

Commentary on the Remarks of Judge Graydon Nicholas

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I have been asked to react to the description of traditional aboriginal legal culture.

One of the great advantages of studying other cultures is to learn more about our own. If an institution in our society is not recognizably present in another society, that institution may also not be essential to our culture, or at least we may not know exactly why it is essential in ours.

I admit at once that the other culture offers few lessons if it has failed in our common goal, to produce a peaceful and happy society. But did the traditional aboriginal legal culture fail, or was it destroyed? Twenty years ago, most Canadians would have chosen the first answer. Hollywood formed our view of aboriginal culture, and borrowed the picture of the warlike Native Americans from the propagandists for the U.S. government during their "Indian wars".

I urge you to read about the first contacts by Europeans with that culture. They reported that the native community was remarkably peaceful, with little of the exclusion and violence so evident in European history. That lesson was so strong that it embarrassed Europeans. Recall the reaction of Rousseau, for example. Thomas Jefferson explained, to his satisfaction if not mine, that the explanation was that the peace in the community of original inhabitants was at too great a price in terms of the individual freedom Europeans claimed to prize. My point simply is that he accepted as fact that the aboriginal system offered tranquility and peace. Therefore, I suggest we would do well to study their ways.

The legal culture we have just heard described seems not to contain two elements that some claim are fundamental to our own. The first is our supposed need for retributive justice. In the world just described, I note there is no impulse to redress wrong. Wrong is accepted as an aberration of nature that simply is, but does not call for redress. The emphasis instead is on reconciliation, and the successful re-insertion of the offender into society. Is it possible then that we can have a peaceful society without institutions to effect retributive justice? That thought should give one pause. Imagine a world without damage awards, injunctions, or prisons! We

must, we believe, have prisons. Without that discipline, or its threat, society would disintegrate. Or what?

I do not, on the other hand, think it is right to suggest the model offers no suggestion of general or personal deterrence. Particularly in a small and cohesive society, the need for an offender to acknowledge his offence to his victim and his communal leaders must surely chill some offenders. I am reminded of the way some families in our society deal with aberrant behaviour: confrontation and confession, but followed by reconciliation and re-integration of the unit. I believe the psychologists call it positive shame therapy.

The second feature I noted was the absence of any sense of the need to reform, re-make, correct, or educate other humans. Instead, I heard of an equality that accepts no hierarchy of values, no sense of received wisdom, and no sense of professionalism. In short, no idea that one person is more clever, or more informed, or wiser, than another, and can and should teach that other. The difference between an elder and a professional helper or manager in our society is that the elder does not claim to know all the right answers. At best, the more experienced person simply shares the greater experience, and the listener learns his or her own lessons.

I am reminded, in the European history that formed our legal culture, of the battle between Pelagius and Augustine. Augustine taught that mankind will inevitably fall into the grip of evil if not formed, and re-formed by the efforts of others. He taught that the magisterium, the power and authority not only to teach others right from wrong but to offer them the sort of external control that kept them from evil, was shared by Church and state. His opponents denied this. John Chrysostom, for example, responded that the power to know what is right was not ". . . the divine gift in any single person . . . but this power extends equally to the whole race; and a sign of this is that the mind is implanted alike in all; for all have the power of understanding and reflection . . ." He taught that "Christians, more than all people, are not allowed to correct by force the

faults of those who sin . . . in our case the wrongdoer must be corrected not by force , but by persuasion".

Augustine of course triumphed in that debate, and his ideas remain with us today. Many today deny the divine source that he relied upon for that view, but they continue to believe in a divinely inspired magisterium. It is just that the new god is science, and her priests are the experts and the professionals. The new faith is every bit as certain as the old. No human problem is incapable of solution if enough scientists study it, and enough politicians, social workers, civil servants, or judges, are at hand to tell us all what to do. But we, the people, cannot be left to solve our own problems. And while our modern society mocks the idea of original sin, the modern Augustinians insist we maintain our belief that, if a group of people sit down to discuss and solve a problem, they will neither have the good will nor the skills to find a happy solution. So we are sceptical of what we hear today, and inclined almost to mock it as impossible.

Perhaps, as Jefferson argued, the kind of society we have created requires the kind of institutions we see as essential. However, we just may be wrong on both counts. That is the lesson for me today.