable actions by both the triumvirate and Augustus during his reign (Tac. *Ann.* 1.10).⁸⁶⁵ By Tiberius' reign, offenders condemned on a capital charge by the senate could face execution.⁸⁶⁶ From this point on, the senatorial order would use whether the emperor approved of executing members of the elite as a yardstick by which they could evaluate him.⁸⁶⁷ This penalty was mitigated in practice by allowing the accused to commit suicide, thus avoiding the

⁸⁵⁵ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵⁶ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵⁷ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵⁸ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁵⁹ Lintott, *The Cambridge Companion to Roman Law*, 324; Baumen, *Crime and Punishment in Ancient Rome*, 20.

⁸⁶⁰ Baumen, *Crime and Punishment in Ancient Rome*, 20.

⁸⁶¹ Baumen, *Crime and Punishment in Ancient Rome*, 20.

⁸⁶² Baumen, *Crime and Punishment in Ancient Rome*, 20.

⁸⁶³ Baumen, *Crime and Punishment in Ancient Rome*, 20.

⁸⁶⁴ Baumen, *Crime and Punishment in Ancient Rome*, 21

⁸⁶⁵ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁶⁶ Lintott, *The Cambridge Companion to Roman Law*, 324.

⁸⁶⁷ Lintott, *The Cambridge Companion to Roman Law*, 324-5.

humiliation.⁸⁶⁸ Furthermore, if the offender committed suicide before he was condemned, this might induce the emperor to be more lenient in yielding the property to the offender's family.⁸⁶⁹ Under the Augustan laws, rewards were offered to accusers in the form of financial compensation (they could earn the estate of those they condemned) and preferment in the pursuit of public office.⁸⁷⁰ The concept of exile and by extension interdiction, became outdated.⁸⁷¹ Exiled offenders were able to pass their lives in an agreeable Greek city and this was not seen as a significant enough punishment.⁸⁷² Therefore, Augustus began to select designated islands for the condemned; exile was then penally restrictive and uncomfortable.⁸⁷³

By the time of the classical jurists, the variety of non-financial penalties had been refined and extended by the senate and emperors.⁸⁷⁴ These penalties now varied not just according to the nature of the crime, but also the status of the criminal.⁸⁷⁵ These penalties could be quite inventive and not confined to 'bad emperors'.⁸⁷⁶ Galba is said to have ordered that a soldier, who was found to have unlawfully sold part of his food allowance, be starved to death (Suet. *Galba* 7.4).⁸⁷⁷ And he ordered that a money changer, who was found to have cheated on the weights, have his hands cut off and nailed to the table upon which he had directed his fraudulent dealings (Suet. *Galba* 9.1).⁸⁷⁸ Under the Republic, the elite tended to profit from their status and receive the concessions of exile while common criminals were likely to be killed or reduced to virtual slaves.⁸⁷⁹ The *Constitutio Antoniniana*, instituted in 212 CE, granted citizenship to all individuals living within Roman territory.⁸⁸⁰ At this time, slavery also declined and was somewhat replaced by serfdom

⁸⁶⁸ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁶⁹ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁷⁰ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁷¹ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁷² Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁷³ Lintott, *The Cambridge Companion to Roman Law*, 325. Augustus' daughter, Julia, was sent to a villa on Pandateria off the coast of Latium for adultery. Her lover, Sempronius Gracchus, was sent to Cercina off Tunisia (Tac. *Ann.* 1.53).

⁸⁷⁴ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁷⁵ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁷⁶ Harries, *Law and Empire in Late Antiquity*, 137.

⁸⁷⁷ Harries, *Law and Empire in Late Antiquity*, 137.

⁸⁷⁸ Harries, *Law and Empire in Late Antiquity*, 137.

⁸⁷⁹ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁰ Biagini, *Roman Law and Political Control*, 331.

(*colonatus*).⁸⁸¹ But, under the Principate at this time, an explicit distinction between the ‘more honourable’ (*honestiores*) and the ‘more humble’ (*humiliores*) was made, and the lower class still suffered under considerable disabilities.⁸⁸² This can be seen in rescripts about local senators from the second century CE (D. 49.19.15; D. 48.22.6.2).⁸⁸³ However the full distinction was made in the Severan period.⁸⁸⁴ For the more honorable, the supreme penalty consisted of execution by sword⁸⁸⁵ (traditionally, they were executed by means of an axe or rope).⁸⁸⁶ The interdiction by fire and water was no longer in use, but was instead replaced by deportation to a designated island and confiscation of the offender’s property.⁸⁸⁷ For the more humble (including slaves), they received execution by means of crucifixion, hanging, being burnt alive, or exposed to the beasts.⁸⁸⁸ Less drastic penalties were also used but were more likely to bring a slow death.⁸⁸⁹ These penalties included hard labor: public work or condemnation to the mines.⁸⁹⁰ *Relegatio* was also introduced as a criminal penalty, a form of *exilium*.⁸⁹¹ It was milder than deportation (*deportatio*), another form of banishment, and lasted for the offender’s lifetime.⁸⁹² *Relegatio* was for a temporary period and not permanent, and it also did not carry a loss of civil rights.⁸⁹³ Penalties, dependent on the victim’s status, were made worse by the addition of beatings of the offender with stick or whips.⁸⁹⁴ Prison was still a way to imprison the offender before trial or execution,⁸⁹⁵ but, in practice, it was also regularly used as a form of

⁸⁸¹ Biagini, *Roman Law and Political Control*, 331.

⁸⁸² Lintott, *The Cambridge Companion to Roman Law*, 325; Harries, *Law and Empire in Late Antiquity*, 139-40; Biagini, *Roman Law and Political Control*, 331.

⁸⁸³ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁴ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁵ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁶ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁷ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁸ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁸⁹ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁹⁰ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁹¹ Braginton, *Exile under the Roman Emperors*, 392.

⁸⁹² Braginton, *Exile under the Roman Emperors*, 393.

⁸⁹³ Braginton, *Exile under the Roman Emperors*, 392.

⁸⁹⁴ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁹⁵ Lintott, *The Cambridge Companion to Roman Law*, 325.

punishment by the late third century CE (D. 48.19.8.9).⁸⁹⁶ Prisons became a way to deal with exiles.⁸⁹⁷ It subjected exiles to humiliating and demeaning treatment under a private prison system which would even force prisoners to hard labour.⁸⁹⁸ However, in 529, Justinian issued a law prohibiting the holding of exiles in both public and private prisons (C. Just. 9.5.2).⁸⁹⁹

The Late Empire:

When Diocletian rose to power as Emperor in 384 CE, the empire underwent various formative stages, ushering in a new era of Roman law.⁹⁰⁰ When Christianity was instated as the religion of the empire, a process started by Constantine and completed by Theodosius I, the cruelty of penalties were, generally, not reduced.⁹⁰¹ In fact, some scholars argue that they seem to have intensified.⁹⁰² However, the use of harsh punishment was publicly questioned, and sources give the impression that judicial torture was a high profile affair.⁹⁰³ This may indicate that vicious punishment was not intensified, but rather that there was a profound questioning of the implication of this *quaestio* procedure.⁹⁰⁴ Changes eventually occurred which suggest more humane values were in play and the variety of possible penalties were decreased.⁹⁰⁵ Arguments against the death penalty arose based on theological grounds.⁹⁰⁶ The insistence, attributed to Christianity, on greater humanity exercised in doling out punishment can still be representative of a society which was conditioned to accept individual suffering and state cruelty.⁹⁰⁷ However, it was increasingly prone to employ the rhetoric

⁸⁹⁶ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁸⁹⁷ Hillner, *Prison, Punishment and Penance in Late Antiquity*, 231.

⁸⁹⁸ Hillner, *Prison, Punishment and Penance in Late Antiquity*, 231.

⁸⁹⁹ Hillner, *Prison, Punishment and Penance in Late Antiquity*, 231.

⁹⁰⁰ Harries, *Law and Empire in Late Antiquity*, vii.

⁹⁰¹ Lintott, *The Cambridge Companion to Roman Law*, 325.

⁹⁰² Lintott, *The Cambridge Companion to Roman Law*, 325.

⁹⁰³ Harries, *Law and Empire in Late Antiquity*, 135.

⁹⁰⁴ Harries, *Law and Empire in Late Antiquity*, 135.

⁹⁰⁵ Harries, *Law and Empire in Late Antiquity*, 135.

⁹⁰⁶ Harries, *Law and Empire in Late Antiquity*, 135.

⁹⁰⁷ Harries, *Law and Empire in Late Antiquity*, 135.

of pain to question and modify the assumptions inherited from the early Empire.⁹⁰⁸ The prime motive for punishment remained the same: retribution and deterrence.⁹⁰⁹

Torture could be regarded as a form of punishment for the crime. This was often the case for Christians during the Great Persecution, many displayed their faith through enduring the *quaestio* up until they died.⁹¹⁰ Some victims of the procedure were so badly mauled by torturers that there was barely anything left to be subject to the laid down penalty (Amm. Marc. 29.1.44).⁹¹¹ Further, the jurist Claudius Saturninus relates that some punishments for malefactors were made worse to set an example (D. 48.19.10).⁹¹²

Christianity greatly influenced the treatment of the death penalty. Once a criminal was executed, the offender had no ability to reform, and thus their chance to improve their fate in the afterlife was denied to them.⁹¹³ Executions were still publicly broadcast to enforce retribution and deterrence.⁹¹⁴ During the first and second century, Pseudo-Quintillian writes that criminals (of the non-Roman variety) were hung on crosses along roads so they would be visible to as many people as possible (Ps. Quint. *Dec.* 274).⁹¹⁵ The Severan jurist Callistratus, over a century later, reports the practice of hanging notorious bandits on gallows where the crime was committed (D. 48.19.28.15).⁹¹⁶ This is a similar practice which shows continuity in approach. Little changed in this regard in the late Empire: emperors exacted retribution through ‘the avenging sword’ (*gladio ultore*) but the exact mode of execution was not always specified.⁹¹⁷ Offenders convicted under Constantine’s laws on forgery were to be ‘done to death’ or ‘delivered to the flames’ (C.

⁹⁰⁸ Harries, *Law and Empire in Late Antiquity*, 135.

⁹⁰⁹ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹⁰ Harries, *Law and Empire in Late Antiquity*, 135.

⁹¹¹ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹² Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹³ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹⁴ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹⁵ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹⁶ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹⁷ Harries, *Law and Empire in Late Antiquity*, 136.

Th. 9.22.1).⁹¹⁸ Executions, as a public affair, began first when the populace was summoned with a trumpet.⁹¹⁹ Known methods of execution included being beaten to death, decapitation, being burned alive, thrown to wild animals, being drowned in a sack, being hurled from the Tarpeian rock, and being buried alive.⁹²⁰ Most of these methods required the offender to be stripped.⁹²¹ As a result, to preserve modesty, women were executed in private.⁹²² Women tended to be executed through strangulation, after those who were virgins had been defiled by the executioner (Tac. *Ann.* 5.9.3; Dio 58.11.5).⁹²³ The goal seems to have been maximum suffering for maximum deterrence.⁹²⁴

Some punishments were elaborated upon. Constantine issued an edict concerning abduction in 320 CE which stipulated that nurses who inveigle their charges to cooperate with their abductors would receive the penalty of having their throats and mouths (which were responsible for the deception) closed by filling them with molten lead (C. Th. 9.24.1).⁹²⁵ The *Historia Augusta* (a series of less than reliable biographies dated to the first to third centuries CE) contains a series of alleged precedents.⁹²⁶ These precedents more credibly reflect the fourth century approaches to punishment taken by the emperors.⁹²⁷ For example, it reports that Severus Alexander ordered a courtier to be suffocated with smoke in the Forum Transitorium at Rome because he had sold illegal favours, a practice termed colloquially as ‘selling smoke’ (SHA *Severus Alexander* 36.6).⁹²⁸

These ironic punishments created displays of imperial rigour which connected the crime and punishment symbolically. There was also an air of theatricality created with the punishments doled out in

⁹¹⁸ Harries, *Law and Empire in Late Antiquity*, 136.

⁹¹⁹ Baumen, *Crime and Punishment in Ancient Rome*, 14.

⁹²⁰ Baumen, *Crime and Punishment in Ancient Rome*, 14.

⁹²¹ Baumen, *Crime and Punishment in Ancient Rome*, 14.

⁹²² Baumen, *Crime and Punishment in Ancient Rome*, 14.

⁹²³ Baumen, *Crime and Punishment in Ancient Rome*, 14.

⁹²⁴ Baumen, *Crime and Punishment in Ancient Rome*, 14.

⁹²⁵ Harries, *Law and Empire in Late Antiquity*, 136-7.

⁹²⁶ Harries, *Law and Empire in Late Antiquity*, 137.

⁹²⁷ Harries, *Law and Empire in Late Antiquity*, 137.

⁹²⁸ Harries, *Law and Empire in Late Antiquity*, 137.

late antiquity.⁹²⁹ This is seen in Theodosius I's rhetoric against homosexuals. He determined that they were to receive the punishment of fire in front of a crowd so that all would understand the punishment for betraying one's own sex in a shameful manner (*Collatio* 5.3.1.2).⁹³⁰ The use of fire in some instances of executions is problematic as it doesn't seem to create a parallel to the crime committed. It may be the case that it acted as foreshadowing based in their religious beliefs.⁹³¹ Or, as seen in the case of martyrs, it could actually prevent them from this fate. The martyr Pionius, before his death, claimed that it was better to burn in the mortal realm as a Christian, than to burn afterwards (*Mart. Pionii* 4.5).⁹³²

Life for the elite Romans was less comfortable than it was in the early Empire, as they were subject to more crimes and more crimes were subject to capital punishment.⁹³³ During the second and third centuries CE, jurists produced analyses of *summa supplicia* (ultimate penalties) and gave the most prominent position to the previously discussed exposure to wild beasts in the arena.⁹³⁴ This fate was laid out for deserters, brigands, murderers, abductors, arsonists, forgers, and those guilty of sacrilege.⁹³⁵ However, arsonists could also be burned alive along with deserters and those guilty of sacrilege.⁹³⁶ Robbers and other types of offenders could be crucified.⁹³⁷ Under Constantine, the penalty of the sack for parricide remained.⁹³⁸ Constantine gave reasons for this penalty: they were to be deprived of two essential elements, air when in life, and earth when in death (C. Th. 9.15.1).⁹³⁹

⁹²⁹ Harries, *Law and Empire in Late Antiquity*, 137.

⁹³⁰ Harries, *Law and Empire in Late Antiquity*, 137.

⁹³¹ Harries, *Law and Empire in Late Antiquity*, 137.

⁹³² Harries, *Law and Empire in Late Antiquity*, 137.

⁹³³ Harries, *Law and Empire in Late Antiquity*, 138.

⁹³⁴ Harries, *Law and Empire in Late Antiquity*, 138.

⁹³⁵ Harries, *Law and Empire in Late Antiquity*, 138.

⁹³⁶ Harries, *Law and Empire in Late Antiquity*, 138.

⁹³⁷ Harries, *Law and Empire in Late Antiquity*, 138.

⁹³⁸ Harries, *Law and Empire in Late Antiquity*, 138.

⁹³⁹ Harries, *Law and Empire in Late Antiquity*, 138.

The penalty of crucifixion and *ad bestias* is last seen in the legislation of Constantine (C. Th. 9.1.5).⁹⁴⁰ This deviation was probably the result of the Christian's distaste for these deadly spectacles which their martyrs had suffered from.⁹⁴¹ However, there was also a probable shift in fashion and imperial policy which resulted in this decline.⁹⁴² Constantine banned branding on the face as a punishment due to the face being the image of heavenly beauty, showing his Christian influence (C. Th. 9.40.2).⁹⁴³ Constantine may have also been the one to ban crucifixion due to the growing influence of Christianity but also because the gallows (*furca*) was seen as a more humane penalty: it allowed an instantaneous death.⁹⁴⁴

Gradually, the privilege of being exempt from more humiliating punishments for the elite eroded with the increasing use of torture, and the charge of *maiestas* fell into disuse.⁹⁴⁵ This did not destroy the class exemptions completely.⁹⁴⁶ Under a decree of Constantine, for the charge of counterfeiting money, decurions and their sons were exiled with their property confiscated, plebeians received 'perpetual punishment', and slaves received the 'supreme penalty' (C. Th. 9.21.1).⁹⁴⁷ Poor people could even receive a sentence to the mines for apparently minor crimes. This includes poor defendants who were unsuccessful in their appeal of their case before the Praetorian Prefects because it was seen as wasting the court's time.⁹⁴⁸ The treatment of adultery also shifted. The adulterer could still face death but not through any means of private family vengeance.⁹⁴⁹ Retribution was solely wrought through the agency of the state.⁹⁵⁰ New crimes were also introduced in this period. It was made illegal to connive in heretical assemblies which resulted in

⁹⁴⁰ Harries, *Law and Empire in Late Antiquity*, 138.

⁹⁴¹ Harries, *Law and Empire in Late Antiquity*, 139.

⁹⁴² Harries, *Law and Empire in Late Antiquity*, 139.

⁹⁴³ Harries, *Law and Empire in Late Antiquity*, 139.

⁹⁴⁴ Harries, *Law and Empire in Late Antiquity*, 139.

⁹⁴⁵ Harries, *Law and Empire in Late Antiquity*, 140.

⁹⁴⁶ Harries, *Law and Empire in Late Antiquity*, 140.

⁹⁴⁷ Harries, *Law and Empire in Late Antiquity*, 140.

⁹⁴⁸ Harries, *Law and Empire in Late Antiquity*, 141.

⁹⁴⁹ Harries, *Law and Empire in Late Antiquity*, 141.

⁹⁵⁰ Harries, *Law and Empire in Late Antiquity*, 141.

forced labour in the mines.⁹⁵¹ Overseers of these assemblies and the procurators of the estates where these meetings took place were flogged first.⁹⁵²

Another important point was the crime for the exertion of major force (*force majeure*). Criticism of abuse of power was a persistent theme in late legal rhetoric.⁹⁵³ From the second century CE and onwards, Roman law took into account the potential of powerful individuals to abuse the system in order to help themselves.⁹⁵⁴ Both Gaius in his comments on the Provincial Edict, and Ulpian in his manual on the duties of a provincial governor stressed that it was the duty of the governor to protect the weak against the strong (D. 4.7.22 [Gaius]; D. 1.16.9.5 [Ulpian]).⁹⁵⁵ Any unlawful interference by the strong (*potens*) in the affairs of the weak could leave them vulnerable, in theory to a penalty.⁹⁵⁶ However, it is clear that the law did not favour the weak. Therefore, if a powerful person coerced a tenant farmer and the tenant lost his farm, the law dictated that the landlord, who had the responsibility of supplying what was in the rental contract, had to return the rent (D. 19.2.33).⁹⁵⁷ But, there was no account taken for the value of the produce lost (D. 19.2.33).⁹⁵⁸

Intention and motive were also taken into account to a certain extent. The removal of boundary stones was a crime but the motive for doing so could be very dependent on the individual (D. 47.21.2; *Collatio* 13.3).⁹⁵⁹ Rich men were punished with exile for approximately two years if found guilty of this offense.⁹⁶⁰ They had clear reason to do this: it increased their landholdings.⁹⁶¹ Poor people who did the same

⁹⁵¹ Harries, *Law and Empire in Late Antiquity*, 141-2.

⁹⁵² Harries, *Law and Empire in Late Antiquity*, 141-2.

⁹⁵³ Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁵⁴ Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁵⁵ Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁵⁶ Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁵⁷ Harries, *Law and Empire in Late Antiquity*, 144.

⁹⁵⁸ Harries, *Law and Empire in Late Antiquity*, 144.

⁹⁵⁹ Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁶⁰ Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁶¹ Harries, *Law and Empire in Late Antiquity*, 143.

were sentenced to two years in the mines if it was found that they had committed the offense deliberately, but less if it was accidental.⁹⁶²

Continuity can be found in the shifts and changes which took place between the early Empire and Dominate. Retribution and deterrence were still big factors in the Roman's approach to punishment. However, the change of the Empire to Christianity did have an effect: retribution did not just take place in the mortal world but in death as well.⁹⁶³ Instead of the variety of afterlives in the different religions which thrived in a polytheistic society, only one belief gradually came to be accepted under the monotheistic government. The *Apocalypse of Paul*, a text which seems to date to the third century and was 'discovered' under the reign of Theodosius I, details the torments of the damned which were intense and appropriate to their crimes committed in life.⁹⁶⁴ Furthermore, the horrible fates of the persecuting emperors (ie. the wretched demise of Emperor Julian while on campaign in Persia, the sordid death of the arch-heretic Arius, etc.) was seen as the judgement of God on earth. Those who were deemed as wrongdoers received their fate on earth from God as well. The elite men were no longer exempt if seen as going against the one and only God.

As Christianization of the state continued, and most of the agents of the state were largely Christian, the imperial bureaucracy became more and more open to the approaches suggested by bishops.⁹⁶⁵ Under this guidance, we see the first ideas of criminal reform.⁹⁶⁶ The magistrates backed the bishops appeals for leniency with the moral authority (*auctoritas*) inherent in their office.⁹⁶⁷ The *iudex* (judge) Ambrose, contrasted the judicial *auctoritas* with the Christian mercy (*miserecordia*).⁹⁶⁸ A criminal, while still alive, could improve himself if unbaptized by being baptized, and if baptized by repenting (*Amb. Ep. 25.8*).⁹⁶⁹

⁹⁶² Harries, *Law and Empire in Late Antiquity*, 143.

⁹⁶³ Harries, *Law and Empire in Late Antiquity*, 146.

⁹⁶⁴ Harries, *Law and Empire in Late Antiquity*, 146.

⁹⁶⁵ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁶⁶ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁶⁷ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁶⁸ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁶⁹ Harries, *Law and Empire in Late Antiquity*, 148.

The bishop Augustine argued that a good Christian should love his enemies and therefore must not inflict on them the supreme penalty, which would prevent them from repenting and redeeming themselves in life.⁹⁷⁰

When a gang of Donatists Circumcellions confessed, under torture, that they murdered and mutilated two Catholic priests, Augustine seized the opportunity to advocate for mercy (August. *Ep.* 133.3).⁹⁷¹ Writing to the *tribunus et notarius*, Marcellinus, Augustine rejected the traditional philosophy of *lex talionis*.⁹⁷² He relates that he supported the theory of punishment as a chance to reform and that he hoped a penalty could be found which would either bring the murderers to their senses, or if not, at least give them something useful to do.⁹⁷³ Augustine explained that rather than too seek retribution, the judge should instead seek to ‘heal the wounds’ of sin.” (August. *Ep.* 133.3)⁹⁷⁴

Many changes occurred in the criminal law throughout Roman history. This began with the initial codification of law on the Twelve Tables, however the main concern of these Tables were civil issues. Gradually, the Romans employed various procedures to deal with crime: the *iudicium populi*, the *iudicium publicum*, and the *cognitio extraordinaria*. The shift of procedure reflected both the centralization of government under an emperor and his bureaucracy, along with the growth of territory of the state. Over time, the jurisdiction of criminal law came to include not just crimes against the state, but personal crimes of violence as well which would have been tried as a civil case previously. Penalties initially included exile, fines, and execution. Later, a finer differentiation occurred and many penalties were added. This was especially true during Late Antiquity under the influence of the Christian religion.

⁹⁷⁰ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁷¹ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁷² Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁷³ Harries, *Law and Empire in Late Antiquity*, 148.

⁹⁷⁴ Harries, *Law and Empire in Late Antiquity*, 148.

Chapter 3

Law and Legal Traditions of Canada's Indigenous Peoples

Canada is legally pluralistic.⁹⁷⁵ There is a simultaneous existence within a single legal order of differing rules and legal traditions which apply to identical situations.⁹⁷⁶ This includes Canadian common law, civil law, and Indigenous law which organize dispute resolution within the country.⁹⁷⁷ A legal tradition consists of ingrained, historically conditioned positions concerning the nature of law, the role that law plays in society and the polity, the operation and correct organization of a legal system, and the ways in which laws should be applied, made, perfected, studied, and taught.⁹⁷⁸ Legal traditions, so long as they continue to be revised and adapted, can work as positive forces in communities.⁹⁷⁹ However, if they become static, they can become overly romanticized, fossilized, and essentialized negative frameworks.⁹⁸⁰ Therefore, it is beneficial to study the history of these legal traditions in order to provide a means of questioning and developing the parameters within these systems to maintain their efficacy.⁹⁸¹ Canada's Indigenous peoples believe that their traditional laws provide significant context for evaluating their relationships with one another and the land.⁹⁸²

Canada's Indigenous cultures are not homogenous, there are many peoples with distinct cultures and languages.⁹⁸³ The Mohawk in southern Quebec are matrilineal and an agricultural people while the Cree in northern Quebec are patrilineal and subsist on hunting, trapping, and fishing.⁹⁸⁴ Yet, on a basic, simplified level, it can be argued that these people share certain characteristics which can be seen as ethics

⁹⁷⁵ Borrows, *Canada's Indigenous Constitution*, 8.

⁹⁷⁶ Borrows, *Canada's Indigenous Constitution*, 8.

⁹⁷⁷ Borrows, *Canada's Indigenous Constitution*, 8.

⁹⁷⁸ Merryman, *The Civil Law Tradition*, 1.

⁹⁷⁹ Borrows, *Canada's Indigenous Constitution*, 8.

⁹⁸⁰ Borrows, *Canada's Indigenous Constitution*, 8.

⁹⁸¹ Halpin, *Glenn's Legal Traditions of the World*, 116.

⁹⁸² Borrows, *Canada's Indigenous Constitution*, 7.

⁹⁸³ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁸⁴ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

or beliefs.⁹⁸⁵ In order to understand Indigenous legal systems and traditions, it is important to first review certain elements of Indigenous communities and their concepts of justice. Elders play an integral role to the functioning of the community. They are largely responsible for preserving the knowledge of Indigenous cultural traditions.⁹⁸⁶ Elders can be male or female and act as teachers and sometimes healers; they help the community, both in a collective and individual way, to learn about their history, customs, traditions, values, and beliefs.⁹⁸⁷ Indigenous Elders are respected for their experience and wisdom they have gained over their long life and for their ability to advise and council people during difficult situations as a result.⁹⁸⁸ Today, certain communities have councils of Elders who can advise tribal governments and officials on matters of interest.⁹⁸⁹

A fundamental belief held by Canada's Indigenous peoples is that each person is made up of three aspects: the body, the mind, and the spirit.⁹⁹⁰ When Indigenous healers try to administer to the sick, they do not just treat the person physically but they also conduct spiritual ceremonies and counsel the person to help clear their mind.⁹⁹¹ It is a holistic approach. Healers can often be Elders in the community.⁹⁹² Some Elders think that, in order for an Indigenous person to heal fully, they must have all three aspects healed in the Indigenous way.⁹⁹³ Some even believe that if an Indigenous person goes to a non-Indigenous doctor, they cannot be healed in the proper traditional way.⁹⁹⁴ Others consider it fine to go to a non-Indigenous doctor, but that the injured must still be healed spiritually and mentally in the traditional way.⁹⁹⁵ By extension, some Elders believe it to be necessary for all Indigenous inmates to be healed in a similar

⁹⁸⁵ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁸⁶ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁸⁷ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁸⁸ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁸⁹ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹⁰ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹¹ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹² Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹³ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹⁴ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹⁵ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

fashion.⁹⁹⁶ Although the offender may not have anything directly wrong with them physically as a result of incarceration, the Elders believe that there are harmful effects left upon the individual's spirit and mind from being imprisoned.⁹⁹⁷

Other ethics and rules of behaviour are defined by Mohawk psychiatrist Dr. Clare Brant and, according to Brant, these ethics and rules are found in some form in all Indigenous peoples of North America.⁹⁹⁸ These ethics and rules of behaviour were first outlined in his 1990 article published in the *Canadian Journal of Psychiatry*, "Native Ethics and Rules of Behaviour". Brant produced his article in this field as a result of psychiatrists assessing Indigenous children and adolescents as passive, and difficult to assess because they were not forthcoming with information. He believed these assessments, which often led clinicians to relate such behaviours with psychopathology, were misinterpretations by these clinicians because they were unfamiliar with Indigenous cultures. His findings were the culmination of twenty-four years of medical practice working with Haudenosaunee groups in southern Ontario and Quebec, Anishinaabe groups in southern Ontario, and Swampy Cree groups based in James and Hudson's Bay.⁹⁹⁹ His last twelve years of practice were particularly spent in psychiatric and psychotherapeutic research.¹⁰⁰⁰ Brant also used additional data collected through extensive interaction with Indigenous populations across Canada and northern United States as the result of his role as a visiting consultant and lecturer.¹⁰⁰¹ The review of these cultural imperatives help to better understand how Indigenous ideas of justice function. As a result, his work has since spurred research in how these ethics can be applied in relation to the Canadian criminal justice system. Notably, it has been the basis of an article by Cathy Prowse published in 2011 in the *International Journal of Humanities and Social Science*, "Native Ethics and Rules of Behaviour in the

⁹⁹⁶ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹⁷ Hamilton and Sinclair, *Public Inquiry into the Administration of Justice and Aboriginal People*.

⁹⁹⁸ Brant, *Native Ethics and Rules of Behaviour*, 534.

⁹⁹⁹ Brant, *Native Ethics and Rules of Behaviour*, 534.

¹⁰⁰⁰ Brant, *Native Ethics and Rules of Behaviour*, 534.

¹⁰⁰¹ Brant, *Native Ethics and Rules of Behaviour*, 534.

Criminal Justice Domain: A Career Retrospect”, as well as serving as a foundational stone in the work of the Manitoban *Public Inquiry Into the Administration of Justice and Aboriginal People* released in 1991.

These cultural imperatives can be organized as four major imperatives although lesser imperatives also exist. The major imperatives are as follows: the ethic of non-interference, the rule of non-competitiveness, emotional restraint, and sharing. “Non-interference” helps to “promote positive interpersonal relationships by discouraging coercion of any kind, be it physical, verbal, or psychological”.¹⁰⁰² It derives from the high degree of respect held by Indigenous peoples for every individual’s independence.¹⁰⁰³ This view sees interference or restrictions as undesirable behaviour if it hinders a person’s personal freedom.¹⁰⁰⁴ It extends even to relationships between adults and children which may be interpreted as permissiveness.¹⁰⁰⁵ This ethic also helps to explain the use of stories in Indigenous societies in order to dole out advice. The story lays out a situation with options and it is up to the listener to decide how they want to understand it and whether they want to act according to the advice.¹⁰⁰⁶ The second ethic of “non-competitiveness” acts as a way to suppress internal conflict within groups by preventing intra group rivalry.¹⁰⁰⁷ It is particularly directed to prevent the strife which can arise from competitiveness in a clan. It has a secondary function to avoid embarrassment for a member of the group who is less-able while participating in a group activity.¹⁰⁰⁸ This is not to be interpreted as an inability to compete, but the valuing of a more cooperative approach.¹⁰⁰⁹ The third ethic, “emotional restraint”, builds upon the first two ethics. It grew from a need to control outbursts of emotions that could create a disruption for the tightly knit Indigenous communities or families.¹⁰¹⁰ However, although it functions to repress angry,

¹⁰⁰² Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰³ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰⁴ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰⁵ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰⁶ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰⁷ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰⁸ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰⁰⁹ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰¹⁰ Brant, *Native Ethics and Rules of Behaviour*, 535.

destructive, and violent feelings to help promote self-control and group harmony, it also acts to repress positive feelings such as joyfulness.¹⁰¹¹ Brant believes this repression of hostility can also lead to explosive episodes.¹⁰¹² The last ethic of “sharing” can be seen in some ceremonies which are in place to prevent any one individual from becoming too rich or powerful and, conversely, to prevent any one individual from becoming too poor or powerless.¹⁰¹³ Ceremonies such as this include more formal potlatches but also daily informal features of Indigenous societies.¹⁰¹⁴ Individuals were expected, as a way of life, to take no more than needed from nature and to share their prosperity with others.¹⁰¹⁵ This acted as a way to ensure group survival but also functioned to suppress conflict by decreasing the likelihood of arrogance, envy, greed, and pride within the community.¹⁰¹⁶ These ethics placed group survival above individual prosperity.¹⁰¹⁷ Although Brant admits these theories of human behaviour are far from complete, they serve to illustrate a simplified idea of Indigenous values and worldviews.¹⁰¹⁸

Scholarly debate centered around what constitutes “law” has created uncertain status in Canada’s formal legal system for Indigenous laws.¹⁰¹⁹ There is some argument over whether Indigenous peoples practiced law prior to colonization with some commentators claiming that Indigenous peoples in North America were pre-legal.¹⁰²⁰ Those who have made these claims believe that a society which possesses laws must have these laws declared by a recognized power capable of enforcing this declaration.¹⁰²¹ This position requires the view that Indigenous legal tradition was only customary and can therefore not be clothed with legality.¹⁰²² However, these arguments can be presumptive and potentially replicate harmful stereotypes

¹⁰¹¹ Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰¹² Brant, *Native Ethics and Rules of Behaviour*, 535.

¹⁰¹³ Brant, *Native Ethics and Rules of Behaviour*, 536.

¹⁰¹⁴ Brant, *Native Ethics and Rules of Behaviour*, 536.

¹⁰¹⁵ Brant, *Native Ethics and Rules of Behaviour*, 536.

¹⁰¹⁶ Brant, *Native Ethics and Rules of Behaviour*, 536.

¹⁰¹⁷ Brant, *Native Ethics and Rules of Behaviour*, 536.

¹⁰¹⁸ Brant, *Native Ethics and Rules of Behaviour*, 538.

¹⁰¹⁹ Borrows, *Canada’s Indigenous Constitution*, 12.

¹⁰²⁰ Borrows, *Canada’s Indigenous Constitution*; Editorial, *One Tier Justice*, A19.

¹⁰²¹ Borrows, *Canada’s Indigenous Constitution*, 8.

¹⁰²² Borrows, *Canada’s Indigenous Constitution*, 8.

about these societies.¹⁰²³ Although some Indigenous law is based in custom, it can also be deliberative, positivistic, or based in theories of natural or divine law.¹⁰²⁴ Furthermore, labeling customary law as holding only moral force can be misleading and this classification by certain scholars may hold inappropriate perceptions of these societies as being inferior or ‘savage’.¹⁰²⁵ Indigenous peoples have historically been identified as ‘ignorant’ and ‘stupid’ for not living with subjection and not submitting to a hierarchical political government.¹⁰²⁶ This has led to the claim that colonization was the singular foundation of Canada’s law which creates a fictional account and erases Indigenous legal systems.¹⁰²⁷

Sources of Indigenous Legal Traditions:

Indigenous legal traditions are based in many sources including positivistic proclamations, sacred teachings, naturalistic observations, deliberative practices, and local and national customs.¹⁰²⁸ They are not simply customary at their root.¹⁰²⁹ Indigenous communities hold very diverse theories about how law derives its binding force. A part of Indigenous law is derived from sacred sources.¹⁰³⁰ Sacred sources are given this designation if they are connected to the Creator, creation stories, or if they come from revered ancient teachings which have withstood the test of time.¹⁰³¹ These laws were given the utmost respect. This is often the case with laws which rest on appeals to the divine.¹⁰³²

Creation stories consist of accounts which contain rules and norms with the goal of providing guidance about how to live within the world and overcome conflict.¹⁰³³ They contain instructions with a

¹⁰²³ Borrows, *Canada’s Indigenous Constitution*, 8; *Milirrpum v. Nabalco Pty Ltd*, 267.

¹⁰²⁴ Borrows, *Canada’s Indigenous Constitution*, 8.

¹⁰²⁵ Borrows, *Canada’s Indigenous Constitution*, 8; Austin, *The Province of Jurisprudence Determined*, 178.

¹⁰²⁶ Borrows, *Canada’s Indigenous Constitution*, 8; Austin, *The Province of Jurisprudence Determined*, 178.

¹⁰²⁷ Borrows, *Canada’s Indigenous Constitution*, 14.

¹⁰²⁸ Borrows, *Canada’s Indigenous Constitution*, 24.

¹⁰²⁹ Borrows, *Canada’s Indigenous Constitution*, 24.

¹⁰³⁰ Borrows, *Canada’s Indigenous Constitution*, 24.

¹⁰³¹ Borrows, *Canada’s Indigenous Constitution*, 24.

¹⁰³² Borrows, *Canada’s Indigenous Constitution*, 25.

¹⁰³³ Borrows, *Canada’s Indigenous Constitution*, 25.

wide scope, and they provided how all beings should relate to definite territories.¹⁰³⁴ They generally apply to an entire region and are sometimes even universal.¹⁰³⁵ Due to this broad reach and spiritual nature, these laws may be less flexible than laws from other sources.¹⁰³⁶ Moreover, the enforcement, recognition, and implementation of these laws are foundational for the workings of other laws.¹⁰³⁷ Creation stories can include the formation of the world but also reference the institution of other significant habitations.¹⁰³⁸

One particular creation story explains how parts of Canada were formed through the use of Indigenous legal traditions.¹⁰³⁹ The Elders in Saskatchewan report that their treaties are sacred because they generated Canada within their territories.¹⁰⁴⁰ A report was done through the Office of the Treaty Commissioner on the meaning of ‘peace and order’ clauses found in the treaties made in the Canadian West.¹⁰⁴¹ The peace and order promises made within treaties with the Cree, Anishinabee, and Dene societies in this area, which spoke of the need to apply and respect Indigenous law within these territories, were examined.¹⁰⁴² From the government perspective, these clauses meant that the Indigenous peoples would, “maintain peace and order between each other and also between themselves and other tribes of Indians or whites”.¹⁰⁴³ This included that Indigenous peoples would, “aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty or infringing the laws in force in the country so ceded”.¹⁰⁴⁴

¹⁰³⁴ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰³⁵ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰³⁶ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰³⁷ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰³⁸ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰³⁹ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰⁴⁰ Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰⁴¹ Borrows, *Canada's Indigenous Constitution*, 25. See: John Borrows, ‘Peace and Order: Describing and Implementing Treaty Justice in Saskatchewan’ prepared for the Office of the Treaty Commission, Saskatoon (2003).

¹⁰⁴² Borrows, *Canada's Indigenous Constitution*, 25.

¹⁰⁴³ Treaty 5.

¹⁰⁴⁴ Treaty 6.

The Elders spoke of these legally binding promises as issuing from a sacred source. First Nations observe their own legal traditions in creating treaties.¹⁰⁴⁵ They did not depend on the written text of the treaty. Their interpretation involved that these treaties were being made with the Creator as well as with the Crown.¹⁰⁴⁶ Furthermore, First Nations believed that they were encouraged in their view, because of the presence of Christian missionaries during negotiations and the invocation of God by the Crown throughout the meetings.¹⁰⁴⁷ Elder Jacob Bill said of Treaty 6 that it was the intention of the Creator to have the ‘White man’ come to live among them and to profit from the prosperity of Mother Earth.¹⁰⁴⁸ He further states, “Just like the treaty, that’s what that is, one law was given, Indian and white, both gave something special, something to keep, something to reverence, just like the treaty, both Indian and white beneficiaries, we were given a gift from the Creator. The Creator owns us, he is still the boss, nothing is hidden...”.¹⁰⁴⁹ These laws surrounding the treaties are intended to encourage moral, spiritual, and legal capacities of all the people who came to settle in these territories.¹⁰⁵⁰ The sacred origin of these treaty laws lead to resistance of First Nations in abandoning them despite the proceeding government neglect.¹⁰⁵¹ To abandon them would be in violation of the Creator’s law and dismisses the promises made to him in maintaining the peace and order throughout the lands.¹⁰⁵²

However, other First Nations have competing views from those held by the Elders in Saskatchewan. They instead regard Canada’s creation not as the Creator’s will but as a profanity.¹⁰⁵³ The Haudenosaunee peoples of the eastern Great Lakes believe that they did not participate in the creation of Canada.¹⁰⁵⁴ Rather,

¹⁰⁴⁵ Borrows, *Canada’s Indigenous Constitution*, 26.

¹⁰⁴⁶ Borrows, *Canada’s Indigenous Constitution*, 26.

¹⁰⁴⁷ Borrows, *Canada’s Indigenous Constitution*, 26.

¹⁰⁴⁸ Borrows, *Canada’s Indigenous Constitution*, 26; John Borrows, *Peace and Order*, 105.

¹⁰⁴⁹ Borrows, *Canada’s Indigenous Constitution*, 26; John Borrows, *Peace and Order*, 105.

¹⁰⁵⁰ Borrows, *Canada’s Indigenous Constitution*, 26.

¹⁰⁵¹ Borrows, *Canada’s Indigenous Constitution*, 26.

¹⁰⁵² Borrows, *Canada’s Indigenous Constitution*, 26.

¹⁰⁵³ Borrows, *Canada’s Indigenous Constitution*, 27.

¹⁰⁵⁴ Borrows, *Canada’s Indigenous Constitution*, 27.

they view treaties as bringing their Confederacy into an alliance with the Crown.¹⁰⁵⁵ Therefore, many Haudenosaunee people do not believe they should be labeled as Canadian citizens because of their distinct status.¹⁰⁵⁶ They do not share this concept of Canada's creation being a sacred event deriving from sacred law.¹⁰⁵⁷ Many first nations in British Columbia share this view with the Haudenosaunee: historic treaties were rare there and Indigenous peoples in this region had difficulty accepting claims that Canada was formed through promises to the Creator with reference to laws.¹⁰⁵⁸

Another source of Indigenous law is natural law. These laws were developed from observations about the physical world.¹⁰⁵⁹ When studying these laws, it's important to understand the ways in which the earth maintains its functions which benefit all living beings.¹⁰⁶⁰ Natural law is an approach which seeks to create rules for regulation and conflict resolution based in a study of the world's behaviour.¹⁰⁶¹ It flows from the consequences of creation and the natural environment.¹⁰⁶² For example, Indigenous peoples who practice this form might observe the way in which a plant interacts with an insect and develop legal principles from the occurrence.¹⁰⁶³ Others may watch the behaviours of watersheds, meadows, shorelines, and the interactions of birds and from these observations, draw analogies to guide legal actions.¹⁰⁶⁴ These laws could be said to literally be written on the earth.¹⁰⁶⁵ This is in stark contrast to Aristotle's philosophy wherein man alone maintains any awareness of good and evil, just and unjust, etc. (Aristot. *Pol.* 1. 1254b-1255a).¹⁰⁶⁶ Indigenous societies do not try to restrain nature. To learn Indigenous natural law, one must also have intimate knowledge of how to interpret the world.¹⁰⁶⁷ In Indigenous natural law, not all forms of this

¹⁰⁵⁵ Borrows, *Canada's Indigenous Constitution*, 27.

¹⁰⁵⁶ Borrows, *Canada's Indigenous Constitution*, 27.

¹⁰⁵⁷ Borrows, *Canada's Indigenous Constitution*, 27.

¹⁰⁵⁸ Borrows, *Canada's Indigenous Constitution*, 27.

¹⁰⁵⁹ Borrows, *Canada's Indigenous Constitution*, 28.

¹⁰⁶⁰ Borrows, *Canada's Indigenous Constitution*, 28.

¹⁰⁶¹ Borrows, *Canada's Indigenous Constitution*, 28.

¹⁰⁶² Borrows, *Canada's Indigenous Constitution*, 28.

¹⁰⁶³ Borrows, *Canada's Indigenous Constitution*, 28.

¹⁰⁶⁴ Borrows, *Canada's Indigenous Constitution*, 28.

¹⁰⁶⁵ Borrows, *Canada's Indigenous Constitution*, 29.

¹⁰⁶⁶ Borrows, *Canada's Indigenous Constitution*, 29.

¹⁰⁶⁷ Borrows, *Canada's Indigenous Constitution*, 29.

legal reasoning is derived from a state focus.¹⁰⁶⁸ Instead, authority can be found in kinship and family networks who guide the family.¹⁰⁶⁹

An example of applied natural law can be seen in the trial of the *Delgamuukw v. Attorney General (British Columbia)* in the early 1990s.¹⁰⁷⁰ Justice McEachern of the British Columbia Supreme Court heard evidence regarding the historic use of the land in the upper Skeena River area by the Gitksan peoples.¹⁰⁷¹ One hundred years prior to this case, the Chiefs of the Gitksan from Gitwangak explained their relationship to the land, “We would liken this district to an animal, and our village, which is situated on it, to its heart. Lorne Creek, which is almost at the end of it, may be likened to one of the animal’s feet. We feel that the Whiteman by occupying the creek, are, as it were, cutting off a foot. We know that an animal may live without one foot, even without both feet; but we also know that every such loss renders him more helpless”.¹⁰⁷² The Gitksan derived legal principles from environmental observations to help guide their relationships.¹⁰⁷³ The Gitksan were worried that the fragmented approach being used for watershed management would produce crippling effects for the people and the land.¹⁰⁷⁴ The analogy they used in comparing territories to animals and the message conveyed functioned as a guide to minimize disputes and legally regulate behaviour.¹⁰⁷⁵ The Gitksan followed this same pattern in the *Delgamuukw* case. They referred and compared animals’ and peoples’ activities with respect to the land in order to provide criteria for judgment.¹⁰⁷⁶ Gitksan Elders provided evidence of their laws through their *adaawk*, their verbal record of the origin for their group and of the experiences they have had with the land and others.¹⁰⁷⁷

¹⁰⁶⁸ Borrows, *Canada’s Indigenous Constitution*, 29.

¹⁰⁶⁹ Borrows, *Canada’s Indigenous Constitution*, 29.

¹⁰⁷⁰ Borrows, *Canada’s Indigenous Constitution*, 33; See: Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations*.

¹⁰⁷¹ Borrows, *Canada’s Indigenous Constitution*, 33.

¹⁰⁷² Borrows, *Canada’s Indigenous Constitution*, 33.

¹⁰⁷³ Borrows, *Canada’s Indigenous Constitution*, 33.

¹⁰⁷⁴ Borrows, *Canada’s Indigenous Constitution*, 33.

¹⁰⁷⁵ Borrows, *Canada’s Indigenous Constitution*, 33.

¹⁰⁷⁶ Borrows, *Canada’s Indigenous Constitution*, 33.

¹⁰⁷⁷ Borrows, *Canada’s Indigenous Constitution*, 33.

For example, an *adaawk* was used in the trial by Elder Mary Johnson about a landslide, an ancient grizzly bear, and the people's transgression of natural law.¹⁰⁷⁸ This account included principles concerning how people should co-exist with fish and what could happen if they didn't respect these beings.¹⁰⁷⁹

“After all the fishing is finished and all the hunting for – for mountain goats and groundhogs and the mountain and all the berry picking is finished, then they got nothing to do, so the maidens would go and make the camp at the lake, at the foot of Stekyooden, and they caught some grouse ... [A]fter they were caught many trouts, they cut out the backbone of the skin, and tails are still on the back bone. And as they was staying there, they learned the dances of the people and all the songs, and the way they were – they move when they were dancing. So one time, one young lady cut one of these back bone and put it on her head as a decoration while dancing. And she would happen to be near the – near the lake, and she look at herself at the edge of the lake, and she saw it was the bone looks really, really beautiful and why she dances gracefully. So she ran and told the others what she have found, and show them. Then they all got back bones and decorated their heads with it and some of the people used to come over and watch them and they didn't put a stop to it, and they smiled at what's going on. So after they all went home when it's time to go home, the people of T'am Lax amit heard a terrible noise, and they [...] left the lake and the people watched where the noise comes from, and they've seen some great big trees were throwing about the top of the rest of the tall trees, and they just stood there wondering what happened, until it comes – there is a little stream that runs from the lake and goes into the Skeena River, and that's – and this thing followed the little stream, tramping down the trees. And finally they see this great huge bear, grizzly bear that they have never seen before. And the chiefs sent messengers through the village to – after warriors, to have the warriors ready, which they did. And not long after the messenger went out, all the warriors came out with their spears and arrows and bow and arrow, and hammers that are made with stone, all those from weapons that strong young men use, they all come out bravely to meet this great grizzly bear. And he gets to the water and swam across and – and they went in front, they all went in front of him, but he is – he is a supernatural grizzly bear, they call him Mediik, and whenever they are shot him with an arrow, the arrow flies way up high instead and fall back down again and it hit the warriors, and they were wounded. And this grizzly bear tramped them until they were crushed to the ground, and goes through the village and kills a lot of people. And after that he – he came – he turned and go into the water again, follow the stream where he came from the first place. So the brave warriors went to – to see where he went, and it goes into the lake, disappeared into the lake. That's why the wise elders told the young people not to play around with fish or meat or anything, because the –because the Sun God gave them food to eat and those who – just they should just take enough to eat and not to play with it, that's why this tragedy happens to them.”¹⁰⁸⁰

Mary Johnson's *adaawk* exhibits how natural laws could be used to govern important principles on how to exist with the environment. Past environmental events were used and interpreted to provide future direction for proper conduct.

¹⁰⁷⁸ Borrows, *Canada's Indigenous Constitution*, 33.

¹⁰⁷⁹ Borrows, *Canada's Indigenous Constitution*, 33.

¹⁰⁸⁰ *Delgamuukw v. A.G.B.C.*, [1991] 5 C.N.L.R. 5 at 52–3 (B.C.S.C.).

Deliberative law was a broad source for Indigenous legal tradition and developed from the processes of deliberation, persuasion, council, and discussion.¹⁰⁸¹ Although sacred and natural law can form the backdrop against which debate occurs, the proximate source used for the majority of Indigenous law originated from people talking to one another.¹⁰⁸² This process included recognition, enforcement, and implementation which led to the laws being subject to revision and re-examination throughout generations.¹⁰⁸³ Due to the deliberative nature of a lot of Indigenous laws, they can be updated continuously and, through this, remain relevant.¹⁰⁸⁴ When Indigenous people are required to persuade, they must do so within their traditions with reference to the entire body of knowledge contained in such.¹⁰⁸⁵ This includes both ancient and modern concepts of human rights, gender equality, due process, and economic considerations.¹⁰⁸⁶ Considering that all Indigenous peoples and communities can never be completely detached from the world, influences can be incorporated from external sources into Indigenous legal developments.¹⁰⁸⁷ Deliberation with the intention of creating or altering Indigenous law can occur in formal or informal meetings and gatherings.¹⁰⁸⁸ In these settings, deliberative laws can be created through a highly structured process or by *ad hoc* means.¹⁰⁸⁹

The deliberative nature of these laws can also aid in preventing fundamentalist and dogmatic legal ideas and practices.¹⁰⁹⁰ This can bring questions about whether this also means there are no available safeguards and protections for the most vulnerable within Indigenous societies.¹⁰⁹¹ Indigenous peoples, like any group, can also make poor life decisions. However, this can be avoided through the strengthening of

¹⁰⁸¹ Borrows, *Canada's Indigenous Constitution*, 35.

¹⁰⁸² Borrows, *Canada's Indigenous Constitution*, 35.

¹⁰⁸³ Borrows, *Canada's Indigenous Constitution*, 35.

¹⁰⁸⁴ Borrows, *Canada's Indigenous Constitution*, 35.

¹⁰⁸⁵ Borrows, *Canada's Indigenous Constitution*, 35.

¹⁰⁸⁶ Borrows, *Canada's Indigenous Constitution*, 35.

¹⁰⁸⁷ Borrows, *Canada's Indigenous Constitution*, 36.

¹⁰⁸⁸ Borrows, *Canada's Indigenous Constitution*, 36.

¹⁰⁸⁹ Borrows, *Canada's Indigenous Constitution*, 36.

¹⁰⁹⁰ Borrows, *Canada's Indigenous Constitution*, 36.

¹⁰⁹¹ Borrows, *Canada's Indigenous Constitution*, 36.

these communities with continuous healing, a challenge for today's Indigenous peoples in Canada given modern hardships such as sexual abuse, residential schools, substance abuse, etc.¹⁰⁹² Persuasion proves most effective if people can have confidence in one another's social and personal integrity.¹⁰⁹³ Therefore, healthier relationships have the ability to foster stronger legal systems due to the increase in social capital upon which they can rely.¹⁰⁹⁴ Social capital is a generated resource from group relationships and has the capacity to promote trust and goodwill in a group, engendering mutual obligations required for effective groupwork.¹⁰⁹⁵ Healthy socio-economic health can lead to healthy participatory legal processes which act as an essential bulwark against domineering, inflexible laws and oppressive leadership.¹⁰⁹⁶

An important part of creating deliberative laws includes providing a voice even to viewpoints which may be in disagreement with the proposed law and taking these dissenting viewpoints into account during the law's formulation.¹⁰⁹⁷ In any society, when a law is identified and proclaimed, inevitably there will be those in disagreement.¹⁰⁹⁸ Therefore, as with most legal systems that have a respect for dignity and individual freedoms, the Indigenous legal system had to find a peaceful way in which this opposition could be dealt with.¹⁰⁹⁹ This resulted in the processing of conflicting viewpoints through a procedure which emphasized discussion, respectful listening, and resolution.¹¹⁰⁰ To accomplish this, circles were often conducted to invite community participation in developing legal standards.¹¹⁰¹ Circles are regarded as sacred and representative of bringing together people in an atmosphere of equality.¹¹⁰² One person is not raised above another. Everyone who joins in a circle discussion is permitted to speak, but everyone must

¹⁰⁹² Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹³ Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹⁴ Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹⁵ Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹⁶ Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹⁷ Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹⁸ Borrows, *Canada's Indigenous Constitution*, 37.

¹⁰⁹⁹ Borrows, *Canada's Indigenous Constitution*, 37.

¹¹⁰⁰ Borrows, *Canada's Indigenous Constitution*, 37-8.

¹¹⁰¹ Borrows, *Canada's Indigenous Constitution*, 38.

¹¹⁰² Borrows, *Canada's Indigenous Constitution*, 39.

be respectful and speak one at a time.¹¹⁰³ Each participant must listen and wait for their turn for the chance to speak which shifts from right to left in the circle person by person.¹¹⁰⁴ Circles are intended to remind the participants of Mother Earth and their journey through life, which transitioned from earth, to infant, to child, to adult, to old age, and back to earth.¹¹⁰⁵ Because of this, circles integrated environmental elements in human terms.¹¹⁰⁶ However, circles do have the potential to become coercive and dominated by an unhealthy individual or group.¹¹⁰⁷ Therefore, participants endeavor to make decisions while attune to the potential for such duress and implement appropriate procedures and protective measures for this conduct.¹¹⁰⁸ Circles can be conducted to address many issues in deliberative law in forms such as talking circles, reconciliation circles, and healing circles.¹¹⁰⁹ Moreover, Peacemaker Tribal Courts and Band council deliberations, which will be discussed further on, can also take the form of circles to create rules and regulations or to address disputes.¹¹¹⁰

Some circles have even functioned in a criminal law context in a way which displayed how Indigenous legal traditions could integrate in and influence the law's development in Canadian society. An example of this in an urban context can be found in the experiences of Aboriginal Legal Services of Toronto (ALST).¹¹¹¹ ALST was developed in 1990 with the goal of strengthening the capacity of Aboriginal communities and their citizens to handle justice issues and deliver Aboriginal-controlled and culturally-based justice alternatives.¹¹¹² It was developed for a combination of both Indigenous and Western legal concerns that developed through counselling together, persuasion, and consensus-building.¹¹¹³ There are

¹¹⁰³ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹⁰⁴ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹⁰⁵ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹⁰⁶ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹⁰⁷ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹⁰⁸ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹⁰⁹ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹¹⁰ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹¹¹ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹¹² Borrows, *Canada's Indigenous Constitution*, 39.

¹¹¹³ Borrows, *Canada's Indigenous Constitution*, 39.

deliberative aspects of the program's daily operation. For example, a Community Council Program is run by ALST and draws heavily from dialogical sources of Indigenous law.¹¹¹⁴ The Community Council Program functions as a criminal diversion platform for Indigenous people based in Toronto who are accused of criminal behavior.¹¹¹⁵ The project develops justice alternatives and brings the accused before trained individuals with expertise in dealing with criminal law issues from an Indigenous legal perspective and who represent a cross-section of the Indigenous population in Toronto.¹¹¹⁶ The Community Council concentrates on consensually developing a plan of action which permits the accused to acknowledge and take responsibility for his or her actions.¹¹¹⁷ The council also serves to develop ways to address the root causes of the individual's problems which led to them committing the crime and to facilitate reintegration into the community in a positive manner.¹¹¹⁸ The Community Council of the ALST believes they are building upon the way justice was administered in the Indigenous communities for centuries before the arrival of Europeans in Central and Eastern Canada.¹¹¹⁹

Some Indigenous communities prefer the form of gatherings such as feasts and other large, public assemblies instead of circles when conducting legal affairs.¹¹²⁰ These large assemblies seek to resolve issues and encourage discussion.¹¹²¹ Feast structures are found to be especially prominent forms in the Pacific Northwest region which includes the Salish, Haida, Tsimshian, Heiltsuk, Nuu-chah-nulth, Nisga'a, Tlingit, Wetsuwet'en, Gitksan, and Kwakwaka'wakw.¹¹²² Elaborate protocols are used to engage communities in decision-making issues and important celebrations.¹¹²³ Some feasts of this manner are called potlatches, which the Canadian government tried to abolish, unsuccessfully, in the late nineteenth and early twentieth

¹¹¹⁴ Borrows, *Canada's Indigenous Constitution*, 39.

¹¹¹⁵ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹¹⁶ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹¹⁷ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹¹⁸ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹¹⁹ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹²⁰ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹²¹ Borrows, *Canada's Indigenous Constitution*, 40.

¹¹²² Borrows, *Canada's Indigenous Constitution*, 40.

¹¹²³ Borrows, *Canada's Indigenous Constitution*, 40.

centuries.¹¹²⁴ They remain an important legal tradition today for Indigenous societies on the Canadian West Coast.¹¹²⁵ Some potlatches seek to address property law disputes and build upon discussion and debate to remedy boundary issues.¹¹²⁶ Such disputes, as described by Gitksan Elder Johnny David, could surface when ‘one person crossing the boundary of another person’s and when that happened, they usually talked about it and that was the end of the problem’.¹¹²⁷ If the informal discussions were ineffective, a potlatch would be initiated as follows, “The could invite each other to a feast and gifts would be distributed, and the person who crossed over a boundary would be spoken to by the chiefs and after that happened, the problem was solved and it never occurred again”.¹¹²⁸ Hereditary chiefs were in charge of directing the proceedings and the Elders would provide guidance.¹¹²⁹ The disputants would endeavor to achieve a consensus under this structure through mutual discussion in the forms of narrative, music, dance, and gift-giving.¹¹³⁰ This procedure aided in the creation of a legal resolution that worked towards the reconciliation of the two parties so that they could leave the feast as friends.¹¹³¹ Other, similar feasts could also be conducted which dealt with commercial disputes, family law issues, and criminal law matters.¹¹³²

One example for feasting as a method of creating deliberative law and legal resolution can be found in the workings of the Carrier Sekani Family Services Agency (CSFS). The CSFS works towards offering professional, community-based child and family services which is culturally appropriate for the eleven First Nations communities based in the north-east of Prince George, British Columbia.¹¹³³ The Society implemented principles and procedures fundamental to traditional feasts or the *bahlats* structure in order to

¹¹²⁴ Borrows, *Canada’s Indigenous Constitution*, 40.

¹¹²⁵ Borrows, *Canada’s Indigenous Constitution*, 40.

¹¹²⁶ Borrows, *Canada’s Indigenous Constitution*, 40-1.

¹¹²⁷ Mills, *Hang Onto These Words*, 360.

¹¹²⁸ Mills, *Hang Onto These Words*, 361.

¹¹²⁹ Borrows, *Canada’s Indigenous Constitution*, 41.

¹¹³⁰ Borrows, *Canada’s Indigenous Constitution*, 41.

¹¹³¹ Borrows, *Canada’s Indigenous Constitution*, 41.

¹¹³² Borrows, *Canada’s Indigenous Constitution*, 41.

¹¹³³ Borrows, *Canada’s Indigenous Constitution*, 41.

welcome back children and adults who were previously removed from their communities.¹¹³⁴ In developing their processes, they paid a good deal of attention to following and learning about the proper legal process at feasting events.¹¹³⁵ They would conduct welcome home feasts which, although not *bahlats* in the strict sense of gathering members of the community, contained the main values of one.¹¹³⁶

Other than circles and feasting, other ways in which Indigenous people develop laws through persuasion can be found. The Haudenosaunee of the eastern Great Lakes constructed and maintained their Great Law of Peace through the consensus of, originally five, and then six different nations.¹¹³⁷ This law was built through deliberative means to create binding legal decisions and continues on today.¹¹³⁸ Past and future generations are considered as a formal part of the society's deliberations.¹¹³⁹ A council of fifty chiefs are selected by the clan mothers which keep in mind the community's concern.¹¹⁴⁰ The confederacy business is administered through a persuasion based process by passing ideas across a longhouse fire with the aim of exploring and analyzing each possibility before taking action.¹¹⁴¹ The system also allows any nation within the Haudenosaunee Confederacy to request a meeting of the council.¹¹⁴² Clan mothers, youth, and other members of the community could also greatly effect decisions by way of their involvement in bringing matters to the council for discussion and resolution.¹¹⁴³ An often necessary part of the adoption of council decisions within the longhouse system of government was unanimity, this displayed the importance of persuasion and debate in law making within the Haudenosaunee legal traditions.¹¹⁴⁴

¹¹³⁴ Borrows, *Canada's Indigenous Constitution*, 41.

¹¹³⁵ Borrows, *Canada's Indigenous Constitution*, 41.

¹¹³⁶ Borrows, *Canada's Indigenous Constitution*, 41.

¹¹³⁷ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹³⁸ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹³⁹ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹⁴⁰ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹⁴¹ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹⁴² Borrows, *Canada's Indigenous Constitution*, 42.

¹¹⁴³ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹⁴⁴ Borrows, *Canada's Indigenous Constitution*, 42.

Perhaps the most visible, modern example of Indigenous legal tradition which emphasizes persuasive debate and deliberation can be found in band council settings. Although a complete expression of Indigenous laws is hindered by non-Indigenous rules in the *Indian Act*, band councils sometimes apply traditional legal teachings to conduct business and regulate communities.¹¹⁴⁵ Many *Indian Act* elected councilors and chiefs reference their individual First Nation's legal values when making decisions and debating.¹¹⁴⁶ In fact, many "Indian" bands pre-dated the *Indian Act* and derive their inherent governmental authority in pre-Confederation.¹¹⁴⁷ Thus, some hereditary chiefs can also be elected chiefs under the *Indian Act*.¹¹⁴⁸ As such, some band councils are well equipped to apply Indigenous legal traditions and carry a long history of applying their own community's principles and procedures in their decision making.¹¹⁴⁹ Other bands were created by the *Indian Act*, such as on the Six Nations reserve in Ontario, and therefore have little legitimacy in administering Indigenous law and consequentially have never been broadly accepted by their community.¹¹⁵⁰

These examples exhibit the ways in which Indigenous legal tradition can progress in a deliberative way either through circles, feasts, councils and other meetings and gatherings, both formal and informal. Many Indigenous communities still encourage this kind of participation in their citizenry today. Some may be so liberal and generous that they extend personal liberties to each community member to the extent that every being has both a legal right and practical opportunity to help in the creation and development of the laws.¹¹⁵¹ However, other communities are not so liberal. Some Indigenous societies may, at times, severely restrict this kind of participation due to rules associated with heredity, status, special accomplishment, or Canadian legal impediment.¹¹⁵²

¹¹⁴⁵ Borrows, *Canada's Indigenous Constitution*, 42.

¹¹⁴⁶ Borrows, *Canada's Indigenous Constitution*, 43.

¹¹⁴⁷ Borrows, *Canada's Indigenous Constitution*, 43.

¹¹⁴⁸ Borrows, *Canada's Indigenous Constitution*, 43.

¹¹⁴⁹ Borrows, *Canada's Indigenous Constitution*, 43.

¹¹⁵⁰ Borrows, *Canada's Indigenous Constitution*, 43.

¹¹⁵¹ Borrows, *Canada's Indigenous Constitution*, 44.

¹¹⁵² Borrows, *Canada's Indigenous Constitution*, 44.

These rules related to participation and the scope of disclosure are an important part of understanding the use of deliberation within Indigenous legal traditions. Some rules can be restrictive of deliberation and are preventive of an individual's free involvement in community life.¹¹⁵³ However, some limits exist because certain laws specify a ceremonial recognition, special position, and hard work to receive them.¹¹⁵⁴ Other laws can be restricted in their application or reception because of the requirement of a hereditary nature.¹¹⁵⁵ These restrictions can lead some people to devalue Indigenous law as non-transparent, undemocratic, or secretive.¹¹⁵⁶ However, these restrictions of participation can serve in an effort to produce a peaceful and orderly flow in the law's development.¹¹⁵⁷ It can also reflect a high degree of specialization needed to understand, practice, and produce law.¹¹⁵⁸ It should also be noted that hereditary positions in Indigenous law necessitated more than just being born into the right family; it also required the person's own hard work and good reputation.¹¹⁵⁹ Furthermore, the more destructive limitations are gradually changing. In the past, some Indigenous societies practiced slavery and put in place a number of restrictions on personal rights and freedoms.¹¹⁶⁰ But as all Indigenous people have forsaken slavery, it holds no relevance to modern legal traditions and no longer restricts any Indigenous person from freely participating in the development and application of Indigenous laws.¹¹⁶¹ Where participation is unduly restricted in contemporary Indigenous law, it is usually the result of a powerful individual or group using positivistic law in order to garner authority from a community.¹¹⁶²

The effect of Canada's legislatures on contemporary Indigenous deliberative law should also be noted. Canada's legislatures have been fairly unsupportive and unresponsive to broader participation within

¹¹⁵³ Borrows, *Canada's Indigenous Constitution*, 45.

¹¹⁵⁴ Borrows, *Canada's Indigenous Constitution*, 45.

¹¹⁵⁵ Borrows, *Canada's Indigenous Constitution*, 44.

¹¹⁵⁶ Borrows, *Canada's Indigenous Constitution*, 44.

¹¹⁵⁷ Borrows, *Canada's Indigenous Constitution*, 44.

¹¹⁵⁸ Borrows, *Canada's Indigenous Constitution*, 45.

¹¹⁵⁹ Borrows, *Canada's Indigenous Constitution*, 45.

¹¹⁶⁰ Borrows, *Canada's Indigenous Constitution*, 45.

¹¹⁶¹ Borrows, *Canada's Indigenous Constitution*, 45.

¹¹⁶² Borrows, *Canada's Indigenous Constitution*, 46.

Indigenous legal regimes.¹¹⁶³ Many jurispactic attitudes are the result of viewing Indigenous law as competing with the state.¹¹⁶⁴ Moreover, the *Indian Act*, passed in 1876, was created with a goal of manipulating and assimilating Indigenous legal traditions, thus restricting traditional rules on participation.¹¹⁶⁵ This has instigated the abandonment of certain legal traditions by some First Nations while others have subverted or incorporated its precepts within their own legal orders.¹¹⁶⁶ Indigenous peoples themselves can also take steps to increase deliberative aspects in their legal traditions by ensuring broader participation within Canada as well as in international legal debates.¹¹⁶⁷ They can also take steps in casting aside traditions which may interfere with persuasion, participation, and deliberation in the creation of their laws.¹¹⁶⁸

Another source of Indigenous law is positivistic law. This source can be found in rules, regulations, proclamations, codes, teachings, and axioms that are considered to be binding or regulating a person's behaviour.¹¹⁶⁹ These laws are different from the laws previously discussed because they do not necessarily base their authority on appeals to the Creator, environment, or deliberative processes to acquire their force.¹¹⁷⁰ Legal traditions of this kind carry their weight because of proclamations made by a person or group deemed authoritative by a sufficient amount of people from the community.¹¹⁷¹ Individuals who possess this power can include hereditary chiefs, headmen, clan mothers, band leaders, or sachems.¹¹⁷² Laws created by these individuals are seen as positivistic because they are dependent on the authority and intelligence of those who issue these laws rather than on the notion of creation, nature, or community

¹¹⁶³ Borrows, *Canada's Indigenous Constitution*, 46.

¹¹⁶⁴ Cover, *The Supreme Court, 1982 Term*, 40-44.

¹¹⁶⁵ Tobias, *Protection, Civilization, Assimilation*, 29.

¹¹⁶⁶ Indian Act, R.S.C. 1985, c. I-5.

¹¹⁶⁷ Borrows, *Canada's Indigenous Constitution*, 46.

¹¹⁶⁸ Borrows, *Canada's Indigenous Constitution*, 46.

¹¹⁶⁹ Borrows, *Canada's Indigenous Constitution*, 46.

¹¹⁷⁰ Borrows, *Canada's Indigenous Constitution*, 46-7.

¹¹⁷¹ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁷² Borrows, *Canada's Indigenous Constitution*, 47.

persuasion and deliberation.¹¹⁷³ Legal positivism, as defined by philosopher John Austin, refers to any binding legal authority who are, “determinate rational being[s] or bod[ies] that the other rational beings are in the habit of obeying”.¹¹⁷⁴ This should not be mistaken to mean that rationality is not found in the other sources of law. However, these laws come from trusted individuals or groups given due regard for their expertise and ability to rationalize in a legal context. Positivistic laws of this sort can be proclaimed in feast halls, wampum readings, council houses, band council chambers, and other public settings.¹¹⁷⁵ When these laws are declared, they can mingle both ancient and contemporary legal ideas and create the basis for statutes, bylaws, conventions, and protocols.¹¹⁷⁶

A portion of positivistic legal traditions may have been, at one point, a part of a larger normative system.¹¹⁷⁷ However, the underlying reasons for the original adoption of these laws has possibly been deliberately abandoned or forgotten as circumstances changed.¹¹⁷⁸ Thus, laws instituted by creation or deliberation may now be followed under the pretense of positivistic reasoning. An individual or group may have gained enough power that the community will follow their declarations.¹¹⁷⁹ This source of law can be problematic. Unlike the aforementioned sources of law, if an individual or group rules using this form of law for too long, there are no restraining influences in place to prevent corruption.¹¹⁸⁰ Positivistic law has the potential to place too much authority in powerful individuals or majorities without a system of checks and balances, or a measurement against a broader normative base.¹¹⁸¹ With time, this could create an abusive domination if the individual or group in power does not allow other normative legal considerations.¹¹⁸² But, positivistic law is not too common within Indigenous communities without the use of other sources of law

¹¹⁷³ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁷⁴ Austin, *Lectures on Jurisprudence and the Philosophy of Positive Law*, 88.

¹¹⁷⁵ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁷⁶ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁷⁷ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁷⁸ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁷⁹ Borrows, *Canada's Indigenous Constitution*, 47.

¹¹⁸⁰ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸¹ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸² Borrows, *Canada's Indigenous Constitution*, 48.

being studied and followed.¹¹⁸³ In fact, Indigenous legal traditions have been criticized for their lack of a recognizable sovereign who can proclaim laws and command obedience to follow them.¹¹⁸⁴ Although this criticism is not strictly true, it serves to demonstrate that Canada's Indigenous people have a fairly decentralized operation.¹¹⁸⁵

In Indigenous legal traditions, positivistic laws not also embedded in deliberation or a sound understanding of nature or what is sacred, may leave communities with what seems like a list of 'do's and don'ts'.¹¹⁸⁶ These laws can be compared with commandments or codes which no longer have context for their development and are sometimes considered irrelevant.¹¹⁸⁷ Examples of types of positivistic laws are: "don't walk on that part of the glacier"; "make sure you walk around the perimeter of an area four times before you leave"; "when you take something from that place, you must leave something there from another place".¹¹⁸⁸ These laws are followed with little understanding as to why they are binding and they are followed because of trust or fear of the individual or group who proclaimed these rules.¹¹⁸⁹ Positivistic laws can be recognized in many other legal traditions and many can probably recognize when a law is not really related to reason or morality.¹¹⁹⁰ Many societies will follow these laws in order to maintain order within their jurisdictions.¹¹⁹¹ When a positivistic law is broken, the concern is not whether the offender was at one point persuaded to support the law, but rather that they had failed to obey it.¹¹⁹² Furthermore, in a system dominated by positivistic law, if an offender continuously flaunts the law, the immediate care is not for whether the person understands that the law is made and followed in the efforts of maintaining harmony

¹¹⁸³ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸⁴ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸⁵ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸⁶ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸⁷ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸⁸ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁸⁹ Borrows, *Canada's Indigenous Constitution*, 48.

¹¹⁹⁰ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹¹ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹² Borrows, *Canada's Indigenous Constitution*, 49.

with some sacred, natural, or deliberative source.¹¹⁹³ Rather, most who witness the civil disobedience are more concerned for their own safety and self-interest along with the safety of their loved ones.¹¹⁹⁴

When faced with illegal activity, people may not immediately be worried about the legitimacy surrounding the law.¹¹⁹⁵ Thus, in terms of the legitimacy of positivistic law, it is important for those subject to these laws to keep in mind that the authority flows from a leader or group's claim to reason and responsibility.¹¹⁹⁶ If unsettling concerns arise with the authority's use of tradition, the authority can be removed without offending other legal traditions which are derived from the community's sense of the sacred, nature, or deliberation.¹¹⁹⁷ Positivistic power has a narrow base for legitimacy which may act as a protective measure for Indigenous peoples subject to an autocratic leader.¹¹⁹⁸ If a questionable law is the result of an authority's misdirected preferences, the law is able to be changed without any perceived natural or divine consequences, or challenges to group unity.¹¹⁹⁹ In fact, the group unity that would be required to remove an authority could be helpful in strengthening the deliberative processes and capacities within the community.¹²⁰⁰ However, the political upheaval which would occur in the community to do this should also not be underestimated and may have a significant impact. But a community who loses a respected leader or group as an authority does not necessarily suffer a political crisis. The person or group in question could have lost credibility by violating one of the other sources of law and is often simply replaced by another individual or group to fill the leadership vacuum.¹²⁰¹ Moreover, in lieu of a replacement, if one was not readily available, other sources of law such as custom or deliberation could also fill the void.¹²⁰²

¹¹⁹³ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹⁴ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹⁵ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹⁶ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹⁷ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹⁸ Borrows, *Canada's Indigenous Constitution*, 49.

¹¹⁹⁹ Borrows, *Canada's Indigenous Constitution*, 49.

¹²⁰⁰ Borrows, *Canada's Indigenous Constitution*, 49.

¹²⁰¹ Borrows, *Canada's Indigenous Constitution*, 50.

¹²⁰² Borrows, *Canada's Indigenous Constitution*, 50.

It is unavoidable though that sometimes a leader's loss of reputation can be complex and create great conflict.¹²⁰³ This can happen if the formerly respected authority made claims that they were the only conduit capable of understanding, interpreting, and proclaiming sacred or natural law, and are indispensable to the proper functioning of a law developed through deliberative sources.¹²⁰⁴ This creates a struggle to separate the personality of the leader from their expression of the other types of legal sources which the community follows.¹²⁰⁵ In this case, it can be tricky for community members to try and disentangle political power from legal sources.¹²⁰⁶ Nevertheless, dynamics such as this should not lead to an overestimation of the problems resulting from leadership change or conflict.¹²⁰⁷ Furthermore, the availability of appealing to the Creator, environment, reasoned consensus, and custom provides compelling alternatives when positivistic law cannot function in proper form.

The final source of law found in Indigenous legal traditions is customary law. Customary law can be defined as the practices and traditions which have been developed through repetitive patterns of social interaction and are accepted as binding to those participating in them.¹²⁰⁸ These laws are frequently inductive: observations of certain behaviours which lead to general conclusion dictating how to act.¹²⁰⁹ This produces obligations which are habitually implied from the society's surrounding context.¹²¹⁰ Examining the community's specific routines and procedures connected to conduct within the community proves an effective way to gain insight on the community's custom.¹²¹¹ Another way to examine this is to talk, if possible, to the people of the community themselves about why they feel obligated to behave in a particular manner.¹²¹² This results in the conclusion that customary laws lean heavily on each community member's

¹²⁰³ Borrows, *Canada's Indigenous Constitution*, 50.

¹²⁰⁴ Borrows, *Canada's Indigenous Constitution*, 50.

¹²⁰⁵ Borrows, *Canada's Indigenous Constitution*, 50.

¹²⁰⁶ Borrows, *Canada's Indigenous Constitution*, 50.

¹²⁰⁷ Borrows, *Canada's Indigenous Constitution*, 50.

¹²⁰⁸ Brierly, *The Law of Nations*, 60.

¹²⁰⁹ Borrows, *Canada's Indigenous Constitution*, 51.

¹²¹⁰ Borrows, *Canada's Indigenous Constitution*, 51.

¹²¹¹ Borrows, *Canada's Indigenous Constitution*, 51.

¹²¹² Borrows, *Canada's Indigenous Constitution*, 51.

unspoken agreement about how obligations and rights will be regulated between members.¹²¹³ The intuitive and communally layered nature of this legal source results in disputes being regulated through social pressures with distribute incentives and disincentives in order to stop people from behaving in certain ways, or encourage them to behave in certain ways.¹²¹⁴ Since this source of law tends to not be as explicit as other legal forms, their interpretation, enforcement, and recognition can be difficult to accomplish if other sources of law intervene.¹²¹⁵ This is not to mean that customary law gives way to the other sources of Indigenous law. Customary law can be a creative form of law and, in the right context, can prove an effective way to produce strong and healthy community relationships.¹²¹⁶

Customary law in the Indigenous legal tradition is most strongly recognized in the setting of marriage and family relationships.¹²¹⁷ For example, in the case *Casimel v. I.C.B.C.*, the British Columbia Court of Appeal found that a ninety-nine year-old man and a seventy-seven year-old woman had legally adopted their daughter's thirty year-old son in accordance with Carrier law.¹²¹⁸ Therefore, when he died, they were entitled to the death benefits as dependent parents under the province's *Insurance Act*.¹²¹⁹ The case relied upon the parents in their customary regime and that natural parents were not deemed in possession of the rights or obligations of a parent under this system anymore.¹²²⁰ Moreover, the Court of Appeal also held that neither Canadian common law or constitutional law abrogated Carrier customary law.¹²²¹ Justice Lambert, in surmising his reasons, wrote, "I conclude that there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of applications of the principles of the common law and the

¹²¹³ Borrows, *Canada's Indigenous Constitution*, 51.

¹²¹⁴ Borrows, *Canada's Indigenous Constitution*, 51-52.

¹²¹⁵ Borrows, *Canada's Indigenous Constitution*, 52.

¹²¹⁶ Borrows, *Canada's Indigenous Constitution*, 52.

¹²¹⁷ Borrows, *Canada's Indigenous Constitution*, 52.

¹²¹⁸ (1993) 106 D.L.R. (4th) 720 (B.C.C.A.).

¹²¹⁹ (1993) 106 D.L.R. (4th) 720 (B.C.C.A.), para. 13.

¹²²⁰ Borrows, *Canada's Indigenous Constitution*, 52.

¹²²¹ Borrows, *Canada's Indigenous Constitution*, 52.

provisions of statute law to the person whose status is established by customary adoptions”.¹²²² There are also many other examples of Canadian courts and legislatures recognizing the family law customs of Canada’s Indigenous peoples.¹²²³ But customary Indigenous legal traditions are not just restricted to family matters, they can be related to Indigenous governances, land, and resource use.¹²²⁴

Another modern area in which Indigenous customary law can be found is in the land claim agreements recently signed throughout Canada. An example of this can be found in the *Labrador Inuit Land Claims Agreement* (LILCA). LILCA applies to a large area of coastal Labrador and recognizes that Inuit law will be a significant source of authority in this region.¹²²⁵ LILCA functions to create a central government, controlled by the Inuit, and allows this government to pass binding laws that are protected by the constitution under section 35(1) of the *Constitution Act*, 1982.¹²²⁶ The central Indigenous government, the Nunatsiavut, work with local Inuit individuals and governments.¹²²⁷ They function in accordance with the *Labrador Inuit Constitution* (LIC).¹²²⁸ The LIC dictates that, “Labrador Inuit customary law is the underlying law of the Labrador Inuit and of Nunatsiavut for all matters within the jurisdiction or authority of the Nunatsiavut Assembly”.¹²²⁹ Moreover, LILCA accepts Inuit customary law and provides that it will have force throughout the region.¹²³⁰ This includes any Inuit customary law which was proclaimed, published, and registered in accordance with part 17.5.¹²³¹ The LIC defines customary law for these purposes as, “The customs, traditions, observances, practices, and beliefs of the Inuit of Labrador which, despite changes over time, continue to be accepted by Labrador Inuit as establishing standards or procedures

¹²²² (1993) 106 D.L.R. (4th) 720 (B.C.C.A.), para. 42.

¹²²³ Borrows, *Canada’s Indigenous Constitution*, 52.

¹²²⁴ Borrows, *Canada’s Indigenous Constitution*, 52.

¹²²⁵ *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1; *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27.

¹²²⁶ *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c.27, s. 3.

¹²²⁷ *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c.27, s. 3.

¹²²⁸ *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c.27, s. 3.

¹²²⁹ *Labrador Inuit Constitution*, s. 9.1.2.

¹²³⁰ *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c.27, s. 3.

¹²³¹ *Labrador Inuit Land Claims Agreement*, ch. 1,1.1.1.

that are to be respected by Labrador Inuit, are the customary laws of the Labrador Inuit, and are referred to as Labrador Inuit customary law”.¹²³² The continued development of customary law acts as an important source of law for the Indigenous peoples of this area.

Inside the LILCA, there are detailed provisions which deal with the interaction of customary law and positivistic law, both Inuit and Canadian.¹²³³ Within the LIC, there is a Charter of Rights and Responsibilities which includes provisions relating to dignity, equality, personal integrity, security of the person, religious observance, elections, freedom of expression, freedom of movement, freedom of trade, private land rights, collective bargaining, fair labour practices, rights of child, environment, water, health care, education, social services, culture, language, housing, access to information, right to administrative actions, and access to court.¹²³⁴ The wide-ranging and all-embracing list of protections serves as an illustration of the scope of Inuit law’s potential impact on people who are subject to LILCA. It is also a demonstration of how the Inuit people regard rights and freedom as an integral part of their legal regime.¹²³⁵ They do not view them as contrary to their own customary laws.¹²³⁶ Inuit customary law can help to facilitate Indigenous rights and freedoms within the Nunatsiavut communities.¹²³⁷ However, customary law and positivistic law can still conflict. To help handle this, the LIC stipulates in section 9.1.3 that in the event that the *Inuit Charter* rights and customary rights conflict, the *Inuit Charter* prevails. However, Inuit customary law is given a paramount position over laws passed by the Nunatsiavut government, if the laws do not conflict with the Charter and they do not expressly extinguish the law themselves.¹²³⁸

In conclusion, sources of Indigenous law and legal traditions can be fit into categories of sacred law, natural law, deliberative law, positivistic law, and customary law. However, these categories can be

¹²³² *Labrador Inuit Constitution*, s. 9.1.

¹²³³ Borrows, *Canada’s Indigenous Constitution*, 53.

¹²³⁴ Borrows, *Canada’s Indigenous Constitution*, 53.

¹²³⁵ Borrows, *Canada’s Indigenous Constitution*, 53.

¹²³⁶ Borrows, *Canada’s Indigenous Constitution*, 53.

¹²³⁷ Borrows, *Canada’s Indigenous Constitution*, 54.

¹²³⁸ Borrows, *Canada’s Indigenous Constitution*, 54.

too formally defined in their separation from one another.¹²³⁹ In reality, Indigenous legal traditions can involve an interaction of two or more sources to create law.¹²⁴⁰ Furthermore, it is easy to see how sources of laws can change as Indigenous communities changed and continued to work with them.¹²⁴¹ Some customary laws could become positivistic if they were codified.¹²⁴² Some positivistic laws could become deliberative if debate took place over the appropriateness of the rules that originally may have derived from custom.¹²⁴³ However, by creating these classifications, it can help to understand the complex nature of Indigenous legal sources.

Indigenous Governance:

Canada's Indigenous peoples have intricate traditional methods used to address crime. However, the practice of written laws did not have a large part in Indigenous justice systems.¹²⁴⁴ Penal methods of incarceration had no place in any Indigenous culture within the northern part of the Northern Hemisphere.¹²⁴⁵ No First Nations in Canada used holding-cells for punishment.¹²⁴⁶ At their root, Indigenous laws instead emphasize restoring balance, social harmony, and re-establishing peace instead of approaching punishment with a retributive goal.¹²⁴⁷ The approach has been identified as restorative justice. This methodology can be seen in the creation stories of many Indigenous people surrounding "Turtle Island".¹²⁴⁸ Many of these stories are maintained and told by Indigenous Elders.¹²⁴⁹ It is not ethically appropriate to share these stories as Indigenous peoples believe it is the role of the Elders to do so in their capacity of the

¹²³⁹ Borrows, *Canada's Indigenous Constitution*, 55.

¹²⁴⁰ Borrows, *Canada's Indigenous Constitution*, 55.

¹²⁴¹ Borrows, *Canada's Indigenous Constitution*, 55.

¹²⁴² Borrows, *Canada's Indigenous Constitution*, 55.

¹²⁴³ Borrows, *Canada's Indigenous Constitution*, 55.

¹²⁴⁴ Monchalin, *The Colonial Problem*, 39.

¹²⁴⁵ Monchalin, *The Colonial Problem*, 39.

¹²⁴⁶ Monchalin, *The Colonial Problem*, 39.

¹²⁴⁷ Monchalin, *The Colonial Problem*, 39.

¹²⁴⁸ Monchalin, *The Colonial Problem*, 39.

¹²⁴⁹ Monchalin, *The Colonial Problem*, 39.

great keepers of this knowledge.¹²⁵⁰ However, certain sketches of “Turtle Island” stories have been published and allow a very basic version of these stories to be examined.¹²⁵¹ But it is important to keep in mind that these descriptions are pale reflections of the authentic tellings of these stories.¹²⁵² The beginning of this story typically features a woman who falls from the sky and ends up on the back of a turtle. Depending on the story, animals, plants, mud, and people may all play various, equal roles in the development of Turtle Island. These stories emphasize inclusion, peace, and harmony. The framework outlined in these stories provide an understanding of Indigenous government rooted in an idea of balance and equality. Blackfoot Elders Reg Crowshoe and Geoff Crow Eagle tell of their creation stories, “And a lot of our stories said that humans were created as equal to all creation. And the concept of being equal defined our thinking and understanding. So I was equal to the animals and plants, the air and the water; the stars were equal to me, and I was equal to all human beings, and even to bugs. Now the concept of beings created equally was the basis of all our practices- our forms of governance, and social relations. We are all created together, and all are sacred. So our Piikani Blackfoot language and oral system are based in ceremonial practices; a ceremonial circle structure was our way of communicating and working in a group”.¹²⁵³ The understanding that all elements of creation, and not just all humans, are equal is a central concept integral to the understanding of Indigenous approaches to punishment.¹²⁵⁴ This includes the treatment of victims and offenders.¹²⁵⁵ Restoring balance to the community and healing relationships are both emphasized in Indigenous justice systems.¹²⁵⁶

Traditional Huron-Wendat governance structure gives an example of Indigenous community organization and their approach to authority. “Chiefs” who governed indigenous communities, were

¹²⁵⁰ Monchalin, *The Colonial Problem*, 39.

¹²⁵¹ Monchalin, *The Colonial Problem*, 39.

¹²⁵² Monchalin, *The Colonial Problem*, 39.

¹²⁵³ Porter, *Mohawk (Haudenosaunee) Teachings: Transcripts for Four Directions Teachings.com*, 1-2.

¹²⁵⁴ Monchalin, *The Colonial Problem*, 40.

¹²⁵⁵ Monchalin, *The Colonial Problem*, 40.

¹²⁵⁶ Monchalin, *The Colonial Problem*, 40.

selected from a specific number of individuals with a certain hereditary position.¹²⁵⁷ Lineage councils were made up of chiefs who had been chosen by the older women members of these lineages.¹²⁵⁸ These women chose members of this council based on criteria of oral proficiency, intellect, acceptance by the community, inclination to work, and, markedly, courage.¹²⁵⁹ These women also had the ability to dismiss a chief found to be insufficient.¹²⁶⁰ Village councils were comprised of Elders and chiefs with various, assigned duties for civil affairs from each lineage such as chiefs of defence.¹²⁶¹ Nation councils were composed of chiefs from all clan segments and from each village.¹²⁶² The confederacy council included civil chiefs and met every spring for several weeks to address all matters which related to the Wendat peoples as a whole.¹²⁶³ This council strove towards “an ideal of peace”.¹²⁶⁴ The council focused on welcoming newcomers, unifying the five Wendat nations, and discussing topics including trade, village resettlement, political developments, subdivision, diplomatic missions, important feasts, new subsistence strategies, major expeditions, the development of new routes, and replacing deceased chiefs (‘raising fallen trees’).¹²⁶⁵ Confederacy councils could also be held in cases of emergency and were held in the village of the chief who called the meeting.¹²⁶⁶

However, given the diverse nature of Canada’s First Nations peoples, the traditional governance structures were also diverse and varied. Therefore, it is useful to study multiple systems in order to gain a broader understanding. The Blackfoot Nation in the Prairies is composed of three nations: the Siksika, the Blood or Kainai, and the Peigan or Piikani.¹²⁶⁷ The Tsuut’ina also joined them at the start of the nineteenth

¹²⁵⁷ Monchalin, *The Colonial Problem*, 42.

¹²⁵⁸ Monchalin, *The Colonial Problem*, 42.

¹²⁵⁹ Monchalin, *The Colonial Problem*, 42.

¹²⁶⁰ Monchalin, *The Colonial Problem*, 42.

¹²⁶¹ Monchalin, *The Colonial Problem*, 42.

¹²⁶² Monchalin, *The Colonial Problem*, 42.

¹²⁶³ Monchalin, *The Colonial Problem*, 42.

¹²⁶⁴ Monchalin, *The Colonial Problem*, 42.

¹²⁶⁵ Monchalin, *The Colonial Problem*, 42.

¹²⁶⁶ Monchalin, *The Colonial Problem*, 42.

¹²⁶⁷ Monchalin, *The Colonial Problem*, 42.

century.¹²⁶⁸ These nations shared common languages and customs, and they frequently intermarried.¹²⁶⁹ But, they had separate political units. Each nation was sub-divided into different clans and each was governed by an elected Chief.¹²⁷⁰ Clan chiefs then chose a head chief for the nation.¹²⁷¹ In order to become a leader of these peoples, the individuals were assessed by their generosity, displays of bravery, and compassion.¹²⁷² The Blackfoot Nation also had “All Comrades” societies who led affairs in the clans and who functioned to protect the people and preserve order.¹²⁷³

Another interesting governance structure was that of the Gitksan and Wet’suwet’en people. Their approach to governance can be related back to the most basic form of human relationships: the family.¹²⁷⁴ Their main political unit is the “House”, which derives its name from their long houses which housed the community.¹²⁷⁵ There is a common ancestry shared by each member of the community who lived in a specific longhouse.¹²⁷⁶ Their crests and songs shown through poles and blankets capture their oral histories.¹²⁷⁷ Each community member had their responsibilities dictated orally by the House’s head chief to the people.¹²⁷⁸ Leadership was conveyed through matrilineal succession because, “a person is born into his or her mother’s House.”¹²⁷⁹ The head chief was responsible for the members of the House and their

¹²⁶⁸ Monchalin, *The Colonial Problem*, 42.

¹²⁶⁹ Monchalin, *The Colonial Problem*, 42.

¹²⁷⁰ Monchalin, *The Colonial Problem*, 43.

¹²⁷¹ Monchalin, *The Colonial Problem*, 43.

¹²⁷² Monchalin, *The Colonial Problem*, 43.

¹²⁷³ Monchalin, *The Colonial Problem*, 42.

¹²⁷⁴ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁷⁵ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁷⁶ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁷⁷ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁷⁸ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁷⁹ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

associated activities.¹²⁸⁰ But the leadership received assistance from the “wings” of the head chief and from the Elders.¹²⁸¹ Both were consulted when decisions were being made.¹²⁸² When larger matters were at hand, chiefs of other houses were also consulted.¹²⁸³ The Gitksan are composed of four clans and the Wet’suwet’en are composed of five.¹²⁸⁴ Societies who neighbor these clans have people who were originally from the same clan and are historically related.¹²⁸⁵ Therefore, clan identity is central to marriage law.¹²⁸⁶ Two individuals in the same clan were not allowed to marry.¹²⁸⁷

However, through the course of colonization, many Indigenous governance structures have been disrupted.¹²⁸⁸ Oppressive measures have been introduced and Indigenous peoples have been disposed of land, relocated, and required to obey an imposed definition of leadership and citizenship.¹²⁸⁹ As a result, foreign laws have been imposed which have removed authority from a lot of Indigenous government structures through law (e.g. the anti-potlatch law).¹²⁹⁰ This has resulted in the displacement of female leadership in women-centered Indigenous societies and social organizations.¹²⁹¹ But these laws did not just disrupt matrilineal lines of kinship and culture, they also imposed a foreign view of governance which emphasized a bowing to authority rather than contributing to the community.¹²⁹² Furthermore, colonial

¹²⁸⁰ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸¹ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸² Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸³ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸⁴ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸⁵ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸⁶ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸⁷ Gitksan-Wet’suwet’en Education Society, Smithers Indian Friendship Centre, and Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice*, 15–17.

¹²⁸⁸ Monchalin, *The Colonial Problem*, 43.

¹²⁸⁹ Monchalin, *The Colonial Problem*, 43.

¹²⁹⁰ Monchalin, *The Colonial Problem*, 43.

¹²⁹¹ Monchalin, *The Colonial Problem*, 44.

¹²⁹² Monchalin, *The Colonial Problem*, 44.

governance was missing a key part of Indigenous governance: spirituality.¹²⁹³ Western systems of governance feature the separation of culture, land, and authority.¹²⁹⁴ These concepts are inseparable in Indigenous governance.¹²⁹⁵ This has had a large impact on the Indigenous justice system and how they react to crime.

A good example of how Indigenous governance and legal traditions overlap can be seen in the Haudenosaunee Great Law of Peace. The Haudenosaunee peoples have largely been able to preserve their traditional systems and values amidst colonization.¹²⁹⁶ Canada's solicitor general, Christie Jefferson, wrote in a report that, "During the 150 years of European presence, the peace created within the Six Nations was never broken, even in the face of murder. The constitution and laws of the confederacy were so effective that they maintained harmony between their member nations".¹²⁹⁷ The Haudenosaunee people ("People of the Longhouse") formed the Haudenosaunee Confederacy or the Six Nations Confederacy and consist of originally five nations: Mohawk, Onondaga, Oneida, Cayuga, and Seneca.¹²⁹⁸ In 1722, the Tuscarora Nation joined them.¹²⁹⁹ These member nations were allied through the Great Law of Peace.¹³⁰⁰ The Great Law of Peace was the founding constitution of the confederacy and was an oral tradition codified in a series of wampum belts (wampum belts are composed of clam beads and sacred shells and typically used by the peoples of the Eastern Woodlands to commemorate and symbolize agreements and important events).¹³⁰¹ These belts are currently held by the Onondaga Nation.¹³⁰² The Great Law of Peace should not be regarded as a law in terms of constitutional legislation.¹³⁰³ Rather, a better translation of the term is "the big warmth"

¹²⁹³ Monchalin, *The Colonial Problem*, 44.

¹²⁹⁴ Monchalin, *The Colonial Problem*, 44.

¹²⁹⁵ Monchalin, *The Colonial Problem*, 44.

¹²⁹⁶ Monchalin, *The Colonial Problem*, 45.

¹²⁹⁷ Jefferson, *Conquest by Law*, 345.

¹²⁹⁸ Monchalin, *The Colonial Problem*, 45.

¹²⁹⁹ Monchalin, *The Colonial Problem*, 45.

¹³⁰⁰ Monchalin, *The Colonial Problem*, 45.

¹³⁰¹ Monchalin, *The Colonial Problem*, 45.

¹³⁰² Monchalin, *The Colonial Problem*, 45.

¹³⁰³ Monchalin, *The Colonial Problem*, 46.

or “the big harmony”.¹³⁰⁴ It is meant to provide guidelines for harmony and coexistence, not hard legislation.¹³⁰⁵

The oral history of the Haudenosaunee peoples has kept peace among the nations for thousands of years.¹³⁰⁶ The stories of the Great Law of Peace, passed on in each generation through wampum belts, preserves and retains cultural traditions.¹³⁰⁷ However, many versions have been recorded in writing about the Great Law of Peace.¹³⁰⁸ The Haudenosaunee Confederacy does not prefer one version over another, all versions highlight the same key values.¹³⁰⁹ The National Museum of the American Indian has produced an abbreviated version of the story based on the various recorded versions and was revised by five different Haudenosaunee peoples.¹³¹⁰ A man called “Peacemaker” embarks on a journey with the goal of spreading peace throughout Haudenosaunee territory.¹³¹¹ At this time, the Haudenosaunee people were at war with one another.¹³¹² Peacemaker makes his way to the home of Hayo’wetha, a leader of the Onondaga.¹³¹³ Hayo’wetha also wished to spread this message of peace, especially because his wife and daughters had been murdered by Tadadaho, the primary leader of the Onondaga.¹³¹⁴ Peacemaker supported Hayo’wetha as he healed from the loss of his wife and daughters.¹³¹⁵ The pair then traveled together to spread peace among their people.¹³¹⁶ Peacemaker wished to present the strength of unity and to do this, he took a single arrow and snapped it easily into two pieces.¹³¹⁷ He next took five arrows and tied them together and tried to snap the bundle. These arrows could not be broken easily when tied together.¹³¹⁸ Through this,

¹³⁰⁴ Monchalin, *The Colonial Problem*, 46.

¹³⁰⁵ Monchalin, *The Colonial Problem*, 46.

¹³⁰⁶ Monchalin, *The Colonial Problem*, 46.

¹³⁰⁷ Monchalin, *The Colonial Problem*, 46.

¹³⁰⁸ Monchalin, *The Colonial Problem*, 46.

¹³⁰⁹ Monchalin, *The Colonial Problem*, 46.

¹³¹⁰ Monchalin, *The Colonial Problem*, 46.

¹³¹¹ Monchalin, *The Colonial Problem*, 46.

¹³¹² Monchalin, *The Colonial Problem*, 46.

¹³¹³ Monchalin, *The Colonial Problem*, 46.

¹³¹⁴ Monchalin, *The Colonial Problem*, 46.

¹³¹⁵ Monchalin, *The Colonial Problem*, 46.

¹³¹⁶ Monchalin, *The Colonial Problem*, 46.

¹³¹⁷ Monchalin, *The Colonial Problem*, 46.

¹³¹⁸ Monchalin, *The Colonial Problem*, 46.

Peacemaker symbolized the strength of unifying the five nations under a single confederacy.¹³¹⁹ The message was received by the five nations and, once they united, Peacemaker and Hayo'wetha sought out Tadadaho to invite him to join the confederacy.¹³²⁰ At first, Tadadaho was reluctant, but when he was promised that the Onondaga would become the capital of the "Grand Council", he accepted.¹³²¹

The unified nations became the Haudenosaunee Confederacy. The Sub-Chief of the Cayuga Nation, Leroy Hill, says that the values of peace that serves as the basis of the Great Law was caring, good mind, and benevolence.¹³²² The Seneca historian Sotsisowah (John Mohawk) reports that this message of peace did not just imply the non-existence of conflict but the effort made by all humans to actively strive towards universal justice.¹³²³ "Righteousness" and "Reason" are both goals under the Great Law.¹³²⁴ Under this, "righteousness" refers to a common ideology of the people which is both unselfish and pure.¹³²⁵ When people synchronize their feelings and thoughts with the "flow of the universe" and they hold intentions of the "Good Mind", righteousness can be achieved.¹³²⁶ Equality among all things in the universe is acknowledged and recognizes that humans do not own the world but that all of creation is meant for everything to benefit equally, including plants, animals, humans, and insects.¹³²⁷ Necessities for survival such as shelter, protection, food, and clothing were regarded as gifts and that, regardless of ability, no one should be deprived of them.¹³²⁸ No individual has the right to divest others of any of earth's gifts.¹³²⁹

"Reason" is derived from the power of the human mind to reach a righteous decision when faced with complex questions or concerns.¹³³⁰ Peacemaker shared the teaching that the power of reason has been

¹³¹⁹ Monchalin, *The Colonial Problem*, 46.

¹³²⁰ Monchalin, *The Colonial Problem*, 47.

¹³²¹ Monchalin, *The Colonial Problem*, 47.

¹³²² Monchalin, *The Colonial Problem*, 47.

¹³²³ Sotsisowah, *Thoughts of Peace*, 31-40.

¹³²⁴ Monchalin, *The Colonial Problem*, 47.

¹³²⁵ Monchalin, *The Colonial Problem*, 47.

¹³²⁶ Monchalin, *The Colonial Problem*, 47.

¹³²⁷ Monchalin, *The Colonial Problem*, 47.

¹³²⁸ Monchalin, *The Colonial Problem*, 47.

¹³²⁹ Monchalin, *The Colonial Problem*, 47.

¹³³⁰ Monchalin, *The Colonial Problem*, 47.

gifted to human beings.¹³³¹ This was given to humans in order to resolve differences without using force, which is to only be used as a last resort.¹³³² Peacemaker also shared that everyone with a healthy mind desires peace, therefore all human beings innately have the ability to understand and grasp the central principles of righteousness.¹³³³ Reason as a skill is necessary to perform the objectives of justice in a way in which no one's rights are abused.¹³³⁴ "Power" is also described by the Peacemaker.¹³³⁵ Power is the ability to enact true peace and it is the product of a unified people who are on the path to righteousness.¹³³⁶ Reason, under this, contains the ability to enact principles of peace through public and political opinion, education, and military unity when necessary.¹³³⁷ Power then has the facility to call on combatting parties to lay down their weapons of war and to come to an agreement.¹³³⁸ To achieve this, the powers of reason and persuasion must be employed along with the power of the intrinsic good will of human beings, and the power of a devoted and unified people.¹³³⁹

To celebrate this message of peace, the Haudenosaunee Nations gathered their weapons, dug a hole, and deposited their arms into it.¹³⁴⁰ They then planted a white pine tree over the hole and named it "the Tree of Peace".¹³⁴¹ This tree has four main roots which represent the four directions and pathways of peace that are indicative of the path to the heart of the Haudenosaunee territory.¹³⁴² This path is welcome to all.¹³⁴³ An eagle perches at the top of the tree and acts as the people's messenger with the Creator and a protector of the Haudenosaunee people.¹³⁴⁴ Each nation was then asked by the Peacemaker to choose its leaders and the

¹³³¹ Monchalin, *The Colonial Problem*, 47.

¹³³² Monchalin, *The Colonial Problem*, 47.

¹³³³ Monchalin, *The Colonial Problem*, 47.

¹³³⁴ Monchalin, *The Colonial Problem*, 47.

¹³³⁵ Monchalin, *The Colonial Problem*, 47.

¹³³⁶ Monchalin, *The Colonial Problem*, 47.

¹³³⁷ Sotsisowah, *Thoughts of Peace*, 34.

¹³³⁸ Monchalin, *The Colonial Problem*, 47.

¹³³⁹ Monchalin, *The Colonial Problem*, 47-8.

¹³⁴⁰ Monchalin, *The Colonial Problem*, 48.

¹³⁴¹ Monchalin, *The Colonial Problem*, 48.

¹³⁴² Monchalin, *The Colonial Problem*, 48.

¹³⁴³ Monchalin, *The Colonial Problem*, 48.

¹³⁴⁴ Monchalin, *The Colonial Problem*, 48.

Peacemaker gave laws to these men who comprised the Grand Council.¹³⁴⁵ The Grand Council totaled at fifty leaders who then were responsible for making decisions which coincided with the Great Law of Peace.¹³⁴⁶ A leader on the council was called a “*hoyaneh*” or a “caretaker of peace”.¹³⁴⁷ Over time, the selection of the new members for the council fell to the clan mothers who would closely observe children as they grew and decided which men they felt held the nation’s best interests at heart.¹³⁴⁸ They ensured that none of the candidates had any motive for envy, greed, or malice and had the ability to see beyond their time resulting in an aptitude to act with wisdom and fortitude.¹³⁴⁹ Thus, they were well positioned to make laws and policies that were capable of safeguarding the rights of people for the following seven generations.¹³⁵⁰ Clan mothers also had the authority to remove leaders who they felt did not fulfill this role.¹³⁵¹ All laws passed by the confederacy had to achieve a full consensus by the chosen members from each nation.¹³⁵²

The legal tradition of Canada’s Indigenous peoples is diverse; it is a reflection of the many communities spanning Canadian territory from the Arctic to the Great Lakes. However, these legal traditions are generally based in a shared value system found in all communities. Indigenous peoples created law through multiple sources: sacred teachings, naturalistic observations, deliberative practices, positivistic proclamations, and local and national customs. Therefore, claims that Indigenous law is purely based in custom are baseless. Moreover, the governance structure of Indigenous communities had an effect on the exercising of law among the community-members. A good example of this is the Haudenosaunee Law of Peace. Under this Great Law, concepts such as righteousness, a Good mind, and power are developed in how law should be exercised.

¹³⁴⁵ Monchalin, *The Colonial Problem*, 48.

¹³⁴⁶ Monchalin, *The Colonial Problem*, 48.

¹³⁴⁷ Monchalin, *The Colonial Problem*, 48.

¹³⁴⁸ Monchalin, *The Colonial Problem*, 48.

¹³⁴⁹ Monchalin, *The Colonial Problem*, 48.

¹³⁵⁰ Monchalin, *The Colonial Problem*, 48.

¹³⁵¹ Monchalin, *The Colonial Problem*, 48.

¹³⁵² Monchalin, *The Colonial Problem*, 48.

Chapter 4

Indigenous Criminal Law

Indigenous Traditional Approaches to Crime:

The Chief Justice Emeritus of the Navajo Nation, Robert Yazzie, reports that, in his perspective, Indigenous methods of law and justice were not recognized by Western colonizers because “They couldn’t see police; they didn’t find courts, they didn’t see uniforms, jails, and all the trappings of power. But they also couldn’t see the clan mothers, who are so important to our Native legal institutions”.¹³⁵³ Furthermore, as we established in Chapter 3, Indigenous peoples traditionally had very advanced laws and ways of developing law which could be very distinct to each nation.¹³⁵⁴ Indigenous people’s approach to addressing criminal offenses and victimization is rooted in their respective world view which emphasize restorative practices and concepts such as the maintenance of balance, respect, and harmony.¹³⁵⁵ According to Taiaiake Alfred, a Mohawk scholar, solutions, sanctions, or actions performed to address crimes were rooted in collective agreements among all community members.¹³⁵⁶ The community all had a part in deciding what to do.¹³⁵⁷ The crime and its seriousness led to varied responses, especially among the diversity of Indigenous communities.¹³⁵⁸ Many communities employed consensus-based decision making.¹³⁵⁹ Cree and Ojibwa decisions incorporated the participation and consent of the entire community.¹³⁶⁰ Similarly, Navajo societies based their decisions in the agreement and consensus of all parties involved in the problem.¹³⁶¹ Mi’kmaq communities achieved resolutions in conflicts by bringing together “disputing parties ... for mediations and

¹³⁵³ Yazzie, *Healing as Justice*, 122.

¹³⁵⁴ Monchalin, *The Colonial Problem*, 53.

¹³⁵⁵ Monchalin, *The Colonial Problem*, 53.

¹³⁵⁶ Taiaiake Alfred, *On His Indigenous Manifesto* [YouTube video], March 1, 2012, <https://www.youtube.com/watch?v=fT9WKzZgB9I>.

¹³⁵⁷ Monchalin, *The Colonial Problem*, 53.

¹³⁵⁸ Monchalin, *The Colonial Problem*, 53.

¹³⁵⁹ Monchalin, *The Colonial Problem*, 53.

¹³⁶⁰ Monchalin, *The Colonial Problem*, 53.

¹³⁶¹ Monchalin, *The Colonial Problem*, 53.

reconciliation by community members, who would then assist them to reach an agreement based on justice and fairness”.¹³⁶² When a final agreement was reached, it attempted to address all main “concerns of the individuals, groups, or governments involved. After the opposing parties accepted an agreement it was understood, and supported by the will of the people, that they would live by its provisions”.¹³⁶³

Cree peoples also use the community when making decisions to address crime and resolve disputes.¹³⁶⁴ John G. Hansen, a sociologist and member of the Opaskwayak Cree Nation, explains this approach, “Cree practiced a justice system that was able to meet the needs of the people. When a member of the community did something wrong the people came together to deal with it”.¹³⁶⁵ He further elaborates that a necessity for the survival of tribal societies was collaboration and cooperation.¹³⁶⁶ These characteristics are seen in the restorative approach used to address crime.¹³⁶⁷ Restoring of those who had been harmed and who had done harm was of great importance and allowed the people of the community to focus on healing.¹³⁶⁸ This approach has often created conflict in modernity. Justice in the Western world can be heavily focused on finding out the “guilty” party and successfully convicting this person under the careful regulation of a court of law and then punishing or reforming this individual.¹³⁶⁹ Hansen conducted interviews with six Omushkegowuk (Swampy Cree) Elders based originally in Manitoba in order to investigate practices, principles, and ideas of traditional Omushkegowuk justice.¹³⁷⁰ The Elders, reported by Hansen, all had an explanation to justice in relation to healing rather than punishment.¹³⁷¹ It is fundamental in the approach of this system to hold the offender accountable and to restore to health anyone

¹³⁶² Paul, *First Nations History*, 9.

¹³⁶³ Paul, *First Nations History*, 9.

¹³⁶⁴ Monchalin, *The Colonial Problem*, 54.

¹³⁶⁵ Hansen, *Countering Imperial Justice*, 4.

¹³⁶⁶ Hansen, *Countering Imperial Justice*, 4.

¹³⁶⁷ Hansen, *Countering Imperial Justice*, 4.

¹³⁶⁸ Hansen, *Countering Imperial Justice*, 4.

¹³⁶⁹ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁰ Monchalin, *The Colonial Problem*, 54.

¹³⁷¹ Hansen, *Countering Imperial Justice*, 1.

or anything the crimes had harmed.¹³⁷² Efforts are made to help the offender understand their wrongdoing and to learn how their actions have affected others.¹³⁷³ The purpose of this was not to punish but to help repair the harm inflicted by making sure the offender was conscious of the consequences of their behaviour.¹³⁷⁴ The wrongdoer was held accountable and efforts were made to repair the harm inflicted upon the victim, offender, and community.¹³⁷⁵ Any harm done to an individual was seen as affecting the entire community.¹³⁷⁶

A part of holding the offender accountable is to educate the individual on the feelings of the victim.¹³⁷⁷ William Lathlin, the former chief of the Opaskwayak Cree Nation, reports that offenders were sent to the victims and those they harmed as a result of their actions in order to discover how those people felt.¹³⁷⁸ This visit was conducted not to punish the offender but with the goal of repairing the harm done and helping the offender understand the consequences of their behaviour.¹³⁷⁹ Banishment was also sometimes employed in cases of serious crime.¹³⁸⁰ However, the Elders of the Omushkegowuk explain that their people did not view banishment as a punishment.¹³⁸¹ Rather, this decision was taken by the Elders in order to help the offender reclaim spiritual health.¹³⁸² At the same time, banishment also protected communities as it removed the wrongdoer from other community members until the individual had healed enough to take responsibility.¹³⁸³ Preventative measures were also used to control misbehavior leading to crime.¹³⁸⁴ The Omushkegowuk Elders recall that their traditional education, through stories and lessons,

¹³⁷² Monchalin, *The Colonial Problem*, 54.

¹³⁷³ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁴ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁵ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁶ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁷ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁸ Monchalin, *The Colonial Problem*, 54.

¹³⁷⁹ Monchalin, *The Colonial Problem*, 54.

¹³⁸⁰ Monchalin, *The Colonial Problem*, 54.

¹³⁸¹ Monchalin, *The Colonial Problem*, 54.

¹³⁸² Monchalin, *The Colonial Problem*, 54.

¹³⁸³ Hansen, *Countering Imperial Justice*, 9;14.

¹³⁸⁴ Monchalin, *The Colonial Problem*, 55.

was employed to ensure the longevity of life in the community and to inspire thankfulness for the land.¹³⁸⁵ These lessons “extended into the development of appropriate behaviour”.¹³⁸⁶ Ojibwa First Nations had a similar method of maintaining peaceful coexistence through the use of the exemplary behaviour of their leaders as well as established traditions that were taught by the Elders who undertook the role of regularly teaching community values.¹³⁸⁷ Likewise, in the Carrier Nation, laws “were ingrained in youth so they would carry on the wisdom of their ancestors”.¹³⁸⁸

Historically, these laws held by Indigenous communities were not written out.¹³⁸⁹ The concept of transcribing laws on paper was brought over by the Europeans.¹³⁹⁰ Instead, Indigenous communities used various rules and injunctions that were passed down through word of mouth for centuries.¹³⁹¹ These rules and injunctions were passed down through oral exchange and interpreted by the Elders in many Indigenous societies.¹³⁹² Behavioural code and knowledge was internalized by the members of each community.¹³⁹³ In Inuit communities, a response to crime was carefully examined to ensure the response was not going to create more problems for the community than the original crime itself.¹³⁹⁴ Instead, emphasis was placed on maintaining the strength and well-being of the community according to the highest societal values.¹³⁹⁵ Kinship was a very significant aspect of many Indigenous communities and, as a result, using sanctions of avoidance, shame, or ridicule proved effective as a social control and order in some societies.¹³⁹⁶ In Blackfoot communities, an individual who stole or presented as a major nuisance was punished through ridicule and scornful laughter by their community.¹³⁹⁷ Further, in Indigenous communities which were small

¹³⁸⁵ Monchalin, *The Colonial Problem*, 55.

¹³⁸⁶ Hansen, *Countering Imperial Justice*, 13.

¹³⁸⁷ Monchalin, *The Colonial Problem*, 55.

¹³⁸⁸ Jefferson, *Conquest by Law*, 20.

¹³⁸⁹ Monchalin, *The Colonial Problem*, 55.

¹³⁹⁰ Monchalin, *The Colonial Problem*, 55.

¹³⁹¹ Monchalin, *The Colonial Problem*, 55.

¹³⁹² Monchalin, *The Colonial Problem*, 55.

¹³⁹³ Monchalin, *The Colonial Problem*, 55.

¹³⁹⁴ Monchalin, *The Colonial Problem*, 55.

¹³⁹⁵ Monchalin, *The Colonial Problem*, 55.

¹³⁹⁶ Monchalin, *The Colonial Problem*, 55.

¹³⁹⁷ Monchalin, *The Colonial Problem*, 55.

and tight-knit such as Inuit communities, everyone knew each other which made public opinion a force which could affect everyone.¹³⁹⁸ As a result, all were quite sensitive to these fairly informal methods of addressing crime.¹³⁹⁹

Ridicule seems to have been regularly employed as a means of addressing crimes of sexual assault.¹⁴⁰⁰ Two examples are quite poignant to this point. The first was recorded by Jane Richardson, and occurred among the Kiowa:

The Kiowas inflicted such embarrassment and ridicule on a criminal that he reportedly soon died. The man was a chronic rapist who was finally taught the error of his ways by the women; they laid an ambush and baited the trap with a beautiful young girl. When he took the bait, they suddenly appeared and overpowered him. As others held him helpless on the ground, each woman in turn raised her skirt and sat on his face. The experience was not in itself fatal, but the loss of status stemming from the derision it inspired was.¹⁴⁰¹

The second example, described by a Moses-Columbia women, features a sanction of ridicule for rape and highlights how those most harmed from a crime were able to decide upon and carry out punishment:

The chief asked the people, what should we do with this man? The women wanted to punish him themselves. The chief agreed. The women took the man away somewhere. They held him down while one older woman rubbed her bottom on his face, asking him, wasn't this what he wanted? She was so mad at him that she threatened to pee on him, but he begged for mercy, so she didn't. The chief then told the man he must leave the village.¹⁴⁰²

However, although shaming and banishment were a punishment used for crimes as serious as rape, this does not mean the traditional Indigenous communities did not invoke physical punishment.¹⁴⁰³ Certain Indigenous communities employed physical force to arbitrate disputes.¹⁴⁰⁴ For instance, as a way of

¹³⁹⁸ Monchalin, *The Colonial Problem*, 55.

¹³⁹⁹ Monchalin, *The Colonial Problem*, 55.

¹⁴⁰⁰ Monchalin, *The Colonial Problem*, 55.

¹⁴⁰¹ Smith, *Conquest*, 19.

¹⁴⁰² Ackerman, *A Necessary Balance*, 93-4.

¹⁴⁰³ Monchalin, *The Colonial Problem*, 56.

¹⁴⁰⁴ Monchalin, *The Colonial Problem*, 56.

disciplining an individual whose infraction had endangered the welfare of the community or who had gone against the community's moral code.¹⁴⁰⁵

The Aboriginal Justice Implementation Commissions reports that some Indigenous societies used the death penalty in extreme situations.¹⁴⁰⁶ In other communities, banishment was tantamount to death because, without the support and connection to the community, the offender had little chance of survival on their own.¹⁴⁰⁷ This is especially true in harsh climates.¹⁴⁰⁸ The death penalty seems to have been reserved mostly for crimes against the community.¹⁴⁰⁹ The Tsilhqot'in peoples of the BC interior held a sanction of death if the individual did anything that could threaten the waterways, upon which the communities were dependent for their livelihood.¹⁴¹⁰ Without fish and fresh water, the Tsilhqot'in community could not survive in its traditional way.¹⁴¹¹ Thus, "water is sacred; water is life".¹⁴¹² For some Indigenous communities settled along the Atlantic seaboard, rape was punished with the death penalty because of the significance of women in the community.¹⁴¹³ Teachings of the Minwaashin Women's Lodge in Ottawa promote the sacredness of women.¹⁴¹⁴ According to these teachings, woman carry this status because they carry the world inside them, they have the ability to carry two heartbeats which makes them strongest.¹⁴¹⁵ In Blackfoot communities, women were deemed to be very powerful because of this life-giving ability.¹⁴¹⁶ Because of this power, only women were permitted to unwrap and re-wrap sacred medicine bundles.¹⁴¹⁷ Men were not allowed to handle these bundles without female intercession.¹⁴¹⁸ Women were considered to

¹⁴⁰⁵ Monchalin, *The Colonial Problem*, 56.

¹⁴⁰⁶ Monchalin, *The Colonial Problem*, 56.

¹⁴⁰⁷ Monchalin, *The Colonial Problem*, 56.

¹⁴⁰⁸ Monchalin, *The Colonial Problem*, 56.

¹⁴⁰⁹ Monchalin, *The Colonial Problem*, 56.

¹⁴¹⁰ Monchalin, *The Colonial Problem*, 56.

¹⁴¹¹ Monchalin, *The Colonial Problem*, 56.

¹⁴¹² Monchalin, *The Colonial Problem*, 56.

¹⁴¹³ Monchalin, *The Colonial Problem*, 56.

¹⁴¹⁴ Monchalin, *The Colonial Problem*, 56.

¹⁴¹⁵ Monchalin, *The Colonial Problem*, 56.

¹⁴¹⁶ Monchalin, *The Colonial Problem*, 56.

¹⁴¹⁷ Monchalin, *The Colonial Problem*, 56.

¹⁴¹⁸ Monchalin, *The Colonial Problem*, 56.

be at the centre of these communities.¹⁴¹⁹ These communities would break down without women, and therefore crimes against them were treated as especially grave.¹⁴²⁰ Lillian Ackerman, an ethnographer, commented in reference to the Plateau peoples that violence against women was regarded as “shameful and illegitimate”.¹⁴²¹ Therefore, rape was an “uncommon crime and in no way condoned”.¹⁴²²

Children were also considered to be very sacred in Indigenous societies.¹⁴²³ Children are believed to be closer to the spirit world.¹⁴²⁴ As a result, the Seneca Nation did not tolerate any child to be hit.¹⁴²⁵ Tehanetorens explains that, “some of you have been among white people and have seen their peculiar way of punishing a child. The Creator loves children [so instead] blow water into a child’s face. If the child still does not mind, threaten to throw him into the river”.¹⁴²⁶ Similarly, Blackfoot communities never punished their children by striking them but by kind words and good examples.¹⁴²⁷

Murder was seen as a serious offence in Indigenous communities. The Cheyenne peoples would deny murderers participation in any national activities for a period as long as ten years.¹⁴²⁸ The Crow and Lakota peoples treated homicide as a private affair.¹⁴²⁹ It was addressed by the parties involved and the kin of the accused was encouraged to offer reparation to the victim’s family.¹⁴³⁰ Homicide in Blackfoot communities was resolved through compensation or by taking the life of the murderer, or a member of the murderer’s family.¹⁴³¹ If it was resolved through compensation, a third party was required to perform the negotiations, and the offender was stripped of all possessions.¹⁴³² The victim’s family had to be

¹⁴¹⁹ Monchalin, *The Colonial Problem*, 56.

¹⁴²⁰ Monchalin, *The Colonial Problem*, 56.

¹⁴²¹ Ackerman, *A Necessary Balance*, 93.

¹⁴²² Ackerman, *A Necessary Balance*, 93.

¹⁴²³ Monchalin, *The Colonial Problem*, 57.

¹⁴²⁴ Monchalin, *The Colonial Problem*, 57.

¹⁴²⁵ Monchalin, *The Colonial Problem*, 57.

¹⁴²⁶ Tehanetorens, *Roots of the Iroquois*, 58.

¹⁴²⁷ Monchalin, *The Colonial Problem*, 57.

¹⁴²⁸ Monchalin, *The Colonial Problem*, 57.

¹⁴²⁹ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁰ Monchalin, *The Colonial Problem*, 57.

¹⁴³¹ Monchalin, *The Colonial Problem*, 57.

¹⁴³² Monchalin, *The Colonial Problem*, 57.

accommodated in such a way that the family members of the victim were satisfied enough to allow the soul of their loved one to rest.¹⁴³³

The Haudenosaunee Nations encouraged the parties involved to reach a settlement in the instance of murder.¹⁴³⁴ The guilty person was urged by the clan councils to admit their guilt and to provide an offering to the victim's family of six white wampum (the customary number for a life) which was seen as a humble appeal for forgiveness.¹⁴³⁵ The head woman of the clan and her council would then decide the fate of the offender.¹⁴³⁶ If an offering was provided by the offender before a decision had been decided and the individual selected to carry out the decision was chosen, the offering was accepted and the parties came to an agreement.¹⁴³⁷ But, if they did not perform this act of recompense in time, and the victim's clan had already agreed on the punishment, it was too late for the offender and their family to offer the customary wampum.¹⁴³⁸ The offender could be faced with execution in some cases.¹⁴³⁹ However, the head women of the family sometimes adopted the murderer as a symbolic replacement for the lost victim.¹⁴⁴⁰ If the latter option was selected, the offender was required to "run the gauntlet" of stick brandishing.¹⁴⁴¹ If the offender survived the test, they were accepted by the victim's family.¹⁴⁴²

Traditional Justice by Geographic Location:

The following criminal law traditions were recorded in the nineteen seventies and drawn from a variety of old, anthropological texts. These reports should therefore be taken as an alien's perspective on Indigenous civilization. It reflects ideals imposed by a European perspective such as gender roles. It is also

¹⁴³³ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁴ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁵ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁶ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁷ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁸ Monchalin, *The Colonial Problem*, 57.

¹⁴³⁹ Monchalin, *The Colonial Problem*, 57.

¹⁴⁴⁰ Monchalin, *The Colonial Problem*, 57.

¹⁴⁴¹ Monchalin, *The Colonial Problem*, 57.

¹⁴⁴² Monchalin, *The Colonial Problem*, 57.

based on snapshots taken after contact with Westerners. Therefore, information can be gained from studying this report, but its ingrained bias must also be realized.

Miq'mak

The Mik'maq resided in modern Nova Scotia, eastern New Brunswick, Prince Edward Island, and southern Gaspé.¹⁴⁴³ Among the Mik'maq, what constituted proper behaviour was generally agreed upon by all communities.¹⁴⁴⁴ However, the punishment and enforcement in the face of infractions varied.¹⁴⁴⁵ Murder was held as a heinous offence.¹⁴⁴⁶ It generally resulted in the execution of the murderer.¹⁴⁴⁷ Once an alleged murderer was identified, the Elder's council and chief would typically pass a sentence on behalf of the settlement.¹⁴⁴⁸ The convicted man, if condemned to execution, would either have his sentence carried out by the victim's family or a larger group of relations and friends.¹⁴⁴⁹ If the guilty party was a woman, the woman of the village were sometimes called upon to carry out the execution.¹⁴⁵⁰ The Mik'maq differentiated between murder, manslaughter, and accidental death:

“One night a man went to hunt moose, gave the moose call, and heard an answer. He was wearing, as a disguise, antlers of bark, in imitation of a moose. He called again, and this time was sure that the answer came from a moose. The other, who was in fact a man, saw the antlers in the bushes and shot at it. He heard a fall, and went over to look at his kill. He peeled off a piece of bark, lighted it, held it up as a torch, and saw a fallen man, shot through the heart. He carried the body home, and explained how the misadventure had happened. He was not punished.”¹⁴⁵¹

¹⁴⁴³ Jefferson, *Conquest by Law*, 5.

¹⁴⁴⁴ Jefferson, *Conquest by Law*, 5.

¹⁴⁴⁵ Jefferson, *Conquest by Law*, 5.

¹⁴⁴⁶ Jefferson, *Conquest by Law*, 6.

¹⁴⁴⁷ Jefferson, *Conquest by Law*, 6.

¹⁴⁴⁸ Jefferson, *Conquest by Law*, 6.

¹⁴⁴⁹ Jefferson, *Conquest by Law*, 6.

¹⁴⁵⁰ Jefferson, *Conquest by Law*, 6.

¹⁴⁵¹ Wallis and Wallis, *The Micmac Indians of Eastern Canada*, 172-3.

Trespassing was treated as a serious offence as an individual's territory was the sole livelihood for the family.¹⁴⁵² If the trespasser had been warned before and was continuing to trespass, the person who was recognized as having rights to the territory was allowed to attempt to rectify the issue.¹⁴⁵³ It is uncertain how exactly this took form.¹⁴⁵⁴ The issue may have been raised at a council of the Elders which was responsible for the allotment of territory for fishing and hunting.¹⁴⁵⁵ Yet, those in the Mik'maq community who were poor, orphaned, or unfortunate were always relieved of their suffering by other community members.¹⁴⁵⁶ The chief was responsible for ensuring the welfare of his people to this extent.¹⁴⁵⁷ If a traveler was found to be hungry, he was allowed to enter a Mik'maq home, even if the owners were not present at the time, and take provisions without fear or shame.¹⁴⁵⁸ Therefore, if a member of the Miq'mak were found to have engaged in theft, they were ridiculed and disdained for committing such an unnecessary act.¹⁴⁵⁹ The matter of theft was habitually not taken any further than this.¹⁴⁶⁰

The Miq'mak community, as is common throughout all Indigenous communities, held a deep respect for the elderly in their community and their families often took care of them.¹⁴⁶¹ When their suffering as a result of their old age reached extreme levels, and the individual was "fading in body and spirit", it was lawful for them to receive a quick and painless end.¹⁴⁶² An alternative to this was to allow them to remain in the forest to free their souls.¹⁴⁶³ The Mik'maq were, for the most part, a very peaceful nation.¹⁴⁶⁴ However, when severe conflict did arise, it was usually the result of a grave injury committed by a hostile tribe against

¹⁴⁵² Jefferson, *Conquest by Law*, 6.

¹⁴⁵³ Jefferson, *Conquest by Law*, 6.

¹⁴⁵⁴ Jefferson, *Conquest by Law*, 6.

¹⁴⁵⁵ Jefferson, *Conquest by Law*, 6.

¹⁴⁵⁶ Jefferson, *Conquest by Law*, 7.

¹⁴⁵⁷ Jefferson, *Conquest by Law*, 6.

¹⁴⁵⁸ Jefferson, *Conquest by Law*, 7.

¹⁴⁵⁹ Jefferson, *Conquest by Law*, 7.

¹⁴⁶⁰ Jefferson, *Conquest by Law*, 7.

¹⁴⁶¹ Jefferson, *Conquest by Law*, 7.

¹⁴⁶² Jefferson, *Conquest by Law*, 7.

¹⁴⁶³ Jefferson, *Conquest by Law*, 7.

¹⁴⁶⁴ Jefferson, *Conquest by Law*, 7.

the Mik'maq.¹⁴⁶⁵ For the community, it was “forbidden [for] them by the laws and customs of the country to pardon or to forgive any one of their enemies, unless great presents are given on behalf of these to the whole nation, or those who have been injured”.¹⁴⁶⁶ If a prisoner of war had been captured, and committed an offence or attempted to escape, death was their punishment.¹⁴⁶⁷ Minor violations and disputes contrary to the code of behaviour within the community itself were commonly settled by the chiefs and friend of the concerned parties.¹⁴⁶⁸ Presents were usually offered to the injured party as a form of settlement.¹⁴⁶⁹ For the more serious crimes, it fell to the victim’s family to obtain justice.¹⁴⁷⁰ The Mik'maq communities often used the term *habenquedouic*.¹⁴⁷¹ The means “he did not begin it, he has paid him back: quits and (becomes) good friends” and described the ideal process of an unintentional crime.¹⁴⁷²

The summer often hosted the most social gatherings among the communities and was the primary opportunity for the formation of marriages.¹⁴⁷³ The host chief was aided in this matter by a *nudjialkatdegat ukcit maltewdj*, a “watcher of young people”.¹⁴⁷⁴ If two young people frequently nodded and noticed each other, it was likely to have been noticed by the “watcher” and their respective chiefs were informed of the growing attachment.¹⁴⁷⁵ Polygamy was allowed in these communities but marriage was sacredly guarded.¹⁴⁷⁶ Once a marriage was agreed upon by all parties, the young man was required by law to live with his fiancée’s family for the period of one year and contribute to them any fruits of his labour in that time.¹⁴⁷⁷ The couple were required to live as if brother and sister for the required period of cohabitation and

¹⁴⁶⁵ Jefferson, *Conquest by Law*, 7.

¹⁴⁶⁶ Hoffman, *The Historical Ethnography of the Micmac of the Sixteenth and Seventeenth Centuries*, 246.

¹⁴⁶⁷ Jefferson, *Conquest by Law*, 7.

¹⁴⁶⁸ Jefferson, *Conquest by Law*, 7.

¹⁴⁶⁹ Jefferson, *Conquest by Law*, 7.

¹⁴⁷⁰ Jefferson, *Conquest by Law*, 7.

¹⁴⁷¹ Jefferson, *Conquest by Law*, 7.

¹⁴⁷² Jefferson, *Conquest by Law*, 7.

¹⁴⁷³ Jefferson, *Conquest by Law*, 7.

¹⁴⁷⁴ Jefferson, *Conquest by Law*, 7.

¹⁴⁷⁵ Jefferson, *Conquest by Law*, 7.

¹⁴⁷⁶ Jefferson, *Conquest by Law*, 7.

¹⁴⁷⁷ Jefferson, *Conquest by Law*, 7.

their relationship was monitored.¹⁴⁷⁸ If the couple violated this chaste condition, they risked bringing great evil upon all the villagers.¹⁴⁷⁹ Pre-marital sex similarly brought shame, especially on the woman and her family who were supposed to monitor the cohabitation.¹⁴⁸⁰ But the couple may still be allowed to marry.¹⁴⁸¹ Marriages between siblings, uncles and nieces, and cousins were forbidden.¹⁴⁸² Also, divorce was permitted and either party could end a marriage.¹⁴⁸³ However, adultery was serious crime and the adulterers were frequently executed.¹⁴⁸⁴ If a man stole another's man's wife, the abductor frequently faced execution by the woman's relatives.¹⁴⁸⁵

The shaman of the community also played a role in settling conflicts.¹⁴⁸⁶ Along with their spiritual duties, the Mik'maq believed that the shaman had the ability to prevent or end misfortune that resulted from an infraction of a traditional rule.¹⁴⁸⁷ The shaman was brought in to examine and determine the identity of the guilty party and the culprit could then be made to pay for the offence.¹⁴⁸⁸ Offenders often approached the shaman themselves and confessed, in the hopes of preventing any disasters for the community.¹⁴⁸⁹ An offender was able to attempt to repay the victim for the harm inflicted and restore peace to the community through an apology and presents.¹⁴⁹⁰ Acceptance of this apology and compensation rested with the offended party.¹⁴⁹¹ A guilty party might still be resigned and subject to the inevitability of a separate, just

¹⁴⁷⁸ Jefferson, *Conquest by Law*, 7.

¹⁴⁷⁹ Jefferson, *Conquest by Law*, 7.

¹⁴⁸⁰ Jefferson, *Conquest by Law*, 7.

¹⁴⁸¹ Jefferson, *Conquest by Law*, 7.

¹⁴⁸² Jefferson, *Conquest by Law*, 7.

¹⁴⁸³ Jefferson, *Conquest by Law*, 7.

¹⁴⁸⁴ Jefferson, *Conquest by Law*, 7.

¹⁴⁸⁵ Jefferson, *Conquest by Law*, 7.

¹⁴⁸⁶ Jefferson, *Conquest by Law*, 7.

¹⁴⁸⁷ Jefferson, *Conquest by Law*, 7.

¹⁴⁸⁸ Jefferson, *Conquest by Law*, 7-8.

¹⁴⁸⁹ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁰ Jefferson, *Conquest by Law*, 8.

¹⁴⁹¹ Jefferson, *Conquest by Law*, 8.

punishment.¹⁴⁹² However, he still may offer these presents to the victim, regardless of a separate punishment “to remove from the hearts of the (victim) all the bitterness caused by the crime of which (he is) guilty”.¹⁴⁹³

At one point, the Mik’maq did employ a penal colony of sorts, but it is doubtful that this was employed before the arrival of Europeans.¹⁴⁹⁴ Islands which were designated as part of the penal colony were titled “devil’s island” and were where the banished would be sent.¹⁴⁹⁵ Helen Martin, a Miq’mak woman of noble lineage, reports that Chapel Island was used for this purpose.¹⁴⁹⁶ If a Mik’maq misbehaved to a serious degree, they were transported to the island for a few days to survive on their own.¹⁴⁹⁷ After the offender had time to learn the value of their community, the importance of co-operation with their neighbors, and need for proper behaviour, they were rescued by their community and brought back.¹⁴⁹⁸ Every member of the Mik’maq was expected to behave according to the rules of the community.¹⁴⁹⁹ Generosity, dignity, and kindness toward other members of the nation as well as strangers were regarded as desirable traits deserving of respect.¹⁵⁰⁰ As a result, members of the Mik’maq community “fear shame and reproach ... they are stirred to do good by honour, for as much as he amongst them is always honoured and renowned who had done some fair exploit”.¹⁵⁰¹

Naskapi

The Naskapi, or Nanénot, are settled in the elevated interior of Quebec, east Sept Isles in Labrador, and Ungava Peninsula.¹⁵⁰² The Naskapi were composed of bands of several families.¹⁵⁰³ In times of peace,

¹⁴⁹² Jefferson, *Conquest by Law*, 8.

¹⁴⁹³ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁴ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁵ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁶ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁷ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁸ Jefferson, *Conquest by Law*, 8.

¹⁴⁹⁹ Jefferson, *Conquest by Law*, 8.

¹⁵⁰⁰ Jefferson, *Conquest by Law*, 8.

¹⁵⁰¹ Marc, *The History of New France*, 213.

¹⁵⁰² Jefferson, *Conquest by Law*, 8.

¹⁵⁰³ Jefferson, *Conquest by Law*, 8.

a head man or chief was selected from each band but was not given much authority. The chief had to be careful to act in accordance with public opinion.¹⁵⁰⁴ A council comprised of respected hunters from each settlement would support this man.¹⁵⁰⁵ It was essential for him to receive this support in order to be able to intervene in important matters.¹⁵⁰⁶ The head man was responsible for the welfare of his community members: he oversaw the distribution of hunting territories, and he also served certain judicial functions.¹⁵⁰⁷ During the hunting season in the winter, the Naskapi retreated to their respective hunting grounds.¹⁵⁰⁸ During this time, the chief had no more authority than anyone else in his community.¹⁵⁰⁹ The harsh environment of the Naskapi territory influenced the way that they lived including the rules of behaviour and their enforcement.¹⁵¹⁰ Notched poles set at the boundary of an individual's territory acted as a way to indicate if a person was in need.¹⁵¹¹ The pattern of notches could denote the type of emergency along with the distance to camp.¹⁵¹² If an individual noted these wooden poles they were required to provide aid regardless of any possible enmity they could hold towards them.¹⁵¹³ Failure to provide assistance was thought to create ill fortune in hunting and thus, cause starvation.¹⁵¹⁴ Moreover, a traveler suffering from extreme hunger, whether Naskapi or stranger, was permitted to take half of another's food cache without the prior permission of the owner or any immediate payment.¹⁵¹⁵

It appears that there were few strictly forbidden activities and even fewer lead to a direct intervention of others.¹⁵¹⁶ Only continued disturbance of the peace and murder resulted in the interference

¹⁵⁰⁴ Jefferson, *Conquest by Law*, 8.

¹⁵⁰⁵ Jefferson, *Conquest by Law*, 8.

¹⁵⁰⁶ Jefferson, *Conquest by Law*, 8.

¹⁵⁰⁷ Jefferson, *Conquest by Law*, 8.

¹⁵⁰⁸ Jefferson, *Conquest by Law*, 8.

¹⁵⁰⁹ Jefferson, *Conquest by Law*, 8.

¹⁵¹⁰ Jefferson, *Conquest by Law*, 9.

¹⁵¹¹ Jefferson, *Conquest by Law*, 9.

¹⁵¹² Jefferson, *Conquest by Law*, 9.

¹⁵¹³ Jefferson, *Conquest by Law*, 9.

¹⁵¹⁴ Jefferson, *Conquest by Law*, 9.

¹⁵¹⁵ Jefferson, *Conquest by Law*, 9.

¹⁵¹⁶ Jefferson, *Conquest by Law*, 9.

of the chief and council in a formal way.¹⁵¹⁷ Beyond this, the wronged individual and their family were largely anticipated to handle their affairs and problems privately, especially during the hunting season.¹⁵¹⁸ The time of year in which the offence occurred affected the selection of an outside party to help in the affairs of the wronged individual.¹⁵¹⁹ If the offence occurred during or could wait to be addressed during the warm months, the band was gathered together and the chief was typically asked to intervene.¹⁵²⁰ When this transpired, and a complaint was brought to the chief, the accused was summoned to come before the chief for questioning.¹⁵²¹ The person was expected to answer these questions with the truth, and for the most part they did.¹⁵²² If the offender was obviously guilty yet denied the charge, they were punished to a greater degree than if they had responded truthfully.¹⁵²³ Complaints, unless the accused was clearly guilty, were rarely acted upon in advance of this hearing.¹⁵²⁴ In cases of minor offences, the chief did not receive counsel and heard the case in private.¹⁵²⁵ But, if the offence was serious and posed a threat to the community's peace, the council and chief heard the case in tandem.¹⁵²⁶

Murder and manslaughter were considered to be heinous offences.¹⁵²⁷ There is no record of the Naskapi distinguishing between unintentional killing and murder.¹⁵²⁸ However, if a murderer was found to have taken another's life in self defence, they were not punished.¹⁵²⁹ Helping another to commit homicide was a crime punished to a lesser degree.¹⁵³⁰ Giving shelter and food to a murderer was not considered to be aiding in an offence, and was not punished.¹⁵³¹ The victim's family was required to avenge the death of

¹⁵¹⁷ Jefferson, *Conquest by Law*, 9.

¹⁵¹⁸ Jefferson, *Conquest by Law*, 9.

¹⁵¹⁹ Jefferson, *Conquest by Law*, 9.

¹⁵²⁰ Jefferson, *Conquest by Law*, 9.

¹⁵²¹ Jefferson, *Conquest by Law*, 9.

¹⁵²² Jefferson, *Conquest by Law*, 9.

¹⁵²³ Jefferson, *Conquest by Law*, 9.

¹⁵²⁴ Jefferson, *Conquest by Law*, 9.

¹⁵²⁵ Jefferson, *Conquest by Law*, 9.

¹⁵²⁶ Jefferson, *Conquest by Law*, 9.

¹⁵²⁷ Jefferson, *Conquest by Law*, 9.

¹⁵²⁸ Jefferson, *Conquest by Law*, 9.

¹⁵²⁹ Jefferson, *Conquest by Law*, 9.

¹⁵³⁰ Jefferson, *Conquest by Law*, 9.

¹⁵³¹ Jefferson, *Conquest by Law*, 9.

their kinsman by taking the life of the murderer.¹⁵³² Sometimes, the murderer was only wounded for his crime.¹⁵³³ This could be the case because of the murderer's status in the community or the circumstances of the crime.¹⁵³⁴ The council and the chief only became involved if the victim had no living relatives to exact punishment on their behalf.¹⁵³⁵ Alternatively, they stepped in if the victim's family neglected their duty and needed to be reminded.¹⁵³⁶ Sometimes, perhaps if there was doubt in the offender's guilt, or the offender was not known, the chief would present gifts to console the grieving family of the victim.¹⁵³⁷

Personal injury was generally dealt with by the wronged individual themselves.¹⁵³⁸ They could exact payment or retained a shaman to punish the offender.¹⁵³⁹ The community would only become involved if the offender rendered the victim unable to hunt from the assault.¹⁵⁴⁰ If this was the case, the offender was required to provide to the victim food and shelter.¹⁵⁴¹ The chief was also frequently requested to intervene in trespassing offences.¹⁵⁴² The Naskapi way of life relied upon hunting for survival and their goods flowed from this singular source.¹⁵⁴³ Accordingly, there were strict rules which pertained to trespassing, particularly when done for hunting.¹⁵⁴⁴ The exception to this was when a person trespassed because they were in need and therefore had the right to hunt in order to prevent starvation.¹⁵⁴⁵ When a trespasser was first found to have committed this crime, they were simply asked by the owner to not trespass again.¹⁵⁴⁶ If an individual was found to have abused their privilege or to have continuously trespassed, they were deemed

¹⁵³² Jefferson, *Conquest by Law*, 9.

¹⁵³³ Jefferson, *Conquest by Law*, 9.

¹⁵³⁴ Jefferson, *Conquest by Law*, 9.

¹⁵³⁵ Jefferson, *Conquest by Law*, 9.

¹⁵³⁶ Jefferson, *Conquest by Law*, 9.

¹⁵³⁷ Jefferson, *Conquest by Law*, 9.

¹⁵³⁸ Jefferson, *Conquest by Law*, 9.

¹⁵³⁹ Jefferson, *Conquest by Law*, 9.

¹⁵⁴⁰ Jefferson, *Conquest by Law*, 9.

¹⁵⁴¹ Jefferson, *Conquest by Law*, 9.

¹⁵⁴² Jefferson, *Conquest by Law*, 9.

¹⁵⁴³ Jefferson, *Conquest by Law*, 9.

¹⁵⁴⁴ Jefferson, *Conquest by Law*, 9-10.

¹⁵⁴⁵ Jefferson, *Conquest by Law*, 10.

¹⁵⁴⁶ Jefferson, *Conquest by Law*, 10.

a life-threatening issue for the family who held the rights to the territory for the purpose of hunting.¹⁵⁴⁷ The family who held the rights for hunting of the territory noted each repeated infraction throughout the hunting season.¹⁵⁴⁸ When the families returned to the settlement for the warmer months, the injured party requested the chief to deal with the offender.¹⁵⁴⁹

“The chief arranges to see the offender and advises him that he did the wrong thing and must never repeat his offence. Then, in order to give the wrongdoer an opportunity for repentance while not punishing him too severely, the chief orders the offender to return to the owner of the land one-half the value of everything he took. The chief adds the warning, however, that if the trespasser repeats his offence the owner of the hunting-ground will be entitled to shoot him and explains that if during the coming winter the crime is repeated and the rightful owner kills the illegal trapper or hunter, the owner will not be brought to account”.¹⁵⁵⁰

Theft in general was viewed by the Naskapi people with disdain.¹⁵⁵¹ Yet, there was little punishment for most types of theft that did not present a serious threat to the survival of the community.¹⁵⁵² The thief was simply requested to return the goods they had stolen.¹⁵⁵³ Damage to another’s hunting area, or arson, was also grounds for required restitution.¹⁵⁵⁴ But, the ‘theft’ of another man’s wife was considered to be a serious crime.¹⁵⁵⁵ If a chief so much as suspected that this type of theft was about to occur, he interceded and forbid the man from proceeding.¹⁵⁵⁶ If the man did not heed this warning by the chief, he could be bound or tied to a tree in the effort of forcing him to agree to the provision and abandon his plan.¹⁵⁵⁷ Other actions were not expressly forbidden or actively punished, but a quick message of disapproval was sent to the offending party by their neighbours.¹⁵⁵⁸ The social ostracism inflicted on the offender was sometimes

¹⁵⁴⁷ Jefferson, *Conquest by Law*, 10.

¹⁵⁴⁸ Jefferson, *Conquest by Law*, 10.

¹⁵⁴⁹ Jefferson, *Conquest by Law*, 10.

¹⁵⁵⁰ Lips, *Naskapi Law*, 476-7.

¹⁵⁵¹ Jefferson, *Conquest by Law*, 10.

¹⁵⁵² Jefferson, *Conquest by Law*, 10.

¹⁵⁵³ Jefferson, *Conquest by Law*, 10.

¹⁵⁵⁴ Jefferson, *Conquest by Law*, 10.

¹⁵⁵⁵ Jefferson, *Conquest by Law*, 10.

¹⁵⁵⁶ Jefferson, *Conquest by Law*, 10.

¹⁵⁵⁷ Jefferson, *Conquest by Law*, 10.

¹⁵⁵⁸ Jefferson, *Conquest by Law*, 10.

to the extent which the offender would emigrate.¹⁵⁵⁹ Within this category of crime which resulted in intense social ostracism was adultery, incest, and rape.¹⁵⁶⁰ Divorce could legally be initiated by the husband or wife, or they could simply desert the marriage.¹⁵⁶¹ Desertion enacted by the wife was thought to be less proper than if it was done by the husband.¹⁵⁶²

The Naskapi worshipped a sky God and believed that all things were inhabited by spirits.¹⁵⁶³ Various ceremonies and taboos were connected to appeasing these spirits.¹⁵⁶⁴ If the ceremonies were neglected or the taboos were not followed, tragedy such as sickness would befall the offender.¹⁵⁶⁵ The Shaman was considered to be a medium in which they could ask the spirits to protect or punish an individual.¹⁵⁶⁶ Evil spirits were also considered to exist and to be capable of replacing or inhabiting the spirit of a human.¹⁵⁶⁷ This evil spirit, the *wiltigo*, could turn the person into a cannibal.¹⁵⁶⁸ The shaman would attempt to rid the person of this spirit.¹⁵⁶⁹ But if he was unsuccessful, the individual was killed.¹⁵⁷⁰

The shaman intervened in disputes which occurred during the winter and could not be put off until the summer gathering to be dealt with.¹⁵⁷¹ These disputes habitually concerned hunting violations.¹⁵⁷² One of the parties in the dispute would commission the shaman to act solely for them.¹⁵⁷³ Through this, a person forfeited the right to solicit any other individual to help in settling the matter.¹⁵⁷⁴ The shaman attempted to discern public sentiment and the facts of the case before agreeing to represent either side.¹⁵⁷⁵ If the shaman

¹⁵⁵⁹ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁰ Jefferson, *Conquest by Law*, 10.

¹⁵⁶¹ Jefferson, *Conquest by Law*, 10.

¹⁵⁶² Jefferson, *Conquest by Law*, 10.

¹⁵⁶³ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁴ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁵ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁶ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁷ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁸ Jefferson, *Conquest by Law*, 10.

¹⁵⁶⁹ Jefferson, *Conquest by Law*, 10.

¹⁵⁷⁰ Jefferson, *Conquest by Law*, 10.

¹⁵⁷¹ Jefferson, *Conquest by Law*, 10.

¹⁵⁷² Jefferson, *Conquest by Law*, 10.

¹⁵⁷³ Jefferson, *Conquest by Law*, 10-1.

¹⁵⁷⁴ Jefferson, *Conquest by Law*, 11.

¹⁵⁷⁵ Jefferson, *Conquest by Law*, 11.

accepted the case, he usually warned the accused that he was acting for the complainant.¹⁵⁷⁶ This caution would often result in spurring the accused to restore peace between the parties.¹⁵⁷⁷ If the accused did not do this, and persisted in their actions, the shaman told his client to build a *wapanon*, a spirit house.¹⁵⁷⁸ The shaman enter the *wapanon*, shaped like a hut, at night and began a battle of spirits.¹⁵⁷⁹ During this, the accused's spirit was summoned by the shaman's spirit, a *mistapéo*.¹⁵⁸⁰ If the accused admitted his guilt, his spirit began a struggle with the shaman's and the other party's.¹⁵⁸¹ Sometimes, the accused contracted another shaman who joined him in the battle of spirits.¹⁵⁸² If the accused, and potentially his shaman, were defeated, it was believed that the accused would either immediately drop dead, or he would be plagued with ill-fortune and end his days in a state of starvation.¹⁵⁸³ Therefore, a spiritual trial occurred, to this effect.¹⁵⁸⁴ But the consequences took place in the physical realm.¹⁵⁸⁵

The Naskapi peoples expected each member of the community to control themselves and to exercise their own power to address their own minor, interpersonal problems.¹⁵⁸⁶ If persistent troublemakers came to be seen as a threat to community peace, they were dealt with by the whole community,

“... the incorrigible thief, the chronic quarreler, persons who habitually hunt on the land of others, are punished by the community with expulsion ... Expulsion is equal to a death sentence. The culprit is expelled from the protecting shelter of the band; his hunting ground is no longer respected; his life is made miserable since he is shunned by his fellow human beings; he is like a lonely world.”¹⁵⁸⁷

¹⁵⁷⁶ Jefferson, *Conquest by Law*, 11.

¹⁵⁷⁷ Jefferson, *Conquest by Law*, 11.

¹⁵⁷⁸ Jefferson, *Conquest by Law*, 11.

¹⁵⁷⁹ Jefferson, *Conquest by Law*, 11.

¹⁵⁸⁰ Jefferson, *Conquest by Law*, 11.

¹⁵⁸¹ Jefferson, *Conquest by Law*, 11.

¹⁵⁸² Jefferson, *Conquest by Law*, 11.

¹⁵⁸³ Jefferson, *Conquest by Law*, 11.

¹⁵⁸⁴ Jefferson, *Conquest by Law*, 11.

¹⁵⁸⁵ Jefferson, *Conquest by Law*, 11.

¹⁵⁸⁶ Jefferson, *Conquest by Law*, 11.

¹⁵⁸⁷ Lips, *Naskapi Law*, 469.

If an individual followed accepted behaviour and did not prove to be a threat to the community, they were left to live out their existence with minimal interference by any authority.¹⁵⁸⁸ The chief only exercised his authority if very strong public opinion was voiced and his authority was constrained by the season.¹⁵⁸⁹ All community members were taught the rules to live by and these unwritten laws were imposed through familial pressure and an authority only if absolutely necessary.¹⁵⁹⁰

Anishinaabe

The Anishinaabe nation consisted of four tribes and inhabited the territory from the western Great Lakes to the waster fringe of the plains.¹⁵⁹¹ The clans in Lake Superior, Ottawa, Mississauga, and Potawatomi were also sub-divided into *tudem*.¹⁵⁹² Marriage within the *tudem* was forbidden, even if the couple were from different tribes.¹⁵⁹³ Governance could vary among the wide territory.¹⁵⁹⁴ All communities had a head chief and councils of proven warriors and hunters as their central authority.¹⁵⁹⁵ Yet, there was rarely ever a chief who could hold influence over all clans in one tribe, and a grand chief was traditionally unheard of.¹⁵⁹⁶ Inter-tribal meetings were conducted between the chiefs and principal men of each community to address concerns such as treaties, division of territory, and disputes.¹⁵⁹⁷ The communities of the Ojibwe, Ottawa, and Potawatomi eventually established a convening of their chiefs known as the Council of Three Fires.¹⁵⁹⁸ The bands settled along the border of the prairies in southern Manitoba were reliant on hunting wandering buffalo herds.¹⁵⁹⁹ The chiefs of these communities were elected from a council

¹⁵⁸⁸ Jefferson, *Conquest by Law*, 11.

¹⁵⁸⁹ Jefferson, *Conquest by Law*, 11.

¹⁵⁹⁰ Jefferson, *Conquest by Law*, 11.

¹⁵⁹¹ Jefferson, *Conquest by Law*, 18.

¹⁵⁹² Jefferson, *Conquest by Law*, 18.

¹⁵⁹³ Jefferson, *Conquest by Law*, 18.

¹⁵⁹⁴ Jefferson, *Conquest by Law*, 18.

¹⁵⁹⁵ Jefferson, *Conquest by Law*, 18.

¹⁵⁹⁶ Jefferson, *Conquest by Law*, 18.

¹⁵⁹⁷ Jefferson, *Conquest by Law*, 18.

¹⁵⁹⁸ Jefferson, *Conquest by Law*, 18.

¹⁵⁹⁹ Jefferson, *Conquest by Law*, 18.

comprised of proven warriors.¹⁶⁰⁰ However, their powers were eclipsed by the workings of warrior societies called “strong-hearted” men.¹⁶⁰¹ These societies were responsible for maintaining order and functioned as police during the crucial and immense buffalo hunts.¹⁶⁰² In the communities north of the western Great Lakes, a council and chief were responsible for managing all affairs.¹⁶⁰³ The chieftainship was a hereditary position but not automatic, the individual was carefully and diligently evaluated before receiving the position.¹⁶⁰⁴ However, in times of war, these chiefs stepped back and war chiefs were elected to assume these duties.¹⁶⁰⁵ The authority of a chief was derived from their personal attributes and not their position.¹⁶⁰⁶ The chief and councilors were expected to behave impeccably at all times and encourage proper behaviour as a result.¹⁶⁰⁷ Personal disgrace and the shaming of an offender’s family served as an effective method for controlling unruly and offensive behaviour by the chiefs and councils.¹⁶⁰⁸

The chief of a community was expected to intervene in disputes between members of a band and to actively participate in negotiations with other bands and chiefs.¹⁶⁰⁹ However, any strife which occurred within a family unit was the responsibility of the head of the family to deal with.¹⁶¹⁰ This responsibility at times even included the agonizing task of taking the life of a close relative.¹⁶¹¹ It is reported that an Ojibway woman from Parry Island was found to have murdered her baby and fled to her brother’s abode.¹⁶¹² Her husband found her there, seated beside her brother.¹⁶¹³ Her husband declared her to be the murderer of their infant and her brother turned to her and immediately struck her down.¹⁶¹⁴ Unlawful murder between

¹⁶⁰⁰ Jefferson, *Conquest by Law*, 18.

¹⁶⁰¹ Jefferson, *Conquest by Law*, 18.

¹⁶⁰² Jefferson, *Conquest by Law*, 18.

¹⁶⁰³ Jefferson, *Conquest by Law*, 18.

¹⁶⁰⁴ Jefferson, *Conquest by Law*, 18-9.

¹⁶⁰⁵ Jefferson, *Conquest by Law*, 19.

¹⁶⁰⁶ Jefferson, *Conquest by Law*, 19.

¹⁶⁰⁷ Jefferson, *Conquest by Law*, 19.

¹⁶⁰⁸ Jefferson, *Conquest by Law*, 19.

¹⁶⁰⁹ Jefferson, *Conquest by Law*, 19.

¹⁶¹⁰ Jefferson, *Conquest by Law*, 19.

¹⁶¹¹ Jefferson, *Conquest by Law*, 19.

¹⁶¹² Jefferson, *Conquest by Law*, 19.

¹⁶¹³ Jefferson, *Conquest by Law*, 19.

¹⁶¹⁴ Jenness, *The Ojibway Indians*, 3.

families, bands, or tribes usually resulted in outside interference.¹⁶¹⁵ In some communities, the chief could offer the murderer protection if the homicide appeared to warrant leniency.¹⁶¹⁶ But, if the chief remained silent, the murderer was generally executed by the relatives of the victim.¹⁶¹⁷

In cases of serious theft in the more easterly villages, the chief and council would often conduct formal deliberations in cases of murder.¹⁶¹⁸ If guilt seemed to be obvious, the council would pass sentence.¹⁶¹⁹ The punishment was often compensation in goods and land or execution.¹⁶²⁰ If homicide was committed and involved another village, each village sent representatives to discuss a settlement and avoid bloodshed.¹⁶²¹ If execution was the demand the parties settled on, a close relative of the victim acted as the executioner.¹⁶²² However, rather than execution, victim's families sometimes requested enormous quantities of territory and goods.¹⁶²³ To amass this amount, multiple years of hard labour was required and the brunt of the work was done by the murderer.¹⁶²⁴ Sometimes murder between villages began a war.¹⁶²⁵ However, it seems they preferred to settle the conflict before this point was reached.¹⁶²⁶ Sometimes, it was required of a chief to judge a close relative.¹⁶²⁷ This is recorded in the murder of a Potawatomi man who was killed by his enraged wife after having sold her pony for more whisky (this event evidently occurred after contact with Europeans).¹⁶²⁸ The wife in this case was the chief's daughter.¹⁶²⁹ Notwithstanding this relationship, the chief had to pass judgement, "His integrity as an Indian chief prevailed ... The storm of

¹⁶¹⁵ Jefferson, *Conquest by Law*, 19.

¹⁶¹⁶ Jefferson, *Conquest by Law*, 19.

¹⁶¹⁷ Jefferson, *Conquest by Law*, 19.

¹⁶¹⁸ Jefferson, *Conquest by Law*, 19.

¹⁶¹⁹ Jefferson, *Conquest by Law*, 19.

¹⁶²⁰ Jefferson, *Conquest by Law*, 19.

¹⁶²¹ Jefferson, *Conquest by Law*, 19.

¹⁶²² Jefferson, *Conquest by Law*, 19.

¹⁶²³ Jefferson, *Conquest by Law*, 19.

¹⁶²⁴ Jefferson, *Conquest by Law*, 19.

¹⁶²⁵ Jefferson, *Conquest by Law*, 19.

¹⁶²⁶ Jefferson, *Conquest by Law*, 19.

¹⁶²⁷ Jefferson, *Conquest by Law*, 19.

¹⁶²⁸ Jefferson, *Conquest by Law*, 19.

¹⁶²⁹ Jefferson, *Conquest by Law*, 19.

agony in the mind of the chief had passed away, and in deep sorrow, he decided that his daughter ought to die by the hand of the nearest kin to the murdered Indian, according to their custom for ages past”.¹⁶³⁰

Among the Anishinaabe, witchcraft was a serious crime and dreaded.¹⁶³¹ Witches were considered to be, “persons supposed to possess the agency of familiar spirits, from whom they receive power to inflict diseases on their enemies, prevent the good luck of the hunter, and the success of the warrior”.¹⁶³² If someone was found to be practicing sorcery, they could be slain immediately.¹⁶³³ If an individual was suspected of being a witch, they were brought before the chief and council for investigation.¹⁶³⁴ In these cases, it was often evil-countenanced or deformed persons suspect of witchcraft.¹⁶³⁵ But many in Anishinaabe communities hesitated to accuse one in these cases for fear of revenge.¹⁶³⁶ These misgivings sometimes resulted in the individuals believed to be under the influence of sorcery to find a shaman, rather than their chief and council.¹⁶³⁷ A shaman was believed to employ his special powers to counteract any witchcraft and to reap revenge.¹⁶³⁸

The Anishinaabe, like most other Indigenous communities, were communal and made sure every individual in need was provided with all that was necessary.¹⁶³⁹ Theft was therefore, in this respect, unnecessary and believed to be shameful.¹⁶⁴⁰ Thieves were publicly condemned and, in punishment, clothed in a costume to display their offence.¹⁶⁴¹ Similarly, if a man was found to be unfaithful or to have been in a relationship with a married woman, he was shamed publicly.¹⁶⁴² Sometimes, he was killed by the maddened

¹⁶³⁰ Kahkewaquonaby, *History of the Ojibway*, 109.

¹⁶³¹ Jefferson, *Conquest by Law*, 19.

¹⁶³² Kahkewaquonaby, *History of the Ojibway*, 145.

¹⁶³³ Jefferson, *Conquest by Law*, 20.

¹⁶³⁴ Jefferson, *Conquest by Law*, 20.

¹⁶³⁵ Jefferson, *Conquest by Law*, 20.

¹⁶³⁶ Jefferson, *Conquest by Law*, 20.

¹⁶³⁷ Jefferson, *Conquest by Law*, 20.

¹⁶³⁸ Jefferson, *Conquest by Law*, 20.

¹⁶³⁹ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁰ Jefferson, *Conquest by Law*, 20.

¹⁶⁴¹ Jefferson, *Conquest by Law*, 20.

¹⁶⁴² Jefferson, *Conquest by Law*, 20.

husband.¹⁶⁴³ If a woman was found to have committed adultery, she was disgraced and had her hair shorn or she may have been abandoned.¹⁶⁴⁴ Minor violations within the Anishinaabe code were publicly condemned by the chief of the offender.¹⁶⁴⁵

At the moment children were considered able to reason, they were instructed on the rules of their community.¹⁶⁴⁶ They were taught about the consequences if they violated these rules, not just for the offender but for the rest of the community also.¹⁶⁴⁷ For instance, children were taught to keep quiet in the evenings or their parents would not catch any game.¹⁶⁴⁸ Also, torturing an animal was strictly forbidden.¹⁶⁴⁹ This is because in doing so, “you will torture your own soul and surely meet with misfortune”.¹⁶⁵⁰ Children were also taught to wait half an hour before they skinned an animal, “lest its shadow learn to know you and prevent you from killing other animals of the same species.”¹⁶⁵¹ The Anishinaabe also believed that every member of their community could affect others through their actions.¹⁶⁵² Members of the Grand Medicine Society, known as *Medés* or *Midewiwin*, were thought to have an extraordinary amount of influence.¹⁶⁵³ These men and women were given much medical and religious knowledge which had been accrued by their ancestors.¹⁶⁵⁴ A strict code of conduct was developed for their behaviour.¹⁶⁵⁵ They were not allowed to lie or steal, they had to remain faithful to their spouse, they had to be respectful to their Elders and parents, and they had to be devoted to the Great Spirit.¹⁶⁵⁶ If they were found to have abused their gift for evil

¹⁶⁴³ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁴ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁵ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁶ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁷ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁸ Jefferson, *Conquest by Law*, 20.

¹⁶⁴⁹ Jefferson, *Conquest by Law*, 20.

¹⁶⁵⁰ Jenness, *The Ojibway Indians*, 80.

¹⁶⁵¹ Jenness, *The Ojibway Indians*, 80.

¹⁶⁵² Jefferson, *Conquest by Law*, 20.

¹⁶⁵³ Jefferson, *Conquest by Law*, 20.

¹⁶⁵⁴ Jefferson, *Conquest by Law*, 20.

¹⁶⁵⁵ Jefferson, *Conquest by Law*, 20.

¹⁶⁵⁶ Jefferson, *Conquest by Law*, 20.

purposes, they were thought to be punished after death by having their souls banned from the Kingdom of the Great Spirit.¹⁶⁵⁷

The Anishinaabe established their rules of behaviour to maintain peaceful co-existence through established tradition taught by the Elders, exemplary behaviour of their leaders, religious powers, and treating a violator with public disgrace.¹⁶⁵⁸ This last method proved effective: “This fear of the nation’s censure acted as a mighty bond, binding all in one social, honorable compact. They would not as brutes be whipped into duty. They would as men be persuaded to the right”.¹⁶⁵⁹

Haudenosaunee

The traditional Haudenosaunee land largely resides in Southern Ontario, Quebec and Northeastern United States.¹⁶⁶⁰ The confederacy was constructed in its formal form by 1450.¹⁶⁶¹ The Haudenosaunee and the Anishinaabe were bound in a treaty of friendship.¹⁶⁶² This has lasted for two hundred years.¹⁶⁶³ The constitution of the confederacy is recorded on wampum belts to help commemorate and preserve the understanding of the treaty for all following generations.¹⁶⁶⁴ Each nation had their own council which was in control of their own local affairs.¹⁶⁶⁵ But, “general control was to be lodged in a federal senate, composed of representatives elected by each nation, holding office during good behaviour, and acknowledged as ruling chiefs throughout the whole confederacy”.¹⁶⁶⁶ Each nation was also divided into clans.¹⁶⁶⁷ If one clan wished to bring a matter before the federal council, they had to persuade the rest of the clans with a

¹⁶⁵⁷ Jefferson, *Conquest by Law*, 20.

¹⁶⁵⁸ Jefferson, *Conquest by Law*, 20.

¹⁶⁵⁹ Kangeegahbowk, *The Traditional History*, 144.

¹⁶⁶⁰ Jefferson, *Conquest by Law*, 21.

¹⁶⁶¹ Jefferson, *Conquest by Law*, 21.

¹⁶⁶² Jefferson, *Conquest by Law*, 21.

¹⁶⁶³ Jefferson, *Conquest by Law*, 21.

¹⁶⁶⁴ Jefferson, *Conquest by Law*, 21.

¹⁶⁶⁵ Jefferson, *Conquest by Law*, 21.

¹⁶⁶⁶ Hale, *The Iroquois Book of Rites*, 21.

¹⁶⁶⁷ Jefferson, *Conquest by Law*, 21.

unanimous agreement.¹⁶⁶⁸ If this was achieved, the head chief then announced a vote of his nation during the league council.¹⁶⁶⁹

Fifty sachemships were also instituted.¹⁶⁷⁰ These men served as representatives of their nation's interests on the general council and also exercised a level of leadership locally.¹⁶⁷¹ These sachems function as an executive, legislative, and judicial authority within the league.¹⁶⁷² No sachem was greater than others.¹⁶⁷³ The Onondaga Nation, as referenced in the story of Peacemaker, were the keepers of the council fire, and the records in wampum of the laws, constitution, and treaties.¹⁶⁷⁴ All council decisions had to be unanimous.¹⁶⁷⁵ The Onondaga (the keepers of the fire) and the Mohawk (the founders of the league), were responsible for preventing any decision harmful to the people from being passed.¹⁶⁷⁶ Two head chiefs of the Seneca were stationed at the doorway of the council room in order to prevent any "crawling creature" or injurious motion from continuing.¹⁶⁷⁷ The sachems were chosen, and deposed if required, by the head woman of the family.¹⁶⁷⁸ They received the hereditary right to select a principal chief.¹⁶⁷⁹ The most suitable man was chosen for office and little regard was given to age.¹⁶⁸⁰ The provided chief also had to be accepted by the council and if they believed he was so young that he lacked the required knowledge and experience, the council designated a tutor to teach and guide him.¹⁶⁸¹

¹⁶⁶⁸ Jefferson, *Conquest by Law*, 21.

¹⁶⁶⁹ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁰ Jefferson, *Conquest by Law*, 21.

¹⁶⁷¹ Jefferson, *Conquest by Law*, 21.

¹⁶⁷² Jefferson, *Conquest by Law*, 21.

¹⁶⁷³ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁴ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁵ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁶ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁷ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁸ Jefferson, *Conquest by Law*, 21.

¹⁶⁷⁹ Jefferson, *Conquest by Law*, 21.

¹⁶⁸⁰ Jefferson, *Conquest by Law*, 21.

¹⁶⁸¹ Jefferson, *Conquest by Law*, 21.

The women of the Haudenosaunee also received other powers within their community.¹⁶⁸² All members of the nations were matrilineal.¹⁶⁸³ Titles, rights, and all goods followed the female line of descent.¹⁶⁸⁴ The elder women served as the head of their family.¹⁶⁸⁵ Further, the women also had orators to represent them at council meetings or they could speak directly through a chief.¹⁶⁸⁶ During wartime, women were the designated peacemakers by duty and right, “when in their opinion the strike had lasted long enough to interfere and bring about a reconciliation”.¹⁶⁸⁷ Governance changed between times of peace and war.¹⁶⁸⁸ In times of war, the sachem was required to step down and was replaced by a war chief until the end of hostilities.¹⁶⁸⁹ A sachem was not able to participate in battle while under their official capacity.¹⁶⁹⁰ Therefore, the constitution stipulated that each sachem had to have a war chief and a runner to bring tidings.¹⁶⁹¹ The war chief, during times of peace, acted as an adviser to the sachem and his influence carried significant weight.¹⁶⁹² The communities also had lesser chiefs or captains who acted as intermediaries between the people and their sachem.¹⁶⁹³ Men were awarded this position based on merit and there was no hereditary aspect.¹⁶⁹⁴ The chiefs governed using requests to the people, not orders.¹⁶⁹⁵ They had no power of force.¹⁶⁹⁶ As a consequence, leaders were careful not to ask for anything that was likely to be met with refusal.¹⁶⁹⁷

¹⁶⁸² Jefferson, *Conquest by Law*, 21.

¹⁶⁸³ Jefferson, *Conquest by Law*, 21.

¹⁶⁸⁴ Jefferson, *Conquest by Law*, 21.

¹⁶⁸⁵ Jefferson, *Conquest by Law*, 21.

¹⁶⁸⁶ Jefferson, *Conquest by Law*, 21.

¹⁶⁸⁷ Hale, *The Iroquois Book of Rites*, 92.

¹⁶⁸⁸ Jefferson, *Conquest by Law*, 22.

¹⁶⁸⁹ Jefferson, *Conquest by Law*, 22.

¹⁶⁹⁰ Jefferson, *Conquest by Law*, 22.

¹⁶⁹¹ Jefferson, *Conquest by Law*, 22.

¹⁶⁹² Jefferson, *Conquest by Law*, 22.

¹⁶⁹³ Jefferson, *Conquest by Law*, 22.

¹⁶⁹⁴ Jefferson, *Conquest by Law*, 22.

¹⁶⁹⁵ Jefferson, *Conquest by Law*, 22.

¹⁶⁹⁶ Jefferson, *Conquest by Law*, 22.

¹⁶⁹⁷ Jefferson, *Conquest by Law*, 22.

The communities also had “Keepers of the Faith” who guarded the moral fibre of the community.¹⁶⁹⁸ They were widely selected men and women of the community chosen through election.¹⁶⁹⁹ Those selected became duty-bound and adopted a new name.¹⁷⁰⁰ They were also allowed to relinquish their office.¹⁷⁰¹

“They were to some extent censors of the people; and their admonitions were received with kindness, as coming from those commissioned to remonstrate. In some cases they reported evil deeds of individuals to the council, to make of them an example by exposure. Sometimes they held consultations to deliberate upon the moral condition of the people”.¹⁷⁰²

The basic social unit of the community was the extended family. In effect, the property of community members belonged to the clan.¹⁷⁰³ The clan was allowed to take the life of a community member, and was the unit to which the compensation as a result of an offence was made.¹⁷⁰⁴ The women acted as the head of their household and held considerable influence both in affairs of day-to-day life and affairs of the state.¹⁷⁰⁵

Murder presented as a dangerous threat to a confederation founded on the notion of peace.¹⁷⁰⁶ The possibility of a vendetta was a hazard and thus, settlement was strongly encouraged.¹⁷⁰⁷ As mentioned previously, clan councils actively advised the guilty party to confess and to deliver white wampum as a present as a humble petition for forgiveness.¹⁷⁰⁸ If the six white wampum belts were accepted, the customary number decided for a life, the matter ended there.¹⁷⁰⁹ The head woman and her council decided the fate of the murderer and the murderer had to present his offer before the murderer’s fate was decided.¹⁷¹⁰ If their

¹⁶⁹⁸ Jefferson, *Conquest by Law*, 22.

¹⁶⁹⁹ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁰ Jefferson, *Conquest by Law*, 22.

¹⁷⁰¹ Jefferson, *Conquest by Law*, 22.

¹⁷⁰² Morgan, *League of the Hohenosaunee or Iroquois*, 178-9.

¹⁷⁰³ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁴ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁵ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁶ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁷ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁸ Jefferson, *Conquest by Law*, 22.

¹⁷⁰⁹ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁰ Jefferson, *Conquest by Law*, 22-3.

fate was decided and no settlement was reached, the offender might flee.¹⁷¹¹ Execution was a possible punishment for murder.¹⁷¹² However, the head women of the victim's family could also adopt the murderer as a symbolic replacement of the victim.¹⁷¹³ As a test, she could require the murderer to "run the gauntlet" of stick-wielding relatives.¹⁷¹⁴ If the murderer survived the test, he was accepted into the family.¹⁷¹⁵

Another crime considered to be most serious was witchcraft.¹⁷¹⁶ It was believed to be a threat to the whole group.¹⁷¹⁷ If an individual was suspected of witchcraft, he or she was summoned before the village or grand council.¹⁷¹⁸ If the individual admitted guilt and stated that he or she intended to reform, the individual was habitually dismissed.¹⁷¹⁹ If they denied the allegations, witnesses were interviewed.¹⁷²⁰ If, after a lengthy investigation, the council were convinced that the accused was guilty, "condemnation followed with a sentence of death. The witch was then delivered over to such executioners as volunteered for the purpose, and by them was led away to punishment".¹⁷²¹ Treason was handled in a similar fashion as this.¹⁷²²

In the event of an offence committed by a member of one village against a member of another village, the leaders of the two communities were expected to handle the situation.¹⁷²³ If they were unwilling or unable to do so, the Grand Council was required to intervene.¹⁷²⁴ In ancient times, the elderly would be killed upon their request if they felt they had become too great of a burden for their family. However, this practice was rarely exercised after the implementation of the confederacy.¹⁷²⁵ There are alleged reports of

¹⁷¹¹ Jefferson, *Conquest by Law*, 23.

¹⁷¹² Jefferson, *Conquest by Law*, 23.

¹⁷¹³ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁴ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁵ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁶ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁷ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁸ Jefferson, *Conquest by Law*, 23.

¹⁷¹⁹ Jefferson, *Conquest by Law*, 23.

¹⁷²⁰ Jefferson, *Conquest by Law*, 23.

¹⁷²¹ Morgan, *League of the Hohenosaunee or Iroquois*, 322.

¹⁷²² Jefferson, *Conquest by Law*, 23.

¹⁷²³ Jefferson, *Conquest by Law*, 23.

¹⁷²⁴ Jefferson, *Conquest by Law*, 23.

¹⁷²⁵ Jefferson, *Conquest by Law*, 23.

the crippled, very ill, and very young being killed in times of extreme starvation and necessity.¹⁷²⁶ There are also rare reports of cannibalism occurring before confederation if death by starvation was imminent.¹⁷²⁷

The murder of a Haudenosaunee person by an enemy usually resulted in war unless prompt reparations were made by the offending community to the clan or nation of the victim.¹⁷²⁸ War was not conducted out of revenge, but as a necessary step required to allow the victim's spirit to find peace.¹⁷²⁹ It was believed that the life of an enemy had to be taken in order for the spirit to cease haunting the area.¹⁷³⁰ The Haudenosaunee themselves seem to have been willing to make reparations after one of their number murdered an enemy in a time of peace or truce.¹⁷³¹ Any captives seized during a battle would face one of two fates: torture until death, or adoption into a family who had lost a warrior.¹⁷³² Before adoption, prisoners were often faced with a beating or some other test of bravery to prove their mettle.¹⁷³³ If a captive showed himself to be courageous, he was generally treated with kindness.¹⁷³⁴

Each Haudenosaunee individual owned their own personal goods such as weapons, clothing, sleeping mats, and a share in the property of the household and clan.¹⁷³⁵ Any individual was free to cultivate an unused parcel of land so long as they continued to use this land.¹⁷³⁶ Their rights to this land after continued cultivation were protected under confederacy law.¹⁷³⁷ However, this did not mean they had absolute title to the land.¹⁷³⁸ Houses within the community were never locked.¹⁷³⁹ Any friendly individual was free to enter and share in the household provisions.¹⁷⁴⁰ As a result, all persons suffering were spared

¹⁷²⁶ Jefferson, *Conquest by Law*, 23.

¹⁷²⁷ Jefferson, *Conquest by Law*, 23.

¹⁷²⁸ Jefferson, *Conquest by Law*, 23.

¹⁷²⁹ Jefferson, *Conquest by Law*, 23.

¹⁷³⁰ Jefferson, *Conquest by Law*, 23.

¹⁷³¹ Jefferson, *Conquest by Law*, 23.

¹⁷³² Jefferson, *Conquest by Law*, 23.

¹⁷³³ Jefferson, *Conquest by Law*, 23.

¹⁷³⁴ Jefferson, *Conquest by Law*, 23.

¹⁷³⁵ Jefferson, *Conquest by Law*, 23.

¹⁷³⁶ Jefferson, *Conquest by Law*, 23.

¹⁷³⁷ Jefferson, *Conquest by Law*, 23.

¹⁷³⁸ Jefferson, *Conquest by Law*, 23.

¹⁷³⁹ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁰ Jefferson, *Conquest by Law*, 24.

starvation and exposure to the elements.¹⁷⁴¹ Material wealth in Haudenosaunee society brought neither power nor prestige.¹⁷⁴² It merely meant that the individual could give more away.¹⁷⁴³ This left little reason for theft.¹⁷⁴⁴ The only materials which, if taken, would have been considered as “stolen”, were medicines and wampum belts.¹⁷⁴⁵ If someone was found to be stealing in this way, they were seen as having violated the community’s trust and therefore received public anger and ridicule.¹⁷⁴⁶ As a result, theft was rare.¹⁷⁴⁷ During the Haudenosaunee New Year’s celebration called "Gi-Ye-Wa-No-Us-Qua-Go-Wa”, one tradition allowed a kind of permissible theft.¹⁷⁴⁸ A “thieving party” composed of boys:

“strolled from house to house, accompanied by an old woman carrying a huge basket. If the family received them kindly ... they retired without committing any depredations. But if no presents were made, or such as were insufficient, they purloined whatever article they could most adroitly and easily conceal. If detected, they at once made restitution, but if not, it was considered a fair win. On the return of the party from their rounds, all the articles collected were deposited in a public place where articles could be exchanged by their owners for something of equal value. A feast was then held with the proceeds of this procedure”.¹⁷⁴⁹

Marriages were coordinated and arranged by clan mothers.¹⁷⁵⁰ If a woman refused to marry the chosen groom, this sometimes resulted in disownment or disgrace.¹⁷⁵¹ If young people were of marriageable age, they were not allowed to speak to each other in public.¹⁷⁵² Along with this, a prospective bride and groom were not allowed to see the other while marriage negotiations were ongoing.¹⁷⁵³ Divorce in Haudenosaunee communities could be instigated by either party although discouraged on a communal

¹⁷⁴¹ Jefferson, *Conquest by Law*, 24.

¹⁷⁴² Jefferson, *Conquest by Law*, 24.

¹⁷⁴³ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁴ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁵ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁶ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁷ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁸ Jefferson, *Conquest by Law*, 24.

¹⁷⁴⁹ Kip, *The Early Jesuit Missions in North America*, 86.

¹⁷⁵⁰ Jefferson, *Conquest by Law*, 24.

¹⁷⁵¹ Jefferson, *Conquest by Law*, 24.

¹⁷⁵² Jefferson, *Conquest by Law*, 24.

¹⁷⁵³ Jefferson, *Conquest by Law*, 24.

level.¹⁷⁵⁴ Adultery seldom occurred but, when it did, the woman was punished publicly through public whipping if ordered by the council after deliberation occurred.¹⁷⁵⁵ Polygamy was forbidden along with marriage within a clan.¹⁷⁵⁶ Children were expected to obey the same rules as adults.¹⁷⁵⁷ However, they were rarely reprimanded with more than a push or splash of water in the face.¹⁷⁵⁸ All adults were engaged in the lives of the children and few actions of the community's children went unnoticed: "Their elders always stood near to arbitrate their disputes and to apportion praise or blame, and no private chastisement in the home could have produced more effect than the outspoken reproof of the entire community".¹⁷⁵⁹

When reparation was required and determined for an offense, the entire clan or village helped to contribute to the reparation for the victim through gifts given on a voluntary basis.¹⁷⁶⁰ The Haudenosaunee believe that all things in nature have a spirit, in addition to the Great Spirit, and including the deceased.¹⁷⁶¹ If any of these spirits was disturbed or offended, which could be the result of ridicule of a sacred ceremony or neglect, the spirit could possibly choose one individual to show their people the way in which they were erring by creating unusual behaviour.¹⁷⁶² A pathfinder or spiritual advisor was consulted in cases such as this to learn the origin of the anger.¹⁷⁶³ A ceremony was then held to appease the spirit.¹⁷⁶⁴ This meant that not all offenders were punished exclusively for their first unacceptable violations.¹⁷⁶⁵ Rather, the entire community assumed responsibility in giving reparation to the victim.¹⁷⁶⁶ The entire community was believed to have contributed to the offence through their own misbehavior.¹⁷⁶⁷ But, when an individual was

¹⁷⁵⁴ Jefferson, *Conquest by Law*, 24.

¹⁷⁵⁵ Jefferson, *Conquest by Law*, 24.

¹⁷⁵⁶ Jefferson, *Conquest by Law*, 24.

¹⁷⁵⁷ Jefferson, *Conquest by Law*, 24.

¹⁷⁵⁸ Jefferson, *Conquest by Law*, 24.

¹⁷⁵⁹ Kip, *The Early Jesuit Missions in North America*, 152.

¹⁷⁶⁰ Jefferson, *Conquest by Law*, 24.

¹⁷⁶¹ Jefferson, *Conquest by Law*, 24.

¹⁷⁶² Jefferson, *Conquest by Law*, 24.

¹⁷⁶³ Jefferson, *Conquest by Law*, 24.

¹⁷⁶⁴ Jefferson, *Conquest by Law*, 24.

¹⁷⁶⁵ Jefferson, *Conquest by Law*, 24-5.

¹⁷⁶⁶ Jefferson, *Conquest by Law*, 25.

¹⁷⁶⁷ Jefferson, *Conquest by Law*, 25.

found to be continuously offending, even after warnings and counselling, they could be banished.¹⁷⁶⁸ Their exile was recorded through a mark on their left cheek or ear so that all who encountered them afterwards would know of their misdeeds.¹⁷⁶⁹ During the banishment of the individual, they were told that they would never find peace among the Haudenosaunee, therefore they should seek people who are of a like mind to themselves.¹⁷⁷⁰ Alternatively, a chronic offender could have lost his life.¹⁷⁷¹

If a chief was found to be violating his sacred trust and committed a crime, the women of the clan removed him from office.¹⁷⁷² If he was found to only be practicing poor leadership and showed poor qualities such as selfishness, he would lose the cooperation of his people and, consequently, his opinion in the council lost a lot of weight.¹⁷⁷³ For small offences such as ridiculing a woman in public or theft, the individual was punished by ostracism.¹⁷⁷⁴ The offender was not considered for any public honours such as leading a dance at one of the communities many festivals.¹⁷⁷⁵ A lengthy period of probation was imposed during which the offender had to redeem themselves through exemplary behaviour.¹⁷⁷⁶ After this, their offence was forgotten.¹⁷⁷⁷

According to Haudenosaunee mythology, an individual who escaped from punishment in his mortal life risked ending up in a dark world of punishments called “Ha-ne-go-até-geh”.¹⁷⁷⁸ When a person died, their deeds were balanced and their good deeds were weighed against their bad deeds.¹⁷⁷⁹ An individual guilty of witchcraft or murder were to be punished eternally.¹⁷⁸⁰ Other crimes other than the most serious

¹⁷⁶⁸ Jefferson, *Conquest by Law*, 25.

¹⁷⁶⁹ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁰ Jefferson, *Conquest by Law*, 25.

¹⁷⁷¹ Jefferson, *Conquest by Law*, 25.

¹⁷⁷² Jefferson, *Conquest by Law*, 25.

¹⁷⁷³ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁴ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁵ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁶ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁷ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁸ Jefferson, *Conquest by Law*, 25.

¹⁷⁷⁹ Jefferson, *Conquest by Law*, 25.

¹⁷⁸⁰ Jefferson, *Conquest by Law*, 25.

led to temporary punishment.¹⁷⁸¹ After the completion of the punishment, the person was allowed to pass on to the land of happiness and the Great Spirit.¹⁷⁸² It was also commonly believed that a great wrong committed by an individual could result in a punishment such as famine, drought, or other scourge befalling the entire community.¹⁷⁸³ When disasters such as this occurred, a meeting was called before festivals such as “A-Yent’-wa-ta” or the Planting Festival.¹⁷⁸⁴ During this meeting, all community members were required to confess any transgression that could have provoked anger from the Great Spirit for the well-being of the community.¹⁷⁸⁵

Blackfoot

Much mystery still shrouds the Blackfoot “Dog Days”, the time before the horse arrived in North America.¹⁷⁸⁶ A legend relays that Blackfoot bands came from the deep south of the continent.¹⁷⁸⁷ Evidence which supports this can be found in some ancient Blackfoot words.¹⁷⁸⁸ The nation most likely spent at least the latter part of the Dog Days around Lesser Slave Lake in the northern woodlands between the Saskatchewan and Peace Rivers.¹⁷⁸⁹ When the horse was introduced, the culture and social structure were revolutionized.¹⁷⁹⁰ Vast distances could be crossed with relative ease while pursuing huge buffalo herds.¹⁷⁹¹ The Blackfoot adopted a nomadic way of life as plains hunters.¹⁷⁹² Blackfoot governance consisted of a confederacy of three tribes, related through tradition and blood.¹⁷⁹³ These tribes were the Siksika, the Pikuni

¹⁷⁸¹ Jefferson, *Conquest by Law*, 25.

¹⁷⁸² Jefferson, *Conquest by Law*, 25.

¹⁷⁸³ Jefferson, *Conquest by Law*, 25.

¹⁷⁸⁴ Jefferson, *Conquest by Law*, 25.

¹⁷⁸⁵ Jefferson, *Conquest by Law*, 25.

¹⁷⁸⁶ Jefferson, *Conquest by Law*, 47.

¹⁷⁸⁷ Jefferson, *Conquest by Law*, 47.

¹⁷⁸⁸ Jefferson, *Conquest by Law*, 47.

¹⁷⁸⁹ Jefferson, *Conquest by Law*, 47.

¹⁷⁹⁰ Jefferson, *Conquest by Law*, 47.

¹⁷⁹¹ Jefferson, *Conquest by Law*, 47.

¹⁷⁹² Jefferson, *Conquest by Law*, 47.

¹⁷⁹³ Jefferson, *Conquest by Law*, 47.

or Peigan, and the Kainai.¹⁷⁹⁴ Tribes were divided into clans and each clan was led by an elected chief.¹⁷⁹⁵ For each tribe, the clan chiefs elected a head chief.¹⁷⁹⁶ According to Blackfoot beliefs, all individuals were created equal and therefore were not to be accorded any special rights because of birth.¹⁷⁹⁷ A man could only hope to become a leader through their displays of generosity, courage, and kind-heartedness.¹⁷⁹⁸

Along with the clans were the “I-kun-uh’-kah-tsi”, All Comrades Societies.¹⁷⁹⁹ Membership in these societies was based on the ability to buy a seat and age.¹⁸⁰⁰ The affairs of clans was considerably influenced by the important leaders of these societies.¹⁸⁰¹ The All Comrades were technically under the authority of the chiefs, however the power of the chief’s was also dependent of the cooperation of the communities.¹⁸⁰² Because of the reliance on community cooperation, All Comrades society leaders could carry strong influence in deliberations of councils.¹⁸⁰³ The All Comrades societies had several functions and duties: “The more general functions of the societies were primarily to preserve order in all circumstances and to punish offenders against the public welfare whenever necessary. They protected the camp by guarding against possible surprise by an enemy”.¹⁸⁰⁴ Other responsibilities also included hosting ceremonies and buffalo scouting.¹⁸⁰⁵ During the summer, scattered clans would join in one large camp to hunt buffalo.¹⁸⁰⁶ During these gatherings, the need for laws arose.¹⁸⁰⁷ The tribal council chose members of

¹⁷⁹⁴ Jefferson, *Conquest by Law*, 47.

¹⁷⁹⁵ Jefferson, *Conquest by Law*, 47.

¹⁷⁹⁶ Jefferson, *Conquest by Law*, 47.

¹⁷⁹⁷ Jefferson, *Conquest by Law*, 47.

¹⁷⁹⁸ Jefferson, *Conquest by Law*, 47.

¹⁷⁹⁹ Jefferson, *Conquest by Law*, 47.

¹⁸⁰⁰ Jefferson, *Conquest by Law*, 47.

¹⁸⁰¹ Jefferson, *Conquest by Law*, 47-8.

¹⁸⁰² Jefferson, *Conquest by Law*, 48.

¹⁸⁰³ Jefferson, *Conquest by Law*, 48.

¹⁸⁰⁴ Mails, *Dog Soldiers, Bear Men & Buffalo Women*, 85.

¹⁸⁰⁵ Jefferson, *Conquest by Law*, 48.

¹⁸⁰⁶ Jefferson, *Conquest by Law*, 48.

¹⁸⁰⁷ Jefferson, *Conquest by Law*, 48.

the All Comrades societies to police the gathering in the upcoming summer hunt and, if necessary, during winter isolation.¹⁸⁰⁸ This duty was for a year term but was often extended.¹⁸⁰⁹

The tenure as a member of the “police” required these selected individuals to maintain the public perception of being a fair individual while enforcing community rules.¹⁸¹⁰ Although the individual might be in this position of authority one year, they could be an ordinary citizen the next.¹⁸¹¹ Thus, they could be subject to the same treatment they inflicted on others.¹⁸¹² Within these societies, it was considered a great honour to be chosen as camp police.¹⁸¹³ In their position, they were given privileges and received a good deal of respect from their entire community.¹⁸¹⁴ By rotating the individuals who served as police, in addition to encouraging just enforcement, the short appointments also allowed a lot of flexibility in the kind of policing available.¹⁸¹⁵ Particular characteristics of each society was noted to be uniquely suited to handle specific condition within the tribe.¹⁸¹⁶ For instance, the “Black Soldiers” and “Soldiers” were noted for their severe punishment of unacceptable crimes.¹⁸¹⁷ If it was believed that there was an increased disrespect for the rules within the society, a society such as the Soldiers might be chosen as camp police.¹⁸¹⁸ After the “crime wave” had been dealt with, a different society might be chosen who were known for their gentle approach to policing.¹⁸¹⁹ Unacceptable behaviour was usurped in the community due to impeccable example led by the police themselves.¹⁸²⁰

¹⁸⁰⁸ Jefferson, *Conquest by Law*, 48.

¹⁸⁰⁹ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁰ Jefferson, *Conquest by Law*, 48.

¹⁸¹¹ Jefferson, *Conquest by Law*, 48.

¹⁸¹² Jefferson, *Conquest by Law*, 48.

¹⁸¹³ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁴ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁵ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁶ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁷ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁸ Jefferson, *Conquest by Law*, 48.

¹⁸¹⁹ Jefferson, *Conquest by Law*, 48.

¹⁸²⁰ Jefferson, *Conquest by Law*, 48.

The Blackfoot held few general laws and these were mostly comprised of crimes which required serious consequence.¹⁸²¹ Only actions which could threaten the community's survival was deemed to be a serious crime.¹⁸²² The year's supply of bison had to be obtained within the few weeks of the buffalo hunt.¹⁸²³ Therefore, the clan's survival was largely dependent on a disciplined and organized approach to hunt and encampment.¹⁸²⁴ The duty of ensuring these conditions fell to the camp police.¹⁸²⁵ When a buffalo herd drew near, no one was allowed to leave the camp.¹⁸²⁶ If one individual, in pursuit of his own wants, selfishly stampeded the herd, the entire clan would starve.¹⁸²⁷ Therefore, if an individual was guilty of this crime, they had their clothing and tipi cut up by the police.¹⁸²⁸ If an individual was found to have left the camp after having been warned to remain, the same fate awaited them.¹⁸²⁹

Other laws were enforced throughout the year. Murder was an egregious offence.¹⁸³⁰ It was settled either through taking the life of either the murderer or a member of their family, or through compensation.¹⁸³¹ A third party was habitually brought in to conduct the necessary negotiations to reach a settlement.¹⁸³² Compensation was usually accepted by the victim's family if their kin was murdered within or outside the nation.¹⁸³³ However, if their kin was killed in battle or at the hands of an enemy, they were required to seek satisfaction in blood or payment.¹⁸³⁴ The soul of their kin was believed to be forced to

¹⁸²¹ Jefferson, *Conquest by Law*, 48.

¹⁸²² Jefferson, *Conquest by Law*, 48.

¹⁸²³ Jefferson, *Conquest by Law*, 48.

¹⁸²⁴ Jefferson, *Conquest by Law*, 48.

¹⁸²⁵ Jefferson, *Conquest by Law*, 48.

¹⁸²⁶ Jefferson, *Conquest by Law*, 48.

¹⁸²⁷ Jefferson, *Conquest by Law*, 48.

¹⁸²⁸ Jefferson, *Conquest by Law*, 48.

¹⁸²⁹ Jefferson, *Conquest by Law*, 48.

¹⁸³⁰ Jefferson, *Conquest by Law*, 48.

¹⁸³¹ Jefferson, *Conquest by Law*, 48-9.

¹⁸³² Jefferson, *Conquest by Law*, 49.

¹⁸³³ Jefferson, *Conquest by Law*, 49.

¹⁸³⁴ Jefferson, *Conquest by Law*, 49.

wander in misery and that they could only find rest when satisfaction was gained.¹⁸³⁵ Accidental death also required compensation, but not to the same extent as intentional homicide.¹⁸³⁶

If theft of most types of goods was found out, it was required for the offender to merely return the goods.¹⁸³⁷ However, if a man was thought to have stolen tobacco from another because they were too lazy to plant it themselves, this was seen as a grievous sin.¹⁸³⁸ Tobacco was considered to be a sacred substance handed down by the Creator.¹⁸³⁹ It was believed that during a dream, a lizard would come to the thief.¹⁸⁴⁰ After this, the offender would fall into a sickness and die.¹⁸⁴¹ All Comrade societies seem to have held rigid codes of behaviour applied to their membership.¹⁸⁴² Violation of these codes occasionally led to the offender's clothes being destroyed in public or beatings in serious cases.¹⁸⁴³ However, there is evidence which suggests that these provided punishments have been told to be more severe than they were in reality.¹⁸⁴⁴ Yet public punishments ensured that would-be-offenders were aware that if they violated the laws, they would be quickly punished.¹⁸⁴⁵

Every four years, a religious figure was appointed by the chiefs and their advisors to be responsible for the nation's sacred items.¹⁸⁴⁶ This prominent figure would hold all spiritual meetings and ceremonies.¹⁸⁴⁷ This figure was regarded as a spiritual and neutral figure within the community, they were often called to determine and judge disputes, "His presence and voice were sufficient to quell all domestic disturbance, and altogether he holds more actual power and influence than even the civil and war chiefs".¹⁸⁴⁸ The

¹⁸³⁵ Jefferson, *Conquest by Law*, 49.

¹⁸³⁶ Jefferson, *Conquest by Law*, 49.

¹⁸³⁷ Jefferson, *Conquest by Law*, 49.

¹⁸³⁸ Jefferson, *Conquest by Law*, 49.

¹⁸³⁹ Jefferson, *Conquest by Law*, 49.

¹⁸⁴⁰ Jefferson, *Conquest by Law*, 49.

¹⁸⁴¹ Jefferson, *Conquest by Law*, 49.

¹⁸⁴² Jefferson, *Conquest by Law*, 49.

¹⁸⁴³ Jefferson, *Conquest by Law*, 49.

¹⁸⁴⁴ Jefferson, *Conquest by Law*, 49.

¹⁸⁴⁵ Jefferson, *Conquest by Law*, 49.

¹⁸⁴⁶ Jefferson, *Conquest by Law*, 49.

¹⁸⁴⁷ Jefferson, *Conquest by Law*, 49.

¹⁸⁴⁸ Jefferson, *Conquest by Law*, 49.

Blackfoot justice system, as a whole, was based in their lifestyle, spiritual beliefs, and plains environment.¹⁸⁴⁹ The rules of behaviour within the community were well established, and they logically followed what was required for the welfare of the entire nation.

Modern Indigenous Criminal Law:

These traditional Indigenous justice systems have historically been repressed by the colonial settler structure of Canada's government and through this, these traditions are in danger of being forgotten. The *Indian Act*, instituted in 1876, remains a part of Canadian law.¹⁸⁵⁰ When further amendments were made to the *Act*, the Deputy Superintendent of the Department of Indian Affairs at the time, Duncan Campbell Scott, declared that the purpose of the *Indian Act* was to, "Get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are not able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not be absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill".¹⁸⁵¹ The homogeneity desired by the *Act* requires that Indigenous peoples assimilate to Western systems. This includes the dispossession of languages, cultures, traditions, and laws.¹⁸⁵²

However, this does not mean that the different beliefs inherent in modern Indigenous culture does not still lead to a dramatically different approach of achieving justice compared to the Canadian retributive system. Furthermore, the over-policing and over-incarceration of Indigenous peoples has led to a resurgence, and a re-taking of Indigenous law. Throughout the past couple of decades, Canada has begun to recognize the need for Indigenous legal structures and the benefits of implementing them. Therefore, it would be wrong to claim that Indigenous legal systems are extinct and no longer at work. They continue to

¹⁸⁴⁹ Jefferson, *Conquest by Law*, 49.

¹⁸⁵⁰ Hewitt, *Indigenous Restorative Justice*, 325.

¹⁸⁵¹ Hewitt, *Indigenous Restorative Justice*, 325; Department of Indian Affairs and Northern Development, *The Historical Development of the Indian Act*, 114.

¹⁸⁵² Hewitt, *Indigenous Restorative Justice*, 325.

develop today and work with modern beliefs as well. These systems have been labelled as restorative. Restorative justice attempts to re-establish harmony and balance.¹⁸⁵³ The victim, perpetrator, and community are all considered in the process.¹⁸⁵⁴ If the violence of the crime disrupted the community, the entire community sought to restore balance.¹⁸⁵⁵ All parties (i.e., offender, victim, family, and community members) involved in the violence or dishonesty are brought together to discuss how the crime influenced them and the affect it had on their lives.¹⁸⁵⁶ Elders serve as peacemaking ombudsmen and facilitate the discussion between parties.¹⁸⁵⁷ They also asked the offender to suggest ways in which they can restore balance to the community.¹⁸⁵⁸

The key factors of restorative justice is the holistic approach with fluid communication.¹⁸⁵⁹ Indigenous language is used when possible and creates space for oral Indigenous law.¹⁸⁶⁰ Law and justice are brought together, law is not strictly set and justice is not dictated by a pre-conceived penalty.¹⁸⁶¹ The spiritual realm is invoked in ceremonies.¹⁸⁶² During the process, a full review is conducted to examine the contributing factors to the crime.¹⁸⁶³ Instead of arguing being done on each side, the process seeks to build a trusting relationship between all parties to promote healing.¹⁸⁶⁴ No time limits are imposed and long silences with patience are valued.¹⁸⁶⁵ Family members are also given a place and voice in the process.¹⁸⁶⁶ Communal and not individual rights are featured and sanctions are used to restore the victim-offender relationship, not the removal of the offender.¹⁸⁶⁷ Offenders are held accountable for bringing about change

¹⁸⁵³ Hand et al., *Restorative Justice*, 452.

¹⁸⁵⁴ Hand et al., *Restorative Justice*, 452.

¹⁸⁵⁵ Hand et al., *Restorative Justice*, 452.

¹⁸⁵⁶ Hand et al., *Restorative Justice*, 452.

¹⁸⁵⁷ Hand et al., *Restorative Justice*, 452.

¹⁸⁵⁸ Hand et al., *Restorative Justice*, 452.

¹⁸⁵⁹ Hand et al., *Restorative Justice*, 454.

¹⁸⁶⁰ Hand et al., *Restorative Justice*, 454.

¹⁸⁶¹ Hand et al., *Restorative Justice*, 454.

¹⁸⁶² Hand et al., *Restorative Justice*, 454.

¹⁸⁶³ Hand et al., *Restorative Justice*, 454.

¹⁸⁶⁴ Hand et al., *Restorative Justice*, 454.

¹⁸⁶⁵ Hand et al., *Restorative Justice*, 454.

¹⁸⁶⁶ Hand et al., *Restorative Justice*, 454.

¹⁸⁶⁷ Hand et al., *Restorative Justice*, 454.

in themselves and are obliged to verbalize their accountability.¹⁸⁶⁸ Apology and forgiveness are the main goals of the process, not vindication.¹⁸⁶⁹

One example of Indigenous-based restorative justice initiatives is the Biidaaban community healing-based model.¹⁸⁷⁰ Biidaaban is the Anishinaabe term for “dawn arrives” or “dawn comes”.¹⁸⁷¹ The model was created by members of the Rama First Nation for offenders within their community.¹⁸⁷² It began in 1993 and is based in restorative, holistic healing.¹⁸⁷³ The program has a recidivism rate, defined as any return to correctional custody, of less than five percent.¹⁸⁷⁴ In contrast, Canada’s criminal system has a recidivism rate, for white citizens, of twenty-seven percent.¹⁸⁷⁵ However, the Biidaaban system is a longer process due the complicated nature of healing.¹⁸⁷⁶ Furthermore, both parties have to participate in the system and therefore it is not available if the victim does not agree to the process.¹⁸⁷⁷ But, when all parties and the community participate, the causes underlying the offender’s actions can be addressed, accountability can be taken, and the harm caused to the victim can be repaired.¹⁸⁷⁸ This forms healthier family and community relationships and results in a drop in the recidivism rate by creating a support system for the offender.¹⁸⁷⁹ Unfortunately, the Crown no longer funds this initiative.¹⁸⁸⁰

In 1996, section 718.2(e) was added to the Criminal Code which stipulates that:

A court that imposes a sentence shall also take into consideration the following principles:

...

¹⁸⁶⁸ Hand et al., *Restorative Justice*, 454.

¹⁸⁶⁹ Hand et al., *Restorative Justice*, 454.

¹⁸⁷⁰ Hewitt, *Indigenous Restorative Justice*, 317.

¹⁸⁷¹ Hewitt, *Indigenous Restorative Justice*, 317.

¹⁸⁷² Hewitt, *Indigenous Restorative Justice*, 317.

¹⁸⁷³ Hewitt, *Indigenous Restorative Justice*, 317.

¹⁸⁷⁴ Hewitt, *Indigenous Restorative Justice*, 319.

¹⁸⁷⁵ Hewitt, *Indigenous Restorative Justice*, 319.

¹⁸⁷⁶ Hewitt, *Indigenous Restorative Justice*, 319.

¹⁸⁷⁷ Hewitt, *Indigenous Restorative Justice*, 319.

¹⁸⁷⁸ Hewitt, *Indigenous Restorative Justice*, 319.

¹⁸⁷⁹ Hewitt, *Indigenous Restorative Justice*, 319.

¹⁸⁸⁰ Hewitt, *Indigenous Restorative Justice*, 320.

(e) 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.

This addition was made to help fight the overrepresentation of Indigenous peoples in Canadian prisons.¹⁸⁸¹ In 1999, the Supreme Court created a set of guiding principles to use in the sentencing of Indigenous offenders under s.718.2(e) in the case of *R v Gladue*.¹⁸⁸² The nineteen-year-old Indigenous woman did not receive an analysis under s.718.2(e) because she did not live on-reserve but in a city.¹⁸⁸³ Therefore, the trial judge did not consider her to be a person “within the aboriginal community”.¹⁸⁸⁴ Ultimately, the Supreme Court of Canada ruled that other issues had to be considered in the issues faced by Indigenous offenders such as a legacy of dislocation and poor social and economic conditions.¹⁸⁸⁵ Therefore: “The sentencing judge must look to circumstances of the aboriginal offender... it may be that these circumstances include evidence of the community’s decision to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice”.¹⁸⁸⁶ This led to the requirement that courts be provided with a pre-sentencing Gladue report for each Indigenous offender.¹⁸⁸⁷ However, Gladue reports are not always produced nor are they consistently applied with the same weight.¹⁸⁸⁸ Gladue reports provide personal histories of Indigenous offenders but only consider a moment of the offender’s life.¹⁸⁸⁹ Indigenous restorative justice, in comparison, considers the whole life of the offender.¹⁸⁹⁰

A number of initiatives implement Gladue principles in accordance with Indigenous legal traditions and community-based alternatives instead of incarceration. These initiatives include courts that specialize in Indigenous matters, community justice committees, Indigenous courtworker programs, and restorative

¹⁸⁸¹ Hewitt, *Indigenous Restorative Justice*, 330.

¹⁸⁸² Hewitt, *Indigenous Restorative Justice*, 330; *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) [Gladue].

¹⁸⁸³ Hewitt, *Indigenous Restorative Justice*, 330.

¹⁸⁸⁴ Hewitt, *Indigenous Restorative Justice*, 331.

¹⁸⁸⁵ Hewitt, *Indigenous Restorative Justice*, 331.

¹⁸⁸⁶ Hewitt, *Indigenous Restorative Justice*, 331; *Gladue*, *supra* note 103 at para 61.

¹⁸⁸⁷ Hewitt, *Indigenous Restorative Justice*, 331.

¹⁸⁸⁸ Hewitt, *Indigenous Restorative Justice*, 331.

¹⁸⁸⁹ Hewitt, *Indigenous Restorative Justice*, 333.

¹⁸⁹⁰ Hewitt, *Indigenous Restorative Justice*, 333.

justice programs.¹⁸⁹¹ Courts specializing in Indigenous matters attempt to consider the circumstances of an Indigenous accused in a culturally appropriate environment.¹⁸⁹² These courts are a part of the provincial court systems and carry parallel powers.¹⁸⁹³ Sometimes, these courts are structured so that crime committed in the territory of the Indigenous court tries non-Indigenous offenders.¹⁸⁹⁴ However, others view that specialized Indigenous courts should not function this way as the non-Indigenous offender does not share the same beliefs or values.¹⁸⁹⁵ Eight jurisdictions to date have created these specialized courts including British Columbia, Alberta, Saskatchewan, Yukon, Northwest Territories, Nunavut, Ontario, and Nova Scotia.¹⁸⁹⁶ The court functions to provide a range of services which ensure that the accused's background is available and that different non-custodial services are made known in the bail and sentencing procedures.¹⁸⁹⁷ Additionally, workers in this court are knowledgeable in the programs and services available to the accused.¹⁸⁹⁸

After the *Gladue* decision, concerns were raised about whether the criminal justice system had enough resources to adequately assess the background and systemic factors surrounding Indigenous offenders.¹⁸⁹⁹ A group of judges, academics, and community organizations convened for a year to flesh out these concerns.¹⁹⁰⁰ Their efforts led to the creation of the Gladue Court at the Old City Hall (OCH) in Toronto.¹⁹⁰¹ This was the first Indigenous court in an urban environment and the court began to offer its services to Indigenous persons in 2001.¹⁹⁰² Three additional Gladue Courts have also opened in Toronto along with similar courts in London, Brantford, Sarnia, and Thunder Bay.¹⁹⁰³ Other courts are also aided

¹⁸⁹¹ Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹² Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹³ Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹⁴ Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹⁵ Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹⁶ Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹⁷ Department of Justice, *Spotlight on Gladue*, 40.

¹⁸⁹⁸ Department of Justice, *Spotlight on Gladue*, 41.

¹⁸⁹⁹ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰⁰ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰¹ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰² Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰³ Department of Justice, *Spotlight on Gladue*, 41.

by Gladue Report Writer programs.¹⁹⁰⁴ The Gladue Court at OCH deals with sentencing and bail hearings and take a case management approach.¹⁹⁰⁵ It aims to employ Indigenous principles and conceptions of justice in its proceedings.¹⁹⁰⁶ All workers at the court including Crown, duty counsel, and judges receive specialized Gladue-related training and Indigenous court-workers play an important role in working with the accused.¹⁹⁰⁷ If an accused cannot cover bail and there was no surety, they can apply to the Toronto Bail Program, Gladue Supervision.¹⁹⁰⁸ The individual has the ability to work with a Gladue bail supervisor and design a plan of care.¹⁹⁰⁹ When an offender pleads guilty, they are diverted to the Community Council at Aboriginal Legal Services who try to employ culturally appropriate rehabilitation.¹⁹¹⁰ Those who work at the Community Council are a restorative circle of Indigenous volunteers.¹⁹¹¹ These volunteers include Indigenous Elders.¹⁹¹² The Council discusses with the offender the reasons leading to the offence and rehabilitative plans of care.¹⁹¹³ The Community Councils existed prior to colonization.¹⁹¹⁴ Offenders are connected to culturally relevant services such as (but not limited to) sweat lodges, harm reduction, counselling for substance abuse, services for anger management, education and training, housing, and employment assistance.¹⁹¹⁵ Through these diversion channels, the Indigenous offenders have their charges withdrawn.¹⁹¹⁶ If an Indigenous accused is not diverted, they are still able to work with Indigenous court-workers.¹⁹¹⁷ One downfall to this system is that the accused must plead guilty in order to have full access to the rehabilitative programs.¹⁹¹⁸

¹⁹⁰⁴ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰⁵ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰⁶ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰⁷ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰⁸ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹⁰⁹ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹¹⁰ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹¹¹ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹¹² Department of Justice, *Spotlight on Gladue*, 41.

¹⁹¹³ Department of Justice, *Spotlight on Gladue*, 41.

¹⁹¹⁴ Department of Justice, *Spotlight on Gladue*, 42.

¹⁹¹⁵ Department of Justice, *Spotlight on Gladue*, 42.

¹⁹¹⁶ Department of Justice, *Spotlight on Gladue*, 42.

¹⁹¹⁷ Department of Justice, *Spotlight on Gladue*, 42.

¹⁹¹⁸ Department of Justice, *Spotlight on Gladue*, 42.

The Tsuu T'ina reserve established a Tsuu T'ina First Nation Court in 2000.¹⁹¹⁹ Its judge, court clerks, prosecutors, probation officers, court social workers, Peacemaker, and some defence counsel are Indigenous.¹⁹²⁰ The court is a balance of the Provincial Court of Alberta and the peacemaker process.¹⁹²¹ A circle process is employed between the victim and offender, their families, volunteers, and resource personnel.¹⁹²² The court does not just preside over Tsuu T'ina members but also non-Tsuo T'ina Indigenous individuals, and non-Indigenous persons.¹⁹²³ It holds jurisdiction over youth justice, First Nation by-law offences, and criminal justice.¹⁹²⁴ The court employs peacemaking traditions and incorporates elements such as smudging with sweet grass or sage.¹⁹²⁵ Local Peacemakers and Elders are a direct part of the court process and review the cases which were diverted from the justice system.¹⁹²⁶ They also review cases that need some form of dispute resolution.¹⁹²⁷ Cases can be referred through a number of avenues including police, provincial courts, schools, the Tsuu T'ina Band Administration, or through a community member.¹⁹²⁸ The Peacemaker process only moves forward if the victim agrees to participate.¹⁹²⁹ Sexual assault offences and homicides are excluded from this process.¹⁹³⁰

Multiple Indigenous courts serve Indigenous communities in their native languages. The Cree-speaking Court was established in 2001 and is based in Prince Albert.¹⁹³¹ It is composed of Cree judges, Crown prosecutors, court clerks, victim services, and legal aid lawyers.¹⁹³² The court also travels to other Indigenous communities such as Sandy Bay, Montreal Lake, and Pelican Narrows.¹⁹³³ Participants can be

¹⁹¹⁹ Department of Justice, *Spotlight on Gladue*, 42.

¹⁹²⁰ Department of Justice, *Spotlight on Gladue*, 42.

¹⁹²¹ Department of Justice, *Spotlight on Gladue*, 42-3.

¹⁹²² Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²³ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²⁴ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²⁵ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²⁶ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²⁷ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²⁸ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹²⁹ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³⁰ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³¹ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³² Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³³ Department of Justice, *Spotlight on Gladue*, 43.

requested in this court to speak in English or Cree.¹⁹³⁴ The peacemaking process is employed when appropriate.¹⁹³⁵ Similarly, a Dene-speaking Court was established in 2006 in Meadow Lake.¹⁹³⁶ It provides services in both Dene and Cree languages through the assistance of translators.¹⁹³⁷ The judge presiding over the court is Cree and uses a restorative approach.¹⁹³⁸

Other community-based programs are available to Indigenous peoples through the Aboriginal Justice Directorate (AJD).¹⁹³⁹ Clients are referred from over seven hundred and fifty Canadian communities including rural, urban, Northern, off-reserve and on-reserve.¹⁹⁴⁰ These programs are characterized by the community's active participation and the offender taking responsibility and accountability.¹⁹⁴¹ Community Justice Committees are an example of one of these programs. These committees are composed of local volunteers who help through the dispute resolution process.¹⁹⁴² Specific criminal matters may be diverted to these committees by the RCMP or Crown prosecutors.¹⁹⁴³ Crimes dealt with by this committee include mischief, theft, alcohol and drug offences, breaking and entering, minor assaults, and vandalism.¹⁹⁴⁴ The Community Justice Committees hear from all parties and work towards a resolution which repairs the harm done by the offence.¹⁹⁴⁵ Some possible resolutions are restitution, community service, apologies, and counselling.¹⁹⁴⁶ In Québec, Community Justice Committees can act as mediators in disputes and identify certain measure that the court could impose when sentencing.¹⁹⁴⁷ They can also work alongside probation and enforcement officers to ensure follow up measures are set out.¹⁹⁴⁸ However, inadequate information

¹⁹³⁴ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³⁵ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³⁶ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³⁷ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³⁸ Department of Justice, *Spotlight on Gladue*, 43.

¹⁹³⁹ Department of Justice, *Spotlight on Gladue*, 45.

¹⁹⁴⁰ Department of Justice, *Spotlight on Gladue*, 45.

¹⁹⁴¹ Department of Justice, *Spotlight on Gladue*, 45.

¹⁹⁴² Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁴³ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁴⁴ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁴⁵ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁴⁶ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁴⁷ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁴⁸ Department of Justice, *Spotlight on Gladue*, 46.

sharing and integration between justice system stakeholders and Community Justice Programs can pose a challenge in the proper functioning of these programs.¹⁹⁴⁹

Another form of alternative programs is healing circles. Healing circles incorporate the participation of the offender, the victim if they wish to participate, the respective families, and community members such as Elders.¹⁹⁵⁰ A holistic approach is taken and the circles try to reach a consensus on how harm can be repaired.¹⁹⁵¹ The effects of the harm caused by the offence on the relationships of the victim and the community are also examined.¹⁹⁵² Resolutions made by healing circles can include specialized counselling programs, potlatch, community service with an Elder's council, or other remedies tailored to the offender's cultural traditions.¹⁹⁵³ Direct restitution may also be required.¹⁹⁵⁴ Instead of formal court proceedings, healing circles better serve Indigenous communities and traditional Indigenous concepts of justice.¹⁹⁵⁵ It is also important to note that restorative approaches to resolutions are not necessarily lighter sentences.¹⁹⁵⁶ They can actually pose a greater burden to the offender than a custodial sentence.¹⁹⁵⁷ Offenders have to heavily invest emotionally, take responsibility for and accept the harm that they caused.¹⁹⁵⁸ Healing circles can be an intensive process and more difficult than a passive jail sentence.¹⁹⁵⁹ Victims may also find participation in healing circles to be less traumatic than a court process.¹⁹⁶⁰ The Mi'kmaq Confederacy of Prince Edward Island's Aboriginal Justice Program offers a series of sophisticated

¹⁹⁴⁹ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵⁰ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵¹ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵² Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵³ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵⁴ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵⁵ Department of Justice, *Spotlight on Gladue*, 46.

¹⁹⁵⁶ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁵⁷ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁵⁸ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁵⁹ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁰ Department of Justice, *Spotlight on Gladue*, 47.

circle processes for various stages of the criminal justice process.¹⁹⁶¹ The circles include objectives of Conflict-Resolution, Early Intervention, Sentencing, Healing, and Reintegration.¹⁹⁶²

Another alternative form, sentencing circles, is based on traditional Indigenous circle processes and help to facilitate community participation in sanctioning an offender.¹⁹⁶³ Community members join the judge, offender, and victim in discussing the factors that led and contributed to the offence.¹⁹⁶⁴ They also discuss options for sanctions and community reintegration.¹⁹⁶⁵ Recommendations in a community sentence often includes some form of restitution, counselling, community service, and possibly a period of custody.¹⁹⁶⁶ Sentencing circles differ from community justice committees and healing circles in that they are not outside of the court process.¹⁹⁶⁷ It is not required that the circle's recommendations be adopted by the sentencing judge.¹⁹⁶⁸ There are three types of sentencing circles: (i) a simple circle where accused persons, victims, respective families, members of the community, and members of the justice system come together in the same circle; (ii) the double circle where the persons who form the simple circle sit together in an inner circle, and onlookers sit in an external circle with the option of moving their chairs to join the inner circle if they wish; (iii) separate circles where two stages of the sentencing process are conducted. The first stage is composed of the meeting of a circle known as the "sentencing council" who meet without a judge present. After the first circle reaches a consensus, the second circle is conducted with a judge present and the judge is informed of the council's recommendations.¹⁹⁶⁹

One of the most documented restorative justice programs in Canada is the Community Holistic Circle Healing Program at Hollow Water (CHCHP).¹⁹⁷⁰ The program was created by social service

¹⁹⁶¹ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶² Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶³ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁴ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁵ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁶ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁷ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁸ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁶⁹ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁷⁰ Department of Justice, *Spotlight on Gladue*, 47.

providers in 1983 and attempted to address issues face by youth in the community such as substance abuse, truancy, and suicide.¹⁹⁷¹ As a part of this process, social workers identified victimization as a result of sexual abuse as the underlying cause for much of the community's issues.¹⁹⁷² It was reported that 75% of Hollow Water's population had been sexually abused and 35% were offenders.¹⁹⁷³ CHCHP functioned as both a healing circle and a sentencing circle.¹⁹⁷⁴ Issues were faced during this program. The process required public acknowledgment of sexual abuse and thus, the confidentiality of participants was compromised.¹⁹⁷⁵ Furthermore, the complex social bonds in the community could sometimes hinder and create distrust throughout the healing process.¹⁹⁷⁶ Nevertheless, evaluations of the program have been largely positive and indicated benefits to the community and participants.¹⁹⁷⁷

It should be noted that there is a large variety of programs across Canada for Indigenous persons in the criminal justice system.¹⁹⁷⁸ These programs reflect the diversity of Indigenous communities and provide many possibilities for a restorative criminal justice process.¹⁹⁷⁹ However, critics of these programs think it unsustainable to rely only on these community efforts in the long run,

“These community- mediated efforts at restorative justice are logistically challenging and often time-consuming and emotionally draining. They are, from a court-management perspective, inefficient. They may also, over time, produce a kind of justice fatigue by exhausting the energy and good will demanded of the host communities and, in particular, community Elder”.¹⁹⁸⁰

¹⁹⁷¹ Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁷² Department of Justice, *Spotlight on Gladue*, 47.

¹⁹⁷³ Ross, *Duelling Paradigms? Western Criminal Justice System versus Aboriginal Community Healing*, 243.

¹⁹⁷⁴ Department of Justice, *Spotlight on Gladue*, 48.

¹⁹⁷⁵ Department of Justice, *Spotlight on Gladue*, 48.

¹⁹⁷⁶ Department of Justice, *Spotlight on Gladue*, 48.

¹⁹⁷⁷ Department of Justice, *Spotlight on Gladue*, 48.

¹⁹⁷⁸ Department of Justice, *Spotlight on Gladue*, 48.

¹⁹⁷⁹ Department of Justice, *Spotlight on Gladue*, 48.

¹⁹⁸⁰ Green, *The Challenge of Gladue Courts*, 9.

Therefore, future work to evaluate various restorative programs in Indigenous communities still need to be conducted.¹⁹⁸¹ Furthermore, Indigenous law is continuously adapting to the modern world and it should not be considered a static tool that cannot be molded to better suit different situations.

Addressing criminal offenses and victimization traditionally in Indigenous communities is a process rooted in their respective world view. It emphasizes restorative practices and concepts such as the maintenance of respect, balance, and harmony. The solutions or actions taken to address crimes were rooted in collective agreements among all community members. The community all had a say in deciding what to do in the effort to heal the offender, victim, and community. Traditional penalties varied from community to community but typically required recompense through goods and services. Severe crimes were usually viewed with gravity because they were seen as endangering the community. These crimes could result in harsh punishments such as banishment or execution. Indigenous criminal law continues today through forms of restorative justice. In addition to this, the court is required to obtain a Gladue report on the Indigenous accused. A number of initiatives have also been introduced which implement Gladue principles in accordance with Indigenous legal traditions and community-based alternatives instead of incarceration.

¹⁹⁸¹ Department of Justice, *Spotlight on Gladue*, 48.

Chapter 5

A Comparison of Roman Law and Canadian Indigenous Law with a Focus on Crime and Punishment

In this chapter, differences and similarities between the Roman and Canadian legal traditions will be noted. These comments may be broad or specific in nature. These comparison points are broken down into five categories: Values; Sources of Law; Legal Academics; Law and Punishment; and Retributive and Restorative Justice. These categories are for organizational purposes and tend to overlap in order to create a more holistic picture. A general conclusion is then presented based off what these differences and similarities says about these respective cultures.

Values:

One difference that may be seen is the variance between the use of law in its application to protect the environment. It seems that Indigenous peoples would sometimes treat harm done by a member of the community to their surrounding environment as a crime.¹⁹⁸² In contrast, it appears, that Roman law dealing with the environment was, for the most part, restricted to private law and therefore functioned only in so far as damage to the environment affected private interest. However, the possible difference between cultures is far more complex than this initial impression. Firstly, the modern concept of laws “protecting the environment” would be anachronistic in its application. It would be forcing a modern point of view and set of modern definitions and categories (that were not invented a hundred years ago let alone in Roman times) upon two, pre-existing cultures without similar understandings. As a result, to attempt to study such would result in having to compile scattered evidence and try to make sense of it retrospectively. Therefore,

¹⁹⁸² See pg. 103.

although it would be an interesting comparison to contrast Roman and Indigenous environmental law, it would have to be done with great care. It is a field which needs to be expanded upon but, in so far as this project, beyond the scope.

Another difference in Roman and Indigenous ideals can be found in the social hierarchy of the respective societies. Romans lived with a clear chain of command, whether that be among the elites (*cursus honorum*), the family (*pater potestas*), or even the pecking order among the rich, the poor, and the various rights given to individuals in annexed provinces. The authority given to those within this system was exercised and (ideally) respected. Indigenous systems also held positions of leadership which were respected.¹⁹⁸³ However, the Roman state held a greater spectrum of wealth and influence among its citizenry. As a result, where Indigenous leaders could be displaced by agreement of the community, the Romans often had to fight civil wars to displace unwanted rulers. This spectrum of wealth and influence led to inequities in Roman law. Under the Principate in the third century CE, an explicit distinction in punishment between the *honestiores* and the *humiliores* was made.¹⁹⁸⁴ The lower classes suffered under considerable disabilities and far more aggressive and degrading penalties than the elite. As a result, those within the *honestiores* classes could expect the same treatment and those within the *humiliores* classes could expect the same treatment, but equality was not overarching. Comparatively, although Indigenous settlements and clans had class distinctions, it was not to the same extent. Within these communities, there was not so great a difference in wealth and influence to buttress class distinctions in such a manner. As such, Indigenous chiefs governed using requests to the people, not orders; they did not hold the power of force. Citizens who did not follow direct orders did not necessarily face punishment. Therefore, Indigenous leaders had to be careful not to ask for anything that may be refused, as they did not have the same resources to enforce their commands.

¹⁹⁸³ In the case of the Naskapi, see pg. 142; in the case of the Haudenosaunee, see pg. 154.

¹⁹⁸⁴ See pg. 83.

The early phases of Roman criminal law also held the governing principle of *pietas*: respect for the divine and for fatherland and parents.¹⁹⁸⁵ *Pietas* served to place the father as the head of the Roman household. This principle seems to date to early Rome. Similarly, Indigenous societies also had a similar respect for the head of each family who governed their household. It is unsurprising to find such a similarity between cultures. The family served as the main structure of society. Therefore, it logically follows that the core of any small community is the leadership of familial heads. This extended to the administration of justice; the head of the household legally held jurisdiction over all members of the household.¹⁹⁸⁶ However, this leads to a difference between Roman and Canadian Indigenous societies. The position of the head of household was not always tied to the male gender. For example, the women of the Haudenosaunee, as is seen in various other Indigenous clans, also received certain authority within their community, far more than Roman woman.¹⁹⁸⁷ Their elder women served as the head of the families.

Further, within Indigenous law, equality was a driving force in restorative justice. Healing circles and sentencing circles are a good example of this.¹⁹⁸⁸ In order for these circles to work, everyone had to be seen as equal. However the chief and Elders still took part in such ceremonies, despite the elevated position they held within the community. But, these community leaders often had a relationship to both the offender and victim prior to the crime. As such, their participation included respect for both parties instilled prior to the circle taking place. Roman law also strove for equality in its own way within the courtroom. However, the inclusion of authorities with no prior connection to the offender created an environment less conducive for healing and reform and may have emphasized power divides. Those knowledgeable in the law and acting in positions such as praetor were elites and those serving as jurors (by the late Republic) were usually

¹⁹⁸⁵ See pg. 49.

¹⁹⁸⁶ In the case of Indigenous familial roles in the administration of justice, see pg. 150.

¹⁹⁸⁷ See pg. 155.

¹⁹⁸⁸ See pg. 105.

wealthy. Therefore, this may have brought an element of bias to proceedings, such as decisions being made with political motivations.

Aspects of the Roman law were codified and displayed in the forum. This made law more accessible, but the common citizen most likely didn't take notice of the law's functioning unless they were directly affected. In contrast, Indigenous law in Canada was passed down through oral traditions. Aspects of the law may have been commemorated and represented through wampum or written on birch bark scrolls. However, the law was largely passed down through the teachings of the Elders to the children of the community. This had a striking affect. Indigenous people followed the law not just because it was the law, but because they also had an intimate understanding of why they had to follow the law for the sake of the community. Everyone was taught a basic knowledge of "justice". This was most likely an option because of the small community size. Barriers to the law were removed in that an offender did not need to have the money to afford legal help. Furthermore, this perhaps was a reason as to why Indigenous law was not codified in writing: it wasn't required for everyone to understand and have access to the law if it was a gradual education they received throughout their childhood. This approach was also more amenable to a restorative approach. The victim-oriented approach was not so concerned with determining what particular law had been broken. Rather, the concern revolved around the harm caused and how to heal all those involved. However, in Rome it was important to determine what law was broken, this allowed Rome to standardize penalties. By standardizing penalties, the ability to deter crime may be seen as augmented. Potential offenders were made aware of exactly what fate would befall them for a particular crime. However, standardizing penalties was also a way to equalize punishment. Differences in penalty may have occurred between class but at the least, all members of the same class were treated in the same way under the law.

Similarities can also be found in these approaches. Indigenous law tries to include the views of the community through healing circles and sentencing circles. This allowed the community to heal along with

the victim and the offender, and the community customs and views were taken into account. Roman law initially had a similar approach through the *iudicium populi*.¹⁹⁸⁹ Through this process, a preliminary investigation would be conducted by the magistrate but after this, the magistrate would bring the accused in front of the popular assembly. The assembly would then vote on the proposal. Thus, the people had their say through the conviction and their voice was conveyed through their vote. This did not promote the voices of the community to the same degree, but at least showed that community involvement was valued. However, healing within the community was sought through retribution rather than restoration. Furthermore, when the *cognitio extaordinaria* was introduced, that community no longer had the same ability to vote. Conviction was still determined symbolically by the people, the senate conducted trials as well as the emperor who could delegate his trials to his bureaucracy, but this was in a passive role.

When the Roman empire was born, pretense at equality gradually lessened among the elite. The imperial family became the top of the government and social hierarchy. Equality in punishment still was attempted but this court had more freedom than the jury-courts. As a result of their inherent authority, the senate and emperor could depart from the laws and penalties already laid down and could mitigate or intensify existing statutes. The emperor himself could even introduce new legislation by way of his constitutions. This was far more freedom extended to an authority, than can be found in Indigenous communities. Under the Roman system, the offender did not just wrong the community and break the code of conduct under which all citizens were to live in order to preserve peace and safety for all. The rules were enforced by a single authority: the imperial bureaucracy. An offender did not break the rules of the community but of the emperor, and therefore the emperor was to exact punishment. However, it should be stressed that this shift occurred over a long period of time. During the inception of the empire, the emperor was seen as the embodiment of the community. The emperor was the chosen representative of the people

¹⁹⁸⁹ See pg. 52.

and was not just a simple leader but a symbol. Therefore, the initial difference between the Roman emperor and an Indigenous chief may not have been so great.

Both Indigenous and Roman legal systems had checks and balances on the authority's power. For Canada's Indigenous people, those who were given power over others were monitored and largely derived their influence from the willingness of the community to follow him. However, they were not given so much authority that the rest of the community could not remove them from power if necessary. Power and authority could be given, but the community also had the power to take it away if misused or contrary to community thought. Similarly, as a way to check a misuse of authority in Roman officials, the *lex Calpurnia*, established a permanent tribunal to investigate money that was supposed to be recovered after suspected extortion by Romans in positions of authority.¹⁹⁹⁰ This was the first legal way in Roman law wherein an individual who had abused their power while in a position of authority could be formally charged. But, because the jurors were of senatorial rank, there was room for underhanded business to be done in place of justice. Therefore, the prosecution had to be of similar rank.

This charge usually became a matter of political controversy, its procedure was an avenue for corruption and provided a method to procure the downfall of political rivals. This limited its efficacy in checking the power of a leader by making the doling out of justice a political matter. But, it is interesting that these first initial innovations of Roman criminal law, the writing down of laws and the establishment of a permanent criminal court, arose from the need to deal with improper uses of authority. The introduction of a tribunal to deal with the 'diminution of the majesty of the Roman people' provided another approach to deal with a wide variety of political misconduct which served to check the power of those who potentially harmed the Roman state.¹⁹⁹¹ However, there was room here as well for corruption and misuse of the law.

¹⁹⁹⁰ See pg. 59.

¹⁹⁹¹ See pg. 75.

Sources of Law:

Canadian Indigenous law was derived from a mix of sacred teachings, naturalistic observations, deliberative practices, positivistic proclamations, and local and national customs.¹⁹⁹² It should also be noted that these source categories are too formally defined in their separation from one another. Indigenous legal traditions generally involved an interaction of two or more of these sources to create law. Moreover, sources of laws could change as Indigenous communities changed and continued to work with them. This can similarly be said of Roman law. Although it is less likely to find Roman legal traditions which derive from naturalistic observation, all other sources of law can be found in a *mélange* within Roman law. In fact there is a clear shift from deliberative and customary law-making to positivistic law-making throughout Roman history, both in creation and through re-branding.

After the initial transition from monarchy to republic, Roman law appears to have remained largely customary. It also had sacred sources through the input of the pontiffs. Due to the customary nature of early Roman law, where unrecorded custom and religion was closely related to justice, it is unsurprising that religious officials also served to provide answers to the public concerning the law. The Twelve Tables set some legal customs into a fixed form, thus eliminating gradual shifts which are common in the use of customary law. The early Republic saw the creation of two representative assemblies with legislative power but these *comitia* were restricted to rejecting and approving proposals put before them by the magistrates.¹⁹⁹³ The laws coming from this source were both positivistic, in that they can from an authority, and deliberative, because they were the result of discussion among the senate and required the approval of the *comitia*. The *concilium plebis* could create important pieces of private legal legislation known as plebiscites.¹⁹⁹⁴ This gave the people further power in law and served as another apparatus for creating deliberative law.

¹⁹⁹² See pg. 129.

¹⁹⁹³ See pg. 16.

¹⁹⁹⁴ See pg. 32.

However, as the Roman state transitioned to empire, law making became more positivistic. The classical period is touted as the high point of legal development which took place during this transition. As the Republican structures declined, statute law, which was enacted by the old popular assemblies, fell into decline with it. In its place, the emperor and his bureaucracy gained authority as a direct source of law. Julius Caesar exercised criminal jurisdiction in the Forum under the *imperium* of his position and Augustus embraced Caesar's approach, employing his precedent to preside over certain trials in Rome through this *imperium*.¹⁹⁹⁵ Augustus did so in a way which disguised his law-making as deliberative in nature. Augustus utilized his tribunician power to legislate through the plebeian assembly which seems to have formed ensuing reforms under his rule. Augustus justified his legislation by presenting it as creating laws derived from the will of the people. This can also be seen as customary or deliberative law.

When Emperor Diocletian came to power, he began to implement substantial legal modifications in response to the instability of the previous decades.¹⁹⁹⁶ As a result, the emperor and his bureaucracy became the only source of lawgiving and legal authority. The bureaucratic reforms which occurred were intended to stabilize the Empire and were accepted by the people who wished for peaceful times. This increased the amount of positivistic sources in Roman law. Another major change occurred when Emperor Theodosius I made Christianity the official religion of the Roman Empire. The Dominate was characterized by a centralized approach to both government and law, every source of law had an element of positivism. The emperor was seen as the only one capable and able to produce legislation as, by this point, he was no longer merely the first among equals, but the supreme ruler of the Roman Empire. Under the Christian religion an element of sacred law also can be found as a justification for this positivism: the emperor was anointed by divine right to do this. Other shifts occurred to handle new developments within the empire. Juristic work shifted away from the making of scientific literature and towards the production of rescripts under the imperial bureaucracy, judges received salaried positions under the employ of the state, and the

¹⁹⁹⁵ See pg. 71.

¹⁹⁹⁶ See pg. 26.

emperor, in the effort to assert further authority over the judicial system, also formalized a system of appeals which created a hierarchy of courts.¹⁹⁹⁷

The Law of Citations regulated the application of the sources of law from the classical period.¹⁹⁹⁸ The application of these writings became mechanical, it grew stagnant in comparison to the adaptive law of earlier periods. The loss of independent juristic activity and the move towards bureaucratization resulted in further codification of the law. Full codification occurred under Emperor Theodosius II and Emperor Justinian. As a result of these changes, the ability to reason when it came to issues in law was no longer a source of legal validity. Deliberative law was all but obsolete and positivistic law was the main source of legal authenticity. With the Empire's conversion to Christianity, bishops also began to gain jurisdiction over particular parts of the law, mostly concerning the family, creating further sacred sources. This resulted in the growth of bishop's courts. By the Dominate period of Roman law, legal sources were almost entirely positivistic with justification provided through combining it with sacred sources.

This can also be seen in the treatment of crime. As laws came to bear weight because they were laid down by the state, this opened up the possibilities for the way in which crime was perceived. Where, initially, many crimes were regarded as civil law to be decided between the guilty and injured party, the codification of the law by the emperor shifted this perspective considerably. This is not to mean the law wasn't gradually working its way to this point. Rather, legal codification can be seen as the completion of this process. When laws became codified, part of this codification included a comprehensive list of what would be considered crimes. If a citizen were to break these crimes, it was no longer a matter of victim compensation to prevent retaliation. It was an outright action in defiance of the state and the community as a whole. Therefore, to maintain state authority and community solidity, the citizen must be punished as wronging the state for breaking the "contract" of acceptable behaviour, lessening the role of the victim in the legal process.

¹⁹⁹⁷ See pg. 26.

¹⁹⁹⁸ See pg. 27.

John Borrows discusses the issues of positivistic law in relation to Indigenous communities and legal traditions. However, it can also be applied in relation to the later stages of Roman legal source development. When a positivistic law is broken, the concern is not whether the offender was at one point persuaded to support the law, but rather that they had failed to obey it.¹⁹⁹⁹ In a system dominated by positivistic law, like the later Roman system, if an offender continuously flaunts the law, the immediate care of the authority and community members is not for whether the person understands why the law was made. This would have been especially true after Roman law was codified. Rather, most who witness or have knowledge of civil disobedience are more concerned for their own safety and self-interest along with the safety of their loved ones. This may be part of a state narrative where the authority claims that the only way to maintain community peace is to follow their laws. This appears to have been true in later Roman law.

Further pressure would have also been applied this way due to the view that the emperor was ordained by God, in part, to create laws. Therefore, these laws were God's way of maintaining peace and not obeying them could anger him. For the average citizen, it was no longer a matter of how the law was formed and how it functioned to maintain harmony, but it was necessary to follow the laws to avoid punishment not just from the imperial apparatus but from God himself after death. Interestingly, the Haudenosaunee peoples had a concept for after-life punishment which was similar to Christian ideology. For the Haudenosaunee, an individual escaped punishment in their mortal life, they ended up in a dark world of punishments.²⁰⁰⁰ These crimes led to a temporary punishment. It is interesting that punishment in the Haudenosaunee afterlife was, for the most part, temporary. This conveys a belief of reform even after death.

Overall, it appears Roman law and Indigenous law were initially quite similar in terms of source. They employed various methods of creating law which were largely deliberative and positivistic in nature.

¹⁹⁹⁹ See pg. 114.

²⁰⁰⁰ See pg. 162.

Indigenous law employed the use of elected, and hereditary leaders to help guide legal decisions but also opened laws up for debate with other citizenry. Roman legal systems had the governing bodies of the elite create law and the citizenry (or at least the male citizenry) voted on it. Both also had laws which derived influence from a perceived divine source. However, Roman law did not have many sources resulting from environmental observation, at least, none that can be found in the laws pertaining to crime. Furthermore, with the introduction of an imperial governing body, legislation became more positivistic in nature, which indirectly functioned to provide the emperor with further legitimacy for holding his position. This legitimacy was strengthened by the introduction of the Christian religion, until other members of the church claimed divine authority for themselves.

Legal Academics:

Both Indigenous and Roman legal systems strove to enact justice. Perhaps their definitions and concepts of justice differed, but both systems developed a sophisticated structure to decide what “justice” implied. The Roman’s split the role into administrators of justice, orators for speech-giving, and experts who spent their time trying to discover the paradigm of justice. The administrators of justice did not judge cases in a modern sense. After the transition from monarchy to republic, the administration of justice was dealt with by the consuls until the office of praetor was instituted, then, under the *legis actiones*, the decision of the dispute was decided by a single judge or group of judges.²⁰⁰¹ These judges were laymen and held no technical legal expertise nor were their decisions based in any externally identifiable legal rules. Their decisions were primarily dependent on the judges’ opinion of what was right and wrong, this made Roman law under this system based largely in custom and positivism (the parties trusted the judge’s ability to reason and the decision to reflect community values). Praetors also did not have any formal training in the law and only served in their office for a limited period. Despite this, remedies in disputes were supplied by

²⁰⁰¹ See pg. 17.

the praetors who could invent new remedies, if needed. This began a more logic and study based approach to deciding what was just.

However, Roman society also had experts who spent their time trying to discover the paradigm of law and who helped guide the administration to justice. The earliest interpreters and developers of judicial concepts were members from the College of Pontiffs.²⁰⁰² Later, when the office of Praetor was introduced, Praetors often did not act alone, considering they had no prior knowledge of Roman law. They were frequently aided by jurists because of their experience in the law. However, during the third century CE, the function of jurists was subsumed into the imperial bureaucracy. Their opinions took on a greater degree of authority and served as binding rules. However, under the Law of Citations, these opinions were limited to the jurists Gaius, Paul, Modestinus, Papinian, and Ulpian. But, although the Romans followed the previous works of the jurists, the facility to reason when it came to issues in law was no longer a source of legal validity. Also, it is important to note that pontiffs and jurists did not represent their clients in court. Orators such as Cicero performed this function. Men who had been educated in rhetoric would undertake to persuade a lay judge of the truth of the client's case by employing rhetorical techniques.

The final administrators of Roman justice were the jury. Assembling a jury was an elaborate procedure.²⁰⁰³ Again, the members of the jury were not professionals trained in the area of the law. This is what necessitated the use of skilled orators. Furthermore, they came from the well-off portion of Roman society. In contrast, juries were not a part of the Indigenous legal administration in this formalized form. However, members of the community were allowed to voice their concerns and common consensus within the community could sway the application of justice. Public opinion held a lot of weight in Indigenous communities, influencing the decisions of the chief and councilors.

In the Indigenous legal systems, one can also find similar functions being undertaken in respect to legal administrators. But, public opinion in the administration of justice was taken into account to a far

²⁰⁰² See pg. 18.

²⁰⁰³ See pg. 61.

greater extent on a day to day basis than in Rome. As such, every member of an Indigenous community was a part of the conversation in exploring justice. Perhaps this was the result of laws held by Indigenous communities not being written out. Writing out laws, although done to make the law more accessible, could also serve to accomplish the opposite. Codification eventually made the learning of the law more complicated and complex, an individual required both the time and financial means to study the law as a sort of education or apprenticeship in the hopes of resulting employment. Instead, Indigenous communities used various rules, largely taught through stories, that were passed down through word of mouth for centuries. Accepted practices in legal procedure were passed down through oral exchange and interpreted by the Elders in many Indigenous societies.²⁰⁰⁴ Elders had experience and wisdom gained over their long life which qualified them to advise and council people on issues of justice as a result. These Elders were usually given such influence because they had proved their worth and wisdom. In this capacity, they served as both administrators of justice and a type of legal counsel. Elders imparted knowledge to all of the members of each community. This atmosphere encouraged introspection on justice from every member. Those who showed a keener ability to discern justice were given more influence on these matters.

Chiefs of Indigenous communities were called upon to intervene in disputes within their band and to negotiate with other bands and chiefs when crime occurred between more than one community.²⁰⁰⁵ The chief was assisted by councilors from the community. However, as with the Romans, any conflict which transpired within a family unit was the responsibility of the head of the family to deal with. Sometimes, it was required of an Indigenous chief to judge a close relative. This is similarly seen under Roman criminal law through the banishment of Augustus' daughter, Julia, by Augustus himself. Yet, this is not always true within the Roman system. During Augustan times and perhaps even earlier, separation between the application of justice and kin was attempted. Witnesses could not be compelled to testify against kin by blood or marriage to the degree of cousin. Furthermore, senators and their relatives were initially barred

²⁰⁰⁴ See pg. 133.

²⁰⁰⁵ See pg. 150.

from sitting on the jury at all, along with those who had served in a minor magistracy for fear that any relation to a defendant or prosecution might sway their vote. But, in Indigenous law, the chief was trusted to pass his judgement without any personal relationship to the accused affecting his decision. This might be explained due to small community size. It was impossible to judge cases without any previous connection because the chief had a personal relationship with all families of his or her clan. Another explanation may be that the chief held his or her position with more vulnerability than those in charge of judging Roman cases. If the community felt their chief was corrupt in their judgments, they could lose influence, respect, and even their position.

The shaman in Mik'maq and Naskapi communities also played a role in settling conflicts.²⁰⁰⁶ Shamans, as part of their spiritual duties, had the ability to prevent or end misfortune that resulted from an infraction of a traditional rule. The shaman was brought in to examine and determine the identity of the guilty party and could administer justice for the offence. Shamans garnered legal authority from their religious authority. This is similar to the role of pontiffs in early Roman law. Both religious authorities could settle disputes and discern justice due to their spiritual status. However, the shamans dealt with justice not just through words but through the spiritual realm. A spiritual trial would occur with consequences that could take place in the physical realm. Therefore, the shamans also served as an administrator of justice and not just as an expert of the law.

Law and Punishment:

Roman and Canadian Indigenous laws differed in many ways. This is partially due to the contrast in legal sources, the differing natures of oral and written law, and difference in the size of the community. Criminal law in Rome grew out of the need to control private retaliation in the form of blood feuds and manage ritual pollution produced by crimes.²⁰⁰⁷ Homicide was considered a heinous crime not just for the

²⁰⁰⁶ In the case of the Mik'maq see pg. 141; in the case of the Naskapi see pg. 148.

²⁰⁰⁷ See pg. 50.

ghastliness of the offense but for its potential to create feuding and social unrest. Therefore, an individual found guilty of homicide was either executed or banished. The victim's family had to believe justice had been achieved to limit discord within the city, the murderer had to be removed as a danger from society, and the city had to rid itself of any ritual pollution brought about by the crime. This bears resemblance to Indigenous legal traditions: Indigenous punishments for homicide largely consisted of execution and banishment. However, there were also other options made available in certain Indigenous communities. The punishment could also take the form of a compensation in goods and land as an act of contrition.²⁰⁰⁸ Another interesting possibility was that the offender could be adopted into the victim's family to replace the potential of the victim as a set of working hands. Both alternative punishments are noteworthy in that they offer a more utilitarian approach to homicide. The loss of the offender along with the victim could create hardship for the community as not just one but two working community members were removed. Therefore, an attempt was made by the offender to repent by trying to replace the loss of resources and work which occurred for the victim's family due to the death of the victim.

Among the Anishinaabe, witchcraft was a serious crime and dreaded. If someone was found to be practicing sorcery, they could be slain immediately.²⁰⁰⁹ The Romans similarly put to death anyone found casting a spell. Such acts were considered to be of great harm to the community. Another comparable law is that an offender convicted of setting fire to a barn or heap of grain was subject to execution. This seems to be a very severe measure for the crime. But it is similar to a law held by the Blackfoot people in that, when a buffalo herd drew near, no one was allowed to leave the camp.²⁰¹⁰ If someone scared away the herd, the entire clan would starve. Therefore, the offender had their clothing and tipi cut up by the police as a symbolic removal of the benefits of the community. Both crimes endangered the food security of the community. Both of these crimes could threaten the community's survival and thus, the punishment

²⁰⁰⁸ See pg. 151.

²⁰⁰⁹ See pg. 151.

²⁰¹⁰ See pg. 165.

reflected this. Along a similar vein, Roman law targeted crimes which diminished the majesty of the Roman people such as instances of military incompetence, unconstitutional behaviors, and treason.²⁰¹¹ Crimes of this nature, again, endangered community survival. But, due to the strict and extensive hierarchy ingrained in Roman society, protecting community peace did not just require the limiting of obvious crimes against the community such as affecting food supply. An important aspect of communal harmony was political stability. Therefore, tribunals were put in place in order to strengthen the community by creating systemic mechanisms against political corruption and strife such as the tribunal concerning bribery.

By the beginning of the third century CE in Rome, more crimes against the community were defined.²⁰¹² This includes various, sophisticated types of fraud, such as corrupt practice in selling goods and granting security, crimes which would be considered as “white collar” today. Moreover, defined types of theft were distinguished, such as theft by night and theft from baths. Punishments were no longer only doled out to deal with the most basic and severe forms of crime but intricate and complex forms of crime as well. Further distinctions were made in the law between what would have been initially labelled as one crime. This can especially be seen in the case of theft. Interestingly, Indigenous peoples had a different concept of theft than the Romans. Most Indigenous communities in differing forms dictated that any traveler suffering from extreme hunger, whether of the same community or stranger, was permitted to take part of another’s food cache without the prior permission of the owner.²⁰¹³ Theft was therefore, in this respect, deemed lawful. Even in cases of unlawful theft, Indigenous communities usually only punished the crime through shame. But, if the theft included the stealing of a sacred object such as tobacco or medicine bags, it was instead considered a grievous sin.

A last, interesting similarity between both culture’s approach to punishment is the use of exclusion from the community after a serious crime. During earlier times in Roman history, one of the most severe

²⁰¹¹ See pg. 65.

²⁰¹² See pg. 81.

²⁰¹³ See pg. 143.

penalties was interdiction from fire and water. In many Indigenous communities, banishment was similarly used in the face of serious crimes. This punishment appears logically straightforward. If a member of the community cannot abide by the agreed rules set by the community, which were behavioral freedoms sacrificed by each individual for the sake of increased safety for both themselves and family, then the offender could no longer be allowed the benefits of living within the community. They must be removed so as to protect the safety and harmony of the rest of the community. The use of this penalty for severe crimes both in early Rome and Indigenous communities may act as a clue that Roman justice, when the city was still a small territory and town, functioned in a very similar way to Indigenous justice traditionally employed across Canada prior to colonization.

Retributive and Restorative Justice:

Roman criminal law can be classified as a retributive justice system while the criminal system of Canada's Indigenous people can be classified as restorative. The earliest form of Roman criminal law developed from the principle of *vindictio*.²⁰¹⁴ *Vindictio*, the reflex to repel violence and insult from ourselves or loved ones through self-defense and revenge, was applied to deter others from offending. However, this also means that, should someone harm a person or their kin, this person must exact vengeance for the threat of revenge to continue to function and prevent further offenses. It was determined that justice allowed vengeance to be an exact retaliation of equal measure to the offense- *lex talionis*. This is expressed in the Twelve Tables: "If a man has broken the limb of another man, unless he makes his peace with him, there shall be like for like, *talio esto*" (Twelve Tables VIII).²⁰¹⁵ However, with the rise of jurists, law became something that could be discovered through a scientific approach and an exercising of reason. By the jurist Gaius' time, law and justice existed in paradigm form and could be formed through human action.

²⁰¹⁴ See pg. 49.

²⁰¹⁵ Translated by Stephenson, *A History of Roman law*, 132.

This is distinct from the Indigenous approach to violence which is still used by Indigenous peoples today. Certainly, retaliation for crimes occurred and largely spurred the need for a criminal system. However, the entire community continued to participate to restore balance, not just the parties of a crime and administrators of justice. All parties in the Indigenous process (offender, victim, family, and community members) are brought together to examine how the crime affected them. Elders, respected for their wisdom and knowledge, act as peacemaking ombudsmen and assist the discussion between all parties. The approach taken to achieve justice was not just a (perceived) objective, “equal” reaction. It was not a scientific punishment determined to be the optimal sentence for the crime. Rather it allowed the subjective views of the participants within the process along with their opinions on how best to heal from the crime. Punishments were not strictly set and justice was not dictated by a pre-conceived penalty. Without the need to codify laws and punishments, justice remained a fluid process with discretion given to the victim. This seems to have been avoided in Roman law, perhaps as a way to prevent victims and their kin from abusing retribution and exacting an unequal blow to the offender. This discretion may have been a larger concern in later Roman society because of the large wealth and influence gap within the population. Some families rich in resources were clearly more capable of exacting punishment and pain on others. Furthermore, the resources required to provide such a service would have been far greater in a large empire with a diverse citizenry.

During modern Indigenous restorative processes, a full review is conducted to assess the contributing factors leading to the crime.²⁰¹⁶ Instead of arguments being made by each side, the process attempts to build a relationship between all parties in order to promote healing. No time limits are imposed and long silences with patience are valued. This presents logistic difficulties due to the sheer amount of time and resources needed for this process. Given the small community sizes of traditional Indigenous settlements, it was perhaps more easily done. This may be why similar approaches are not seen in later

²⁰¹⁶ See pg. 168.

Rome considering the sheer size of the state during the empire. However, there may be other reasons this approach was not taken. First, this approach requires all who join in sentencing and healing circles to approach the procedure as equals. Given the difference in classes found in Roman society by the second half of the republic, and the differences in resources among Roman families, this would be difficult to maneuver. Second, this procedure occurs after guilt is determined. This means that this process occurs after an already considerable expenditure of resources for the initial determination of guilt. Therefore fairly intensive and expensive trials have already taken place. Praetors, orators, jurors, jurists and the like had to be paid either by the state or parties involved. In contrast, Indigenous trials, although also highly concerned with only convicting a guilty person, most likely had fewer incidents to handle due to the smaller community size. Furthermore, because of the ethic of sharing, non-competitiveness, and non-interference, “petty crimes” such as theft were less common or simply resulted in public ridicule and distrust instead of a large expenditure of community resources.

The third issue with the restorative process is that it requires the state and community to admit that they may have helped contribute to the crime by not intervening to help the offender prior to the offense. This concept can be seen in Gladue reports. Additionally, when a full review is conducted to evaluate factors which contributed to the crime, steps are put in place for the offender to receive help with issues such as drug use. The community actively contributes to help the criminal reform and sanctions are used to restore the victim-offender relationship, not the removal of the offender. If theft was motivated by poverty, this is far harder to help reform when that poverty was partly caused by the conditions of the society.

As previously examined, a feature of Roman retributive law was the use of law for deterrence. Initially, under *lex talionis*, this deterrence was the fear of revenge from the victim of your crime. However, as the government became more and more involved in the regulation of Roman law (initially in the efforts to stop blood feuds), this deterrence was purely the fear of punishment. After the expansion wars, special commissions (*quaestiones*) were set up, allowing magistrates to investigate and punish without the

confirmation of the people.²⁰¹⁷ This sent the message that it was now for the state to punish others for crimes. Further, the *lex Calpurnia* introduced a fixed penalty for the crime. From this, we see the beginning of the *poena legis*, the penalty of the law. Interestingly, this is no longer a direct eye for an eye formulation. Rather, the punishment could be worse than the crime to heighten the deterring effect. Furthermore, punishment was often carried out in some public fashion. This ensured that the communities were aware of the punishment.²⁰¹⁸

Canada's Indigenous peoples approached the deterrence of crime differently. Apology and forgiveness are the main goals of the Indigenous criminal process, not vindication.²⁰¹⁹ Instead of trying to deter people from offending through harsh punishments, Indigenous peoples attempt to teach youth not only the communities' laws but also why it was important to follow these laws. Thus, this was a process throughout an individual's life. All adults in Indigenous communities were involved in the lives of the children and few activities of the children went unnoticed. In comparison, private chastisement within the home would have had a lesser effect than the outspoken reproof of the entire community. When punishment was doled out, it was to satisfy the victim and the community's wishes to restore the harmony. A deterring effect within the sentence was more constructed to affect the offender alone, not other potential offenders within the community. This required flexible punishments dependent on a particular situation to fit a holistic approach. As a result, punishments were not set in stone to match the crime as was the case in Roman law. Instead, punishments for various crimes became more or less common and developed patterns that were not obligatory to follow.

In the later Roman Empire, little changed with regard to retribution: emperors exacted a reckoning through 'the avenging sword' but the exact mode of execution varied.²⁰²⁰ However, the introduction of Christianity within the imperial apparatus greatly influenced the treatment of the death penalty and

²⁰¹⁷ See pg. 59.

²⁰¹⁸ See pg. 86.

²⁰¹⁹ See pg. 169.

²⁰²⁰ See pg. 86.

punishment in general. Ironic punishments created displays of imperial rigour which connected the crime and punishment symbolically.²⁰²¹ This seemed to have been done to re-introduce the idea of exact retribution under *lex talionis*. This was not an exact formulation of eye for an eye but nevertheless created an idea of balance.

Due to the Christianization of the state, most of the agents of the state practiced this religion. In time, the imperial bureaucracy became more and more amenable to the approaches recommended by bishops.²⁰²² The first ideas of criminal reform were implemented into Roman punishment as a result. If a criminal was executed, the offender had no ability to reform. Thus, the chance for the offender to improve their fate in the afterlife was denied to them. This led to the beginning of a rejection of the death penalty, which would prevent offenders from repenting and redeeming themselves in life. Furthermore, this same school of thought also believed that the wounds of the sin should be healed. This is similar to Indigenous conceptions of punishment. A procedure of reform is undertaken by Indigenous peoples to show the offender why laws should be followed. There was a perceived possibility of the offender remodeling after the process.

Both Roman and Indigenous societies experienced instances where crime was either repeated by an offender to the point where reform was less plausible, or the crime committed was particularly heinous and dangerous to the community. In these instances, the offender was removed from the community. During the early Republic in Rome, a guilty party may have been given the death penalty for their crime but was customarily allowed to escape into exile before the decision of the critical voting division was proclaimed.²⁰²³ Later, the capital penalty, became banishment in the form of interdiction of fire and water and by the early empire, this banishment became restricted to a particular location. But, in Roman society, a class aspect was present in the doling out of exile sentences. During the Republic, the elite more often

²⁰²¹ See pg. 87.

²⁰²² See pg. 91.

²⁰²³ See pg. 69.

profited from their status and received the concessions of exile. Common criminals tended to be killed or reduced to virtual slaves. The magistrates and juries of the Roman legal system were largely composed of elite citizens who also held further influence by the nature of their financial prosperity. When they were banished, it partially served as a way to remove a dangerous individual from the community. However, due to the politicking of the elites, it perhaps also functioned as a way to remove opponents and shame them, or to punish one of their own in a moderate way. Meanwhile, lower class citizens had very little sway in the legal system and therefore it was easier to focus on retribution and deterrence through execution.

For Canada's Indigenous peoples, banishment was also occasionally used in cases of serious or repeat crime.²⁰²⁴ Temporary banishment was considered a way to help the offender reclaim spiritual health. Similar to Roman banishment, it also functioned to protect communities by removing the wrongdoer from the community until the individual had healed enough to take responsibility for their actions. In some instances, banishment was also employed in place of capital punishment. However, depending on the region of the community, banishment could be close to a death sentence. Yet, the survival of the offender was still in their own hands.

In both Roman and Indigenous legal systems, banishment served as an alternative to execution which balanced the safety of the rest of the community with humanity and mercy. However, exile, although applied to the entire community in early Rome, later became a punishment for the wealthy and influential. This penalty is reminiscent of Plato's *Crito* (50a-52d) wherein Socrates explains to Crito that he cannot escape the punishment of execution because he had benefitted from the city his entire life and therefore had agreed to live by the laws of the city. He explains that, if he had decided not to live by these laws, he could have left and lived somewhere else:

“... yet even so we pronounce that we have given the power to any Athenian who wishes, when he has been admitted as an adult and sees the affairs of the city and us the laws and is not pleased with us, to take his possessions and leave for wherever he wants. And if any among you wants

²⁰²⁴ See pg. 132.

to live in a colony because we and the city do not satisfy him, or if he wants to go somewhere else and live as a foreigner, none of us laws stands in the way or forbids him from taking his possessions with him and leaving for wherever he wants.” (Plat. *Crit.* 51d)

The punishment of exile acts as a civic death without the blood. By banishing dangerous citizens, they forced offenders to leave the communities and laws by which they had not abided. Exile acted as a forced surrendering of citizenship in place of removing a danger through more violent means.

Final Thoughts on the Comparison:

In summation, there are a number of similarities and differences that can be found between Roman law and the law of Canada’s Indigenous peoples. Both cultures have created a system which originated from a principle of *vindicatio*. However, the balance between personal freedoms, safety, and the communal good are slightly different. Indigenous law places more weight on communal peace. This may be the result of the relatively small community sizes by which this culture organized itself into. Crimes would have had a larger impact on smaller communities and the discord this would have created may have threatened the community’s longevity and ability to thrive. Therefore, healing was the primary goal to help keep the community functioning and avoid the loss of a pair of working hands. The children were carefully raised to abide by this system in order to continue the traditions and continue peace in the community after the current generation had gone. Furthermore, it was easier to dedicate resources and time under the chief to healing and reform after a crime. This raises the question of whether Rome in its early days, when its population was small, also functioned in a similar manner. After all, most records of Roman kings were written hundreds of years after their time. Moreover, almost no written record survives and law from this time is seen as having been primarily custom. But, the same could be said of traditional Indigenous law from an outsider’s perspective, with regard to oral law equating customary law. Could early Roman law have been more sophisticated than currently perceived, and could it have also functioned as a primarily oral system similar to Canada’s Indigenous peoples?

In contrast, the later Roman system, spanning the mid-republic to late antiquity, weighted personal freedom slightly more. This may have only been true for the elite. Due to their resources and influence, Rome's elite tended to receive lesser penalties and could afford better legal advice from legal experts and representation from orators. Alternatively, this may have been the result of the value of personal, familial honour and hierarchy within Roman society. As Rome's community grew, the society was able to firmly stratify. Prominent elite families rose labelled the patricians, and even this class had an elite called the *gentes maiores*. This inequality between Roman citizens prompted the need to codify law and create pre-determined penalties. As the city grew into an empire, a ruling class rose from the senate: the imperial family. Roman law gradually became a set of rules imposed by an authority. Therefore, criminals were to be punished not just because they had harmed another and because their offense could create discord in the community. The criminal had to be punished because they went against the authority of the emperor. If the emperor did not punish the criminal as a public show of deterrence, they could lose some of their perceived authority. This was heightened with the introduction of Christianity which gave further divine backing to the emperor, but also introduced a concept already found in Indigenous law: reform. However, reform was not introduced, as is seen in Indigenous legal traditions, to try to lessen the offender's loss to the community if banished. Reform was not introduced because the offender was inherently seen as needing healing to return to a proper-functioning individual who could provide value to the community. Reform was instead implemented because it was what a good Christian would do: a Christian should not bloody his own hands by dealing with an offender. An offender still had potential as a citizen, but it was up to the industry of the offender to turn their life around, not help provided by the community. If the offender rejected reform, they could still be used to aid the community.

In conclusion, the differences between these two criminal legal traditions should not be an idle identification of Indigenous law being custom-based and Roman law being positivistic and codified. The difference is actually found in the size and values of the community. The Indigenous peoples of Canada settled in many smaller communities while Rome and its Empire ran its administration out of cities and a

vast populace was governed by a single authority. This had a massive impact on how thoroughly each case could be assessed and dealt with, how stratified the community could become, and the amount of diversity in their backgrounds. However, other values were similar. The Roman principle of *religio* concerned their respect for the divine. Canada's Indigenous peoples similarly held the laws that they believed were handed down by the Creator with utmost respect. The Roman principle of *pietas* was also similar to Indigenous values. Like in Rome, the Indigenous extended family served as the basic social unit of the community. Above all, both Canadian Indigenous criminal law and Roman criminal law functioned as complex systems employed to maintain peace and order within their communities.

Conclusion

Canada's Indigenous peoples face a multitude of challenges in adapting and developing their legal traditions into a modern context. But, if it can be convincingly argued and several hurdles to this goal can be removed, this can help install respect for Indigenous legal traditions within Canadian law and legal scholars. In order to gain further insight into these hurdles, common law and civil law has been reduced to an early originator and contributor: Roman law. Roman law, in itself, provides an interesting perspective in its long history from city to empire, pagan to Christianity, and oral tradition to complete, unaltered codification. The issues found in the differences between Roman law and Canadian Indigenous law established in this work includes: differences in approach to criminal laws and penalties, differences in sources for the development of law, and differences in values and application of the law.

Roman law, on average, employed far more serious penalties to crime than Indigenous penalties. Instead, due to the tight-knit aspect and small size of Indigenous communities, penalties which employed social pressure and shaming often proved sufficient. They employed a mental punishment. In contrast, Roman law employed more physical punishments. However, these punishments lessened considerably for the upper class. This has interesting implications in terms of modern theft. In a similar way to Roman law, Canadian law dictates that common theft of property such as stealing money from another's wallet is a crime under the criminal code.²⁰²⁵ But, wage theft, the act of employers not paying their employee's the wages they are owed, is not a crime under the criminal law.²⁰²⁶ Both result in the unlawful taking of another's money, yet it is only the kind of crime more likely to be done by the impoverished portion of the population which is criminally prosecuted. In fact, Douglas Hay, a professor at Osgoode law school, argues that the criminal law functions in modern societies to help capitalism work.²⁰²⁷ This is in strong opposition

²⁰²⁵ R.S., c. C-34, s. 283.

²⁰²⁶ Tucker, *When Wage Theft Was a Crime in Canada, 1935-1955*, 933.

²⁰²⁷ Hay, *England, 1562-1875*, 59-116.

to traditional Indigenous approach to wealth which is to be shared and not hoarded (as is seen in capitalistic structures). In accordance with this view, Indigenous communities generally allowed those in dire need to take whatever was required for survival and it would not be considered a crime. If theft did occur, it was merely punished with social ridicule.

However, the amassing of wealth in Roman culture was not clear cut. As we have seen, Rome in early times may have more clearly resembled Indigenous cultures around Canada. In fact, as the city of Rome grew, the very beginning of legal codification occurred in an attempt to limit and regulate the excessive power of the elite classes who had begun to monopolize the administration of justice. As Rome grew in size, and social classes became more distinct, the administration of justice became less even across these classes. This does not mean that the Romans did not expect equality under the law. However, they came to accept a system which allowed uneven application across social classes, but equality for everyone within each class. Therefore, this seems to be an adaptation to a growing citizenry and territory. In contrast, Canada's system presents the idea of equality under the law but does not allow or admit to the differences of application across social classes. However, this realistically occurs in the Canadian criminal system. Those with more resources can afford better representation, more easily afford bail, and the loss of income from jail time or having to be at court proceedings. Therefore, in reality, a similar system occurs even if it is not formally accepted. In comparison, Canada's Indigenous peoples have traditionally lived in small communities, even on modern reserves. The uneven application of law across social statuses to this extent is a relatively new development. This may create a sense of injustice for Indigenous peoples forced to use imposed judicial structures which appear unjust, particularly for a portion of the population largely battling poverty. As a result, this may generate a good deal of polarization and dissension within Indigenous communities for Canadian criminal laws.

Furthermore, the Roman and Indigenous criminal systems conflicted in their approach to achieving justice once a crime was committed. Within the Roman system, a large effort was made to determine guilt

of the accused: “Proof lies on him who asserts, not on him who denies” (D. 22.3.2).²⁰²⁸ The entry of this law in Justinian’s *Digest* attributes it to the jurist Paul. It is believed to have been introduced into the Roman criminal system under Antoninus Pius.²⁰²⁹ This resulted in a process which required the expenditure of a substantial amount of resources per trial; juries had to be called, court processions took up a good deal of time, and the orators in each trial had to be paid. This was the result of the burden of proof, “Accusers should not bring criminal charges unless they can be proven by proper witnesses, by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day” (*Code* 4.19.25). This burden also fell on the defense: “when anyone is accused of crime, he must prove that he is not guilty” (D. 48.1.5). However, once guilt was determined, under the establishment of *poena legis*, the offender would then be given the penalty stated in the law. This measure was most likely implemented as a result of inequity of sentencing which had resulted due to unfair treatment which occurred in relation to the social order. This penalty was often to be considered equal under *lex talionis* or if not, done to deter the guilty party from re-offending and the rest of the community from committing the same crime. When the sentence was carried out, it was believed that justice had been served.

Section 718(1) of the Canadian criminal code dictates that, “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. This appears to agree with *lex talionis* in that the penalty attempts to be proportional to the crime. As is seen under the Christian Roman Empire, the Canadian criminal system also acts to reform offenders. Penalties can be reduced if an offender shows he is working towards reform. For example, if a party has been charged for impaired driving, he may lessen his future sentence if he elects to attend a rehabilitation centre in the meantime. Additionally, Canada has various organizations dedicated to offender reform such as the John Howard society, the Elizabeth Fry

²⁰²⁸ Translated by Watson, *The Digest of Justinian*, 22.3.2.

²⁰²⁹ Bury, *A History of the Roman Empire from its Foundation to the Death of Marcus Aurelius*, 527.

society, The Canadian Criminal Justice Association, the Canadian Families in Corrections Network, and the Church Council on Justice and Crime.

In Canadian criminal law, similar to Roman law, offenders are, “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal” in accordance with section 11(d) of the Canadian Charter of Rights and Freedoms. Additionally, the burden of proof in Canadian criminal law rests on the Crown, but not the defense. Punishments in both the common and civil law fell under the criminal code. Under section 718 of the criminal code, sentencing is to be approached as follows:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, a respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community;
and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Therefore, both systems ideally function to deter potential offenders and reform the criminal. However, an offender may also be removed from society by sending them to prison if necessary. This may appear to act as a sort of modern banishment, as is found in both Roman and Indigenous legal systems. Robert Nichols, referred to in the Introduction, instead suggests that carceral use and expansion is a political choice made because it solidifies control over the state apparatus and creates continuous reterritorialization.²⁰³⁰ It has not

²⁰³⁰ Nichols, *The Colonialism of Incarceration*, 442.

reduced crime in any way.²⁰³¹ Those who committed even fairly minor offences are removed from society to a pre-determined location and may give up more autonomy than perhaps may be taken in traditional banishment. Incarceration, similar to exile, serves as a more palatable choice to capital penalties in contrast to the prolific use of execution (in many forms) used in Roman law for minor crimes during late antiquity. It provides a social death (but usually temporary) instead of a physical one.

However, the efficacy of prison must be called into question. If this option shows no reduction in crime,²⁰³² it suggests the inability to deter offenders, a main function of both the Canadian and late Roman criminal systems. The other main function, reform, also does not seem to be used in the most efficient method under the prison system. Canada's criminal system has a recidivism rate, for white citizens, of twenty-seven percent.²⁰³³ In comparison, the Indigenous Bidaaban system had a recidivism rate, defined as any return to correctional custody, of less than five percent.²⁰³⁴ This leads to multiple questions. Does the prison system simply act to remove undesirables from society as a more palatable option to capital punishment or is it a modern form of banishment? If it is a modern form of banishment, then does the prison truly act to reform offenders? If the Bidaaban system could effectively reduce resources needed to run prisons, why is opposition against restorative programs the need for resources? How can Indigenous peoples respect incarceration as a criminal sentence when it does not function as a way to deter or reform an offender let alone heal them? All of these questions are beyond the scope of this research but interesting none the less. I suggest that prison systems are the result of the intense use of positivism in the Canadian criminal system. Most who witness civil disobedience in a positivistic system are more concerned for their own safety and self-interest along with the safety of their loved ones.²⁰³⁵ Therefore, prisons serve as an easy method to create a feeling of "protection" for society. Furthermore, when these people are faced with illegal

²⁰³¹ Nichols, *The Colonialism of Incarceration*, 442.

²⁰³² Nichols, *The Colonialism of Incarceration*, 442.

²⁰³³ Hewitt, *Indigenous Restorative Justice*, 319.

²⁰³⁴ Hewitt, *Indigenous Restorative Justice*, 319.

²⁰³⁵ Borrows, *Canada's Indigenous Constitution*, 49.

activity in a positivistic system, they are not immediately worried about the legitimacy surrounding the law.²⁰³⁶ This makes the Canadian system more resistant to change and reform. The concern is the removal of the offender from society because of the perceived threat they pose while very little thought among common citizens goes into why the crime occurred in the first place. However, in traditional Indigenous legal systems, positivistic power has a narrow base for legitimacy.²⁰³⁷ Therefore, this use of prisons as a tool of positivistic law does not as easily fit into their traditional perceptions of justice and sentencing.

Canada's Indigenous peoples, likewise to the Canadian and Roman systems, placed a lot of weight into determining the truth of the matter and only convicting the guilty. This would be done through the communities' chief, other leaders and Elders, spiritual figures, and other members of the community. However, an additional process takes place after conviction. Sentencing is a separate affair wherein resources are dedicated not to exacting vengeance on behalf of the victim but to restoration. Crime is seen as a disruption to the community which can hinder the community's ability to function. Therefore, efforts are made to repair the damage caused to all parties in order to move forward and restore harmony. This does not mean that the victim does not achieve justice, but that justice is defined in a different way. Reparations are made by the offender which are tailored to the victim's needs; penalties are not laid down and constrained. This may have been possible because of the small size within Indigenous communities. In fact, it raises the question whether the early Rome justice system, when Rome was a small town, may have operated in a similar manner and may have approached sentencing in a restorative way. Everyone who was involved in sentencing approached the process as equals. Moreover, sentencing was in itself a form of reform. Unlike Canadian criminal systems, reform isn't an option that offenders have to actively seek, Indigenous structures required the active participation of each participant in taking accountability for their actions and amending their behaviour while showing contrition through reparation. This process is very

²⁰³⁶ Borrows, *Canada's Indigenous Constitution*, 49.

²⁰³⁷ Borrows, *Canada's Indigenous Constitution*, 49.

difficult given the unique nature of every person, such as differences in upbringing and previously inflicted mental wounds. Thus, it requires considerable time and resources. This may have been facilitated by the small community size within Indigenous societies. However, restorative practices such as this are currently being implemented in Canada today with substantial success.

Due to these fundamental differences, conflict can arise in Canada's criminal law system when dealing with Indigenous accused and offenders. First, both later Roman law and Canadian law is exercised using force: citizens are required to follow the law or face retribution enforced by the state. In contrast, Indigenous law also employs a threat of penalty but with far greater weight placed upon education before and after an offense to teach everyone in the community why they should follow laws. This is a part of their value of non-interference. However, this is far easier done within a small group of people who have the same cultural heritage. This approach by the Canadian government may create scorn on the part of Indigenous peoples for the authoritative application of governmentally administered criminal law which could create outright rebellion and discord. This could also create a lack of trust for the actual process of determining the facts of the case. Furthermore, when guilt or innocence is determined and sentencing has taken place without the traditional process of healing, it is likely that Indigenous peoples won't believe that justice has truly been achieved. This is a significant issue. If Indigenous peoples feel that Canada's current criminal system does not affect justice, they, as a result, may view the criminal law as unfair and corrupt. This can serve as a direct barrier to reconciliation in Canada between the government and Canada's Indigenous peoples.

As a result of these differences and harmful outcomes, more aspects of traditional Indigenous law have been adapted into today's criminal law system through specialized courts. However, a huge hurdle to these shifts is the disdain held by Canadian legal scholars because Indigenous law is viewed as "less than" with a purely custom-based nature. I suspect that dismissing Indigenous laws as "custom" is purely a way to support euro-centric and colonial views. It is an external view of an oral system which may appear as

primarily customary due to its lack of written codification. As we have seen, this alleged lack of other sources of law is strictly untrue. Indigenous communities held many sources of law along with custom, including sacred teachings, naturalistic observations, deliberative practices, and positivistic proclamations. Moreover, Roman law also held many aspects of custom, especially prior to codification and the implementation of an imperial structure, without any perception of a lack of sophistication. Customary law was written down initially on the Twelve Tables in part due to the conflict of the orders. This began a process of solidification and consolidation of the law, to convey an attempt at equality under the law and to help streamline the process as the population of the empire grew. This was advanced under the imperial bureaucracy as the breaking of a law came to mean an offense against the state instead of solely an offense against another citizen. This likely resulted in a lot of customary law being codified and re-branded as positivistic law. Therefore, Roman law, which served as an inspiration for many aspects of Canadian common and civil law, most likely also had customary aspects even after codification which had been rebranded into positivistic law.

Another reason Indigenous criminal law may be perceived as largely customary is the lack of a laid-down penalty for each crime. In Roman law this may have been down to help partially eliminate class imbalance, to try to achieve a perfect form of “retribution” for each crime, to expedite the criminal process by not having a separate procedure for sentencing, and later to create a sort of irony under the Christian Empire. Indigenous criminal sentencing does not do this. This appears to be done in order to allow flexibility in sentencing to suit the needs of the victim and offender for the process of healing. It was also feasible to do so given there was less need to organize and administer justice to a large amount of people. Canadian criminal law deviates from Roman law in this area. Sentencing is based in precedent and therefore able to gradually evolve. However, sentencing is still employed as a retributive measure, as well as a way to deter similar crimes. The punishment is inflicted on behalf of the state and not the victim. But, the precedent sentencing process does still allow flexibility in what punishment an offender is to receive based

on the compounding factors of the case. Therefore, both the Canadian and Indigenous sentencing processes are similar in that they at least try to allow flexibility in the punishment. Therefore, this lack of laid-down penalty for a crime should not be considered as solely customary. Also, to claim that the part of Indigenous law that is customary invalidates this system would require that the customary aspects of Canadian law, even if these customary aspects are no longer recognized as customary in source, should also invalidate that system.

Canada is moving towards truth and reconciliation between Indigenous peoples and the Canadian government. However, much work is needed to do so, including breaking down unconscious and conscious biases within its government and legal systems. The Truth and Reconciliation Commission have advised that reform is needed in the way criminal law is applied to Indigenous peoples. This is due to a disproportionate representation of Indigenous peoples in the criminal system and in federal custody. Indigenous peoples have to battle with issues such as substance abuse and sexual abuse, largely caused by the traumas of residential schools, along with economic dislocation and non-Indigenous political interference which may lead to higher incidents of crime.²⁰³⁸ As a result, more traditional and adapted Indigenous legal structures need to be implemented into today's criminal law system along with a further understanding of Indigenous values. This can be beneficial for non-Indigenous Canadians as well, who can profit from the strong healing aspects for both the victim and offender in restorative justice practices. This move will also help strengthen trust and make a space for Indigenous people in Canada's criminal law system. Moreover, the government should not hesitate to implement these Indigenous structures under any false perspective that Indigenous law should be lower down on the ladder due to an alleged lack of sophistication.

²⁰³⁸ Borrows, *Canada's Indigenous Constitution*, 36.

Yet, this is a hard feat to accomplish. Studying the history of Roman criminal law may illuminate a middle point between traditional Indigenous legal systems and Canada's modern legal system. Within Rome's history, the city itself expanded from a town roughly the size of an Indigenous community to a broad empire with many provinces and territories. As a result, the state had to adapt in order to accommodate the many needs of its expansion. The processes within the system became more detailed and standardized, professions were created, and charges began to be put forward by others than the victim or victim's family. The way in which justice was administered gradually changed with the city itself to accommodate new demands. Rome's example presents the adaptations of administering criminal justice within a large citizenry. In a tightly knit community, such as traditional Indigenous settlements and early Rome, all members are active participants within the same circle and handle crime as a common responsibility and interest. In Canada and many modern societies, the connection between individuals has become much smaller and more superficial. In modern cities, it is not uncommon for neighbours to not know each other's names. In many instances, the victim and offender of a crime in larger communities are perfect strangers. The families and friends of both parties no longer feel the same necessity to work to solve crime as a common issue.

As a result, it is more difficult for the offenders to truly understand and care for the consequences of their actions and to recognize the feelings of those they harmed. It is also more difficult to employ social pressure through shame and distrust as a consequence for an offender, since they can easily slip into the anonymity a big city can provide. In turn, it is harder for the victim of a crime to consider the background and reasons leading to the offense. It is difficult for the victim to assess the possible mitigating circumstances and potential for rehabilitation of an individual they have only known in relation to the crime itself. As a result, the offender simply tries to get away and the victim simply requests compensation and punishment. The later Roman example, as impersonal and bureaucratic as it may seem, exhibits the way in which the justice system adapts to act in substitution of a "community". In the modern world, the concept

of a community has become more theoretical than real. Therefore, although the Indigenous model of justice shows potential for smaller communities, it presents serious difficulties when exporting this system to modern urban environments, which are also the most critical for crime.

Further Research:

I argue that the many differences between the Roman legal system and Indigenous legal system may stem partly from the difference of community sizes and organizing structures. Smaller organizational structures perhaps reduced the possible reach and power of community leaders, but may have increased the efficacy of community structures. Community size can affect the numbers of offenses and indictments, amount of resources available, and possible connections between both parties. Further research should be done in this area to determine the effect of community size on the application and efficacy of law. This can help create further ways for law to function in Canada and Indigenous communities if smaller community sizes are found to improve the implementation of law. This can be applied in Canada today through a decentralization of the current system even if this was limited to criminal law or other specific legal areas.

Further research should also be done on the efficacy of implementing further restorative aspects to the sentencing process. Although healing-based reform found in these processes requires a substantive amount of resources, it has been found to significantly reduce recidivism. This can reduce the amount of trials being held for repeat offenders as well as the total capacity needed in carceral buildings. A utilitarian evaluation of the cost of resources needed for healing-based reform weighed against the saved resources from recidivism would be a valuable contribution to scholarly debate. I believe this perspective may provide support for implementing Indigenous-inspired systems of healing-based reform. I suspect the savings in a lack of recidivism would be highlighted. This would help improve support for the implementation of these processes along with their other goal to help heal the relationship between the Canadian government and Canada's Indigenous peoples and act as a support for these measures.

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