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LAW, PROCEDURE, AND PUNISHMENT IN EARLY BUREAUCRACIES

WILLIAM CHRISTIE MACLEOD*

INTRODUCTORY.

Correlations With Legal Phenomena Among the Northwestern Pecuniary-Paranoids.

In our earlier paper published recently in this Journal¹ on aspects of the earlier development of law and punishment, in addition to notes towards a general introduction to the general subject, we surveyed several aspects of law in the paranoid-pecuniary culture of the peoples of the northwestern coasts of North America.

The data were correlated with three types of political society: the southern anarchic peoples; the middle peoples whose state was a simple genealogical pyramid or primitive feudalism; the northern peoples whose state was similarly constructed but complicated, in addition, so far as the law went, with the presence in the social structure of the matrilineal exogamous clan. The middle and southern groups did not have the clan, nor were they unilateral in reckoning of descent, neither patrilineal nor matrilineal, but possessed kinship organization roughly similar to that of Europe.

All the peoples surveyed were non-agricultural save for the growing of tobacco. The northern and middle peoples were holders of chattel slaves; among some villages as much as one-third of the population was estimated to be slave. Only debtor servitude existed among the anarchists of the south. Private property in land and personalty was universal along the coast.

Despite the general uniformity in much of the culture of the three sub-cultures of the coast, we nevertheless were able to differentiate institutions of law, procedure, and punishment, peculiar to one and another region. The exogamous clan was peculiar to the north; the professional assassin was peculiar to the middle (exclusive of the Kwakiutl); the property-duel was peculiar to the potlatch institution developed by the Kwakiutl; money compensation for murder was an optional settlement all along the coast except among the Kwakiutl who knew of this technique but rejected it from their culture just as

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¹MacLeod: *Aspects*.

they rejected the institution of the professional assassin with which they were also acquainted; politico-social rank affected the amount of blood-settlement in the north and middle culture but among the anarchists of the south the financial standing of the victim determined the amount of the blood-settlement. The institution of the go-between we take up in this following paper; it was peculiar to the southern anarchist section of the coast.²

All along the coast, we noted, intent was not relevant in the question of offense; offenses could be constructive, indirect, and through agents. All along the coast (unless the Kwakiutl are a possible exception) the blood feud appears not to have been continuous; that is, the relatives of the murderer did not defend him nor did they avenge him; the life for the life terminated the feud, or the money for the life.

Some non-political and non-economic correlations of the regional distinctions may be added here for the curious reader; we shall not have space to discuss their significance in the question of origins. The northern exogamous clan is almost exactly correlated in distribution with the use of the lip-plug or labret and with cremation, and the exogamous institution comprises cross-cousin marriage. The Kwakiutl and the related Nootka practiced tree burial; the southern Kwakiutl practiced brother-sister marriage among royalty and nobility, while the other middle peoples and the anarchists of the south forbid even cousin marriage within a wide range of degrees similarly to the phenomena for the ancient European family; the middle peoples with the exception of the Kwakiutl had the interesting institution of the shaman-undertaker; the middle and the southern peoples practiced head flattening.³

*The Fundamental General Contrasts in the Penology of the Eastern
Bureaucracies and of the Feudal and Anarchic
West Coast.*

Now, approaching the data to be surveyed in this paper, we may point out some more general characteristics of the law of the paranoïd-pecuniary culture of the northwest coast.⁴

(1) The state is not concerned in any way with law, offense, procedure, nor punishment.

(2) Punishment is not ceremonialized.

²See below.

³See MacLeod: *Mortuary Aspects*; and *Central American Origins*.

⁴Some very slight qualifications may be developed later.

(3) Punishment is conceived of as retaliation, not as expiation.

(4) Punishment is not conceived of as a measure of social prevention or asepis, but as a measure of social defense.

(5) No extenuating circumstances are ever taken account of in evaluating the weight of an offense.

Among the bureaucratic peoples whom we shall here survey (some regional differentiations aside, which we shall note later) these contrasting phenomena appear:

(1) The state, in a considerable range of offenses, intervenes to prevent private retaliation, to investigate, prosecute, judge, and punish. Accompanying this there is a great complexity of development of juridical institutions, in contrast to the absence of such in the northwest.

(2) Punishment is highly ceremonialized, publicly.⁵

(3) Punishment aims at social prevention, and it is such prevention which is primarily the object of the elaborate public ceremonialization of the punishment.

(4) Punishment is widely conceived of as expiation, not as retaliation.

(5) Extenuating circumstances among some peoples are taken account of in fixing punishment for some offenses; and, on the other hand, other circumstances may be taken account of in judging a crime to be more heinous, more socially menacing, than the ordinary crime of the same class.

(6) There exist offenses which are classed in law as offenses against the state as well as against persons; in contrast to the facts for the northwest where there are offenses only against persons.

As on the northwest coast regional differentiations appear, so it is among the eastern bureaucracies. Among the Creeks and their neighbors murder is treated as primitively as among the Kwakiutl while at the same time advanced methods of dealing with other offenses exist. Among the same peoples, intent and extenuations are ignored in most cases as on the northwest coast. Among the Menominee and their central Algonkian neighbors primitive elements exist synthesized with advanced techniques. Among the southeastern peoples primitive law regarding medical treatment by shamans (doctors) exists very similar to that of the northwest coast.⁶

All the people to be considered below are politically organized on bureaucratic patterns. The state which is completely a bureau-

⁵This public ceremonialization we discuss in a separate paper.

⁶The data on the law of medicine we also reserve for a separate paper.

cracy is one such as our United States where "no genealogical or contractual pyramiding exists at all"; where "there is, instead, a great complexity of political pattern which ignores entirely any relationship of families or of chiefs."⁷ However, just as in the bureaucratic monarchies which survive, such as that of England with its hereditary royal family, faint survivals of the feudal organization exist; so it is with the bureaucracies we now survey; the Menominee and the Creek and Choctaw tribes were limited monarchies; the Iroquois tribes were representative democracies but with some hereditary offices.

Among all these eastern peoples the intertribal exogamous clan exists, usually matrilineal, similar to the like phenomenon on the northern northwest coast. But this important difference exists; the exogamous clan in the bureaucracies is assimilated structurally to the political pattern whereas on the northwest coast it is almost purely social, not reflected in the state.⁸

The patterns of the state among the bureaucratic peoples considered here are, beyond any reasonable doubt, the consequence of the migration of cultures and peoples into North America from central America. I have traced their origin elsewhere.⁹ Undoubtedly therefore further examination will exhibit the North American indebtedness to the advanced states of Central America in the field of jurisprudence.¹⁰ In the case of the Menominee we think we have disclosed *an instance of an as yet imperfect diffusion of advanced technique into the milieu of the more primitive technique of a far northern people.*

*The Contrast in the Psychological Set of Culture With
Reference to Offenses.*

In contrast to the northwest coast, among these bureaucratic peoples there is no noteworthy presence of pecuniary nor of paranoid social attitudes. There was, in contrast, an emphasis on the obligation of the individual to serve society; on an almost "chivalric" concept of noblesse; on personal self-esteem quite free from the touchiness of the inferiority complex universal on the northwest coast. Two observations from the sources may be noted to illustrate this.

⁷MacLeod: *Politics*, pp. 103-104.

⁸For a description of this complex integration see my chapters on the Iroquois mentioned in our list of references.

⁹MacLeod: *Aztec and Omaha* (M. S.).

¹⁰On the resulting theoretical implications see our paper *Aspects*.

Among the Takelma,¹¹ an anarchic group of the west coast:

The practice of demanding remuneration even for comparatively slight personal injuries was well developed.

Instead of retaliating when a blow was received, it was not infrequently preferred to keep cool and say:

"Give me some money, for you have struck me."

Contrast this with a typical incident among the Hurons of the east: a Jesuit missionary in 1653¹² tells of a "captain" or warrior chief who was feloniously attacked and wounded by a young man of his tribe, and of the aroused people preparing to make the young man face the penalty of his offense. The captain however immediately terminated the affair; in all his noble pride he checked them by saying:

"Enough! Did you not hear the earth tremble with horror at that audacity?"

Even for the more primitive coastal Algonkian of New England Roger Williams records a similar attitude of noblesse in its aspect of desiring to prevent the contagion of feuds. He observes of the native nobles that "their spirits in naked bodies" are "as high and proud" as the spirits of Old World nobles; that in peace as in war belittling or scorn incites them to anger: "yet I have known some of their chieftest say," regarding whether or not they should retaliate for some personal affront:

"Why should I hazard the lives of my precious subjects, them and theirs, to kindle a fire which no man knows how far or how long it will burn,—for the barking of a dog."¹³

Striking Regional Contrasts in the Law of Murder and Compensation.

The close-knit bureaucratic political society of the Creeks of the southeast was as finely an organized bureaucracy as that of the Hurons and Five Nations of New York and Ontario in the north. And the Creeks and their Muskogean-language neighbors had quite as elaborate a method of handling offenses classed as crimes as did the

¹¹Sapir: *Takelma*, p. 270.

¹²Jesuit Relations, v. 38 (1653), p. 268.

¹³Williams, *Key*, pp. 149-150. Likewise see Morton: *Canaan*, p. 157.

For long and circumstantial accounts of disputes over rank, over whether one is to have the seat at the right or the left hand of an honored guest, between chiefs of different tribes in the southeast, see Garcilasso, Part 2, Book 2, Chapter 9; and Part 2, Book 3, Chapter 18.

Iroquois-speaking peoples of the north. *Yet*: while even such an offense as adultery was a capital crime among the Creeks and their neighbors, murder was an offense of which the state took no cognizance! Moreover, among these economically and politically and juridically advanced peoples, although they were acquainted with the use of money compensation as a settlement for murder as used by their neighbors (comparable to the phenomena among the Kwaikiutl), yet money compensation was not admitted; a life had to be taken for a life. Among the Huron of the north, on the other hand, *no more advanced economically, politically, nor, on the whole, juridically, than the Creeks and their neighbors*, murder was an offense against the state. Money compensation was not only permitted—it was obligatory. Whereas among the Creeks blood revenge was noble, among the Hurons it was considered the most heinous of crimes!

How can one understand such contrasts in the light of the prevalent categories of "stages of culture" and of economic or other determinisms! Rather, I think, they must be comprehended in terms of the conceptualizations I have offered elsewhere under the subject of "disharmonious contemporary patterns."¹⁴

The Law of Murder Among the Creeks, Choctaw, and Chickasaw.

A number of considerations render it altogether likely that fundamentally and in most details the legal and penal institutions of the three above mentioned peoples were similar; however we have but little data on the Chickasaw, and inadequate data on the Creeks. I shall treat the three together, but particularize in the reference to the data.¹⁵

No money compensation for murder was conceivable.¹⁶ In the early period of American contacts with the natives just after 1800, the United States officials for long tried in vain to have these peoples adopt money settlement.¹⁷ At the great annual ceremony (the busk) of the Creeks at least, all offenses were freely forgiven—*except* murder.¹⁸ Even when the killing was accidental, even accidental killing by a child, and even constructive murder (death, for example, while serving an employer)—all had to be settled by the taking of a life

¹⁴See the section: "Disharmonious Contemporary Patterns" in my *Politics*, p. 150 seq. and compare our earlier paper, *Aspects*.

¹⁵I shall refer to the original sources through the medium of Swanton's fine compilations: *Choctaw*; *Chickasaw*, and *Creeks*.

¹⁶*Choctaw*, p. 104.

¹⁷*Choctaw*, p. 105; *Creeks*, p. 343.

¹⁸*Creeks*, p. 340.

for a life. The life required was that of the killer, of his nearest relative, or of some acceptable substitute. No extenuating circumstances were considered; no exceptions allowed.¹⁹

A mother is permitted to put to death her infant up to the end of its first month of life; after this month infanticide would be murder and she would have to die for it.²⁰ (For indirect responsibility for the death of a son a mother might be put to death by her daughter.)²¹ The aged may be clubbed to death by their relatives if they (the aged) request it; this would not be murder.²²

Special provisions apply to death occurring while out hunting far away in the woods (these peoples were settled agricultural villagers). If there should be just two persons together out hunting, for example, two men, or a man and his wife, and one should die, the survivor must carry the corpse home to the village. "Life for a life was the law,"

and every life had to be accounted for in a satisfactory manner. It would not do for a man to return home and report that his hunting companion or his wife had been lost or drowned, devoured by wild beasts, or died a natural death. He must show the body.²³

Murder is exclusively the affair of the families (matrilineal) and the exogamous clans immediately concerned; the state (the town community politically organized) has nothing officially to do with it. For the Creeks we read:

If murder is committed the family or tribe [meaning clan] alone have the right of taking satisfaction. They collect, consult, and decide. The rulers of the town or the nation, have nothing to do or say in the business. The relations of the murdered person consult first, among themselves, and if the case is clear and their family or tribe [clan] are not likely to suffer by their decision, they determine on the case definitely.

However the affair might be such as to seriously involve the entire clan beyond the immediate family and in such case and in others the family council consults with the clan council: The clan council is also consulted in "doubtful" cases, and in the case of "an old claim for satisfaction."²⁴

¹⁹MacLead: *Aspects*, for the data in comparison with the data on intent on the west coast; see also Swanton, *Creeks*, p. 343; *Choctaw*, pp. 104-106.

²⁰Milfort, in Swanton, *Creeks*, p. 345.

²¹See cases cited in references in note 19 above.

²²Also from Milfort, cited above.

²³This is cited from the Choctaw's own statement of their origin tradition; see Swanton: *Choctaw*, p. 20.

Among the Cherokee a doctor was not permitted to treat his own wife (Mooney: *Cherokee*, pp. 337-338).

²⁴Hawkins, in Swanton: *Creeks*, p. 343.

As appeared to be the case on the west coast, the relatives of the murderer do not defend him from vengeance; nor do they avenge him. His killing ends the matter.²⁵ Thus the blood feud is not continuous (as, for example, among our Kentucky mountaineers).

There is no public executioner. The execution must be done by the nearest relative of the deceased.²⁶ However, the execution was made a fairly elaborate public ceremonial, rather in accord with the general punishment pattern of the bureaucracies and in considerable contrast to the phenomena of the west coast. In law the executioner is merely the agent of the family; but with the public, formally arranged-for ceremonial execution, *functionally considered, the executioner appears much as a public executioner.*

There is no investigation nor trial proper—save for the already mentioned private discussions in the councils of the separate families or clans involved. Typically, when the facts are clear, a murderer or killer would not attempt to deny the offense nor attempt to flee. There was no arrest nor imprisonment needed. The murderer was informed by his executioners when and where to appear for execution. The date might by arrangement with him be postponed to permit him to settle his affairs—to harvest a crop, to attend a native ball game or religious ceremony. Ordinarily he would appear promptly and cooperate in his own execution. Fear of being branded a coward was a powerful force in making for this submissiveness on the part of murderers. If the murderer fled the family of his victim would require the life of his nearest relative or some other substitute formally acceptable to them. Then the fled murderer must continue to live in exile unless he should choose to return among his people and live with the brand of cowardice upon him. If he returned he was free of any liability, the offense having been settled.²⁷ (On the west coast, as we have seen, the murderer, if substituted for, had to pay the price to his own family or clan.)²⁸ Even when by about 1820 the Creeks, probably as a result of American influence, or else the influence of neighboring tribes, had adopted state intervention in murder cases, we note that

They have no trial by jury, and their judicial proceedings are exceedingly summary, *for the warriors are too proud to deny a charge lest it be construed into cowardice.* Executions sometimes take place within an hour after the commencement of trial.

²⁵Choctaw, p. 106.

²⁶Creeks, p. 342.

²⁷Choctaw, pp. 106-108.

²⁸MacLeod: *Aspects*.

For this period we are cited the case of a murderer who returned to his home village years after the murder, to pay the penalty; he had chosen to die rather than live in exile with the brand of coward.²⁹

If the criminal fled, sometimes the family of the victim might allow the family of the murderer a period of grace within which to bring the criminal to justice; the data offered on this are not clear as to whether the family of the criminal in such case might kill their own kinsman.³⁰

Anyone, kin or not (but the only cases cited are of nearest relatives), might voluntarily substitute for a murderer, but their substitution would have to be formally acceptable to the kin of the victim. The murderer is obliged to accept the offer of substitution; and once the substitute is accepted he (or she) cannot change his mind about substituting. Women may substitute for men.³¹ In one Choctaw case cited a mother substituted for her son; but the son did not escape the brand of cowardice so he slew the son of his former victim and then committed suicide (apparently by way of being his own executioner since he went through the execution formality of dying beside an open grave dug for himself). In a second case when a man appeared to be cowardly and in fear of appearing at the appointed place for his execution, his brother said to him:

"My brother, you are not a brave,—you are afraid to die—stay here and take care of my family,—I will die in your place."

An unrequited wrong is remembered down the generations, the descendant of the victim seeking revenge upon the descendant of the offender.

There is nowhere any mention of variation when the rank of the victim is different from the rank of the criminal.

The Double-Suicide Duel.

The Choctaw institution which we now have to describe is so strange that it deserves some attempt at interpretation. As I see it, it must be related to two underlying phenomena. (1) If a man kills another, he cannot escape death as a result of his murder (unless he is to accept the intolerable brand of cowardice). (2) Even if he chose to murder a person who has offended him and be executed for

²⁹Gregg, Hodgson, and Eakins, in Swanton: *Creeks*, p. 344.

³⁰*Creeks*, pp. 340-341, 343.

³¹In the Choctaw data it is stated that an avenger always takes the life of a male, not a female; perhaps this refers merely to vengeance taken upon a foreign group.

it nevertheless the method of murder has its disadvantages—because the souls of murderers cannot go to the Choctaw elysium; they must stay in a less desirable other-world place which, tantalizingly enough, has an excellent view of the happy realms.³² This fate is not interpreted by the native as punishment continued into the other world; it is apparently one of the innumerable provisions met with among primitive peoples in which variation in the manner of death results in variation in the fate of the soul. (Murderers are executed).³³

The Choctaw form of duel would achieve the result of the death of one's enemy, accompanied by one's own death, but yet at the same time it would relieve one of the undesirable social and cosmological (or religious) consequences following upon murder.

The effect of the institution of the duel was, it is reported, to decrease the tendency to commit offenses against others; it made for "good manners." The Choctaw said: "a man should never quarrel unless he is willing to be challenged to die."

If one offended another in any way the offended might decide to challenge the offender to a duel. A brave man should never be afraid to die, and so is under social compulsion to accept the challenge to *certain* death. To refuse the challenge results in the brand of cowardice, scorn by even one's own relatives and friends, "degradation and disgrace for life." On one occasion noted when a man appeared to be hesitating to accept such a challenge, his sister stepped forward and offered herself as a substitute (but was refused by the challenger).

When one Choctaw challenged another, the challenge was given verbally, face to face, the time and place designated then and there. If accepted (as it was almost certain to be) the two went to the place, each with his second.

Friends were usually chosen as seconds.

The two combatants then took their places *unarmed* about twenty feet apart, each with his second at his right side with a rifle in his hand. At a given signal each second shot the combatant standing before him (his principal). That closed the scene.

This is an amazing sort of thing. In a sense it might be interpreted from our point of view as simultaneous murder-and-execution with neither party legally a murderer but both nevertheless executed.

Duelling of our own European type as a result of a dispute over seats at table (right or left side) between visiting chiefs of foreign

³²*Choctaw*, p. 216.

³³See for example MacLeod: *Mortuary Aspects*. . . . *Northwest Coast*.

tribes is mentioned in the De Soto narrative of Garcilasso (for circa 1540) for tribes of the lower Mississippi, neighbors of the Choctaw; and the single combat before battle, a variety of duel of our own type, is widespread in North America. In the Choctaw affair there is no need to seek European influence.³⁴

We may add that the Choctaw type of duel is amazingly comparable, particularly in some of its psychological aspects, to the property-duel of the potlatch complex as evolved, probably, by the Kwakiutl of the west coast described by us in an earlier paper.³⁵

*The Huron Pattern of Prevention: the Example of the
Definition of Theft.*

The problem of murder was very differently handled among the Huron and neighboring peoples of Iroquoian language and social structure in the north, in accord with a punishment pattern which took elaborate precautions to prevent offenses. As to the precautionary technique, we have an interesting example (amid our all too scant data on the Iroquoian peoples) of how the Hurons painstakingly defined theft. A Jesuit missionary of 1653 notes:

To *avoid contest* in this matter, they have established, first, that if a thing, lost or dropped, even though it be but three paces away, be taken by anyone whatsoever, this is not theft;—that is, it is so only when an object is taken from the cabins or huts; secondly, that the one from whom anything has been stolen, on recognizing it in the hands of another, must not suddenly seize it, but must question him,—for instance, ‘Who gave you that javelin?’

The investigation of transfers of ownership must then be carried back until there is reached that person who cannot establish that he has legally acquired title to the javelin, and this person then is pronounced guilty of theft.

In this, *and in similar things*, they display great sincerity,—never naming an innocent man; while the guilty one, through his silence, confesses himself the culprit.

The Jesuit then offers an hypothetical case where an element of doubt might exist. An old woman in a corn field hangs her purse on a

³⁴*Choctaw*, pp. 108-109.

See Garcilasso, Pt. 2, B. 3, chap. 18 (Guaychoya versus Anilco) The challenge was to a duel from canoes. On Iroquois duelling or single combat, see Biard in the *Jesuit Relations* (1610), v. 1, p. 269. Garcilasso also describes a single combat, across a creek, between a native and a Spaniard.

³⁵*Aspects*.

nearby tree while she hoes the corn. A neighbor waits the opportunity to acquire the purse without being liable to a legal charge of theft. As the old lady leaves the field forgetting her purse, the neighbor rushes up right before the old lady's eyes and snatches the purse from the limb of the tree and says: "I have made a good find" and walks away with the purse.

Now, the uncertainty is, whether this woman can legitimately keep it, or whether the other has a right to despoil her. The *intentions* are obscure: for who knows whether the owner intended to return, as she said, into the field? If she did not, the purse, according to the accepted usage of the country, is accounted as abandoned, *et primo occupantis*.

The Jesuit referred the problem to a native "captain" or chief. The chief observed:

If the matter is considered with strictness, the prize is good;—at least the old woman has not the right to dispossess the other woman; but the latter, unless she wishes to be thought unmannerly, litigious, and avaricious, should give back the purse and content herself with some civility or gratuity, which the other owes her.³⁶

In such a case one could hardly imagine any west coast native being other than quite satisfied to be considered unmannerly, litigious, and avaricious; *everyone avowedly was, and had to be, to keep up with the Jones's in west coast society*. Among the Huron and Iroquois such characteristics were socially disapproved of, so the hypothetical case of the Jesuit in real life would be nearly unthinkable.

*The Huron Law of Murder, and Vengeance as the
"Blackest of Crimes."*

In the case of murder, the compensation required for the killing of a woman was one-third higher than for man:

This is partly because a woman cannot defend herself like a man; partly because they people the countries.

So far as I can learn such a provision is unique in America.

For killing an alien (presumably one of a friendly people visiting in the group), the excess liability is even greater than in the case of killing a woman: otherwise, said the Hurons:

murders would be continuous, trade would be ruined, and much war would be precipitated.

³⁶Jesuit Relations, v. 38 (1653), p. 269.

This too is, so far as I can learn, a unique provision.⁸⁷

The law of murder forbade reprisal by the relatives of the victim. If these relatives slew the murderer or any of his kin, the money obligation of the murderer's kin was of course wiped out. But more important—the avenger was accounted a murderer (!) and as such had to make money compensation to the kin of his victim. This amazing rule was devised said the Hurons:

to show *how detestable they regard vengeance*; since the blackest crimes, such as murder, appear nothing in comparison with it. . . .⁸⁸

An almost incredibly elaborate public ceremonialization attended the formal payment of the money compensation settling a murder. The narratives of the Jesuits describe it in great detail.⁸⁹ Its nature and forms were in accord with the general pattern of ceremonialization of public intercourse among the Hurons and Five Nations Iroquois.

Since all murders had to be settled with money payments, murderers among the Hurons were not executed; *murder, in other words was not a capital crime!*

However, "in former days" (sometime before 1636), a Jesuit inform us, "the murderer was subjected to what must have been almost as bad as, or worse than, death, in a public humiliation:

The dead body of his victim was stretched upon a scaffold and the murderer was compelled to remain lying under it and to receive upon himself all the putrid matter

which exuded from the corpse of his victim and so to remain until the relatives of his victim chose to exempt him from further humiliation upon payment of a price for his release."⁹⁰

The Judicial System of the Central Algonkian Peoples.

In the subsequent pages we shall describe briefly several of the aspects of the juridical organization of the Menominee, a central Algonkian people; but it must be recalled that they are representative of at least a considerable block of other Central Algonkian peoples

⁸⁷Jesuit Relations (1653), v. 38, pp. 283-284.

⁸⁸Jesuit Relations (1636), v. 10, p. 221.

⁸⁹Jesuit Relations (1636), v. 10, pp. 215-221; v. 38 (1648), pp. 273-284, p. 281.

⁹⁰Jesuit Relations (1636), v. 10, p. 221.

Materials for the penology of the New York Iroquois confederation are referred to in our bibliography. All the northern Iroquoian peoples were of similar social patterns.

the variations in whose systems we shall not have space here to survey. The Menominee social organization appears particularly to be almost completely similar to that of the Sac or Sauk, the Fox, and the Kickapoo, and to the Winnebago, a detached Siouxian tribe resident among the central Algonkian peoples and similar to them. We shall first follow our single informant's account of the Menominee system,⁴¹ and later make some interpretative observations.

The Police Organization.

Among the Menominee there was a body of police known as *mike-wuk* (singular, *mikao*); these were also sometimes called *akcita*, sometimes *minisno-wuk* (Red Ones) sometimes *nanawetau-wuk* (Braves). The duties of the police, headed by the hereditary tribal king or head-chief were (with the assistance of all other men of noteworthy bravery) to (1) police the village; (2) to take charge of ceremonies; (3) to regulate the harvesting of the wild rice, the staple food of the tribe; (4) to act as Speakers or mouthpieces, and as agents for the civil chiefs in making public announcements or speeches; and (5) to serve as go-betweens in disputes in the manner which we here describe.

An ordinary *mikao*, it seems, always served the offended party in the dispute, the claimant.

The offenders (defendants) it appears, must always have the services of a Pipeholder. The Pipeholder or *sakanahowao* (also called *manawetau okemau* (Warrior Chief), is a *mikao* or member of the police organization, but he is also chief of one of the Bear clans of the tribe—for the Menominee and their neighbors had the exogamous clan organization. The Pipeholder is attended by the chief of a second Bear clan. The Pipeholder has charge of the Peace Pipe, which was reputed to have been given to the Bear clans by the great Underground Bear God, god of the lower regions. The chief of the third Bear clan is the Red Chief (*minisno okemau*). It would seem that the Red Chief as well as the Pipeholder and his attendant was available as a Pipeholder, to serve defendants, but on this as on certain other points our informant is unfortunately vague.

The Function of the Police Go-Between in a Murder Case.

When a murder was committed among the Menominee, a continuous series of reprisals set in until one of the parties sought and

⁴¹The Menominee data is from Skinner: *Menominee*, pp. 22 seq. On the Sac and related tribes see our list of references.

obtained the services of a Pipeholder. If there were delay in getting a Pipeholder, the blood feud might result in a number of deaths. One case is mentioned where eight persons were slain on both sides in the reprisals before a Pipeholder was reached.

Normally, after killing someone, the killer will flee to his family and explain the facts to his father or other nearest relative. The nearest relative then will prepare presents of peace to be offered to the relatives of the victim and also immediately seek out a Pipeholder. Meantime the family of the victim will seek out one of the ordinary police (*mikao*) to serve as their go-between.

The Pipeholder then dons his sacred regalia as custodian of the Peace Pipe, and the ordinary police go-between puts on a necklace, symbol of office, similar to that worn by civil chiefs, but smaller.

Penological Psychology Evidenced in the Symbolism of the Symbol of Office of the Police When Serving as Go-Betweens and Judges.

This necklace embraces the most elaborate symbolism recorded for anything among the Menominee, and the symbolism exhibits something of the social psychology of the office of the wearer.

The red ribbon at the end of the pendant symbolizes *the shedding of blood*; the brooch at the end of the pendant symbolizes *the intercession of the Great Underground Bear, god of the underworld, for the murderer*; the left side of the necklace symbolizes *the sympathy of this evil god for the murderer*; he sees with the heart of the murderer.

The right side of the necklace is known as the tail of the morningstar, and signifies *that day or joy follows night and crime*; the right side of the necklace symbolizes *the goodness and purity of Matchawatuk, the Supreme Sky God, and his justice to the wronged party*; the Sky God looks into the heart of men.

Adorned with such symbols, the Pipeholder and his attendant, accompanied by the criminal as a sort of prisoner and the entire family of the criminal, proceeds to the house of the family of the victim. Here the family of the victim waits with their *mikao* as their representative.

The Negotiations.

The victim's family sits in a row around the side of the house farthest from the door, with the nearest relatives of the deceased at the end of the line, the four nearest relatives of all sitting a little

apart from the rest. When the family of the killer arrive they either sit outside or within, near the door.

The murderer, stripped naked, with his face painted black (symbol of being in the shadow of death), stands in the center of the floor between the two families. Beside him stands his brother, because, it seems, the brother is a possible substitute in case of execution.

The Pipeholder and his attendant enters and places the presents offered the victim's family in the center of the floor and lays the peace pipe on top of the pile. Then an attendant of the Pipeholder, striking flint and steel, lights the pipe (filled with tobacco). If the first spark lights it the omen is good; if not, trouble is anticipated, so everyone eyes the operation carefully. The pipe lighter hands the pipe to the Pipeholder who turns to his clients (the defendant's family) and makes a formal statement concerning the situation at hand. Then he offers the pipe to the nearest relative of the deceased and if it is accepted it then passes sunwise down the line of relatives to be smoked. If the father or other nearest living relative desires, he accepts the pipe when offered, weeping. If it is accepted, then the Pipeholder takes off his necklace of authority and puts it about the acceptor's neck with a speech of condolence and of congratulation. Then the Pipeholder turns to the murderer and tells him that he is pardoned by means of the necklace.

The nearest relative wears the sacred necklace for four days, when the servant of the Pipeholder returns to get it. Then the relative of the victim washes the black of death from the face of the murderer. But this relative of the deceased now is supposed (according to the religion of the people) to have command over the soul of the killer much as if he had taken the killer's life, for if the killer should die, this relative of the deceased can command the killer's soul, having it assist someone else on the hazardous journey to the other-world.

When the relative of the deceased thusly promptly accepts the peace pipe, it appears that no trial is held. Perhaps such prompt acceptance occurs only when the family of the victim have already been completely satisfied that the crime has not been a particularly heinous one, containing some extenuating circumstance.

Trial, Oaths, Witnesses, Prosecution and Defense, Judges and Judgment, and Execution.

If the relative of the victim refuses the pipe, the Pipeholder returns to the center of the floor, turns his back to the complainants,

facing the defendants (the entire family of the murderer are held responsible), and says to them:

You see; they have refused the pipe.

The *mikao* or go-between for the complainants then says:

What shall we do to settle all this?

The Pipeholder and the ordinary *mikao* then argue the case with each other. Each argues the case of his clients, thus serving in the capacity of prosecutor and defendant respectively. They call over and examine any witnesses they wish, swearing them in properly. They seek for possible extenuating circumstances in the killing, for it may have been in self-defense. Yet the two officers are also judges, for the verdict rests with them alone and the case is decided when they at last agree with each other.

When the decision is reached the representative of the relatives of the victim makes a speech to his clients, thus:

Now, my people, this is justice, this is right.
We will not demand the life of the murderer. He is justified. We find the quarrel was started by our friend [that is, by "our relative".] He had a bad record anyway.
Let us agree without further bloodshed.

The representative of the complainants then washes the black from the face of the murderer.

But if the verdict declared the murderer culpable, he was executed then and there by the nearest relative of the deceased.

The Go-Between: The Institutionalization of Impersonality in Negotiations.

Some note by way of interpretation and history of the Menominee and similar central Algonkian systems should now be made. Perhaps most instructive, culture-historically, is the incorporation in the Menominee system of the institution of the go-between, whereby impersonality in negotiations is obtained. I know of no note of the institution of the go-between in North America except among the anarchist peoples of the west coast.

However, elsewhere on the west coast a note of impersonality was achieved in other curious ways—sometimes. Note, first, its absence in the negotiations over blood-settlement after fighting between the Taku Tlingit and the Tahltan:

The chiefs sat down, and taking sticks, counted the number slain on each side since the war began. The chiefs sometimes brandished their knives, and several times fell near a-fighting before a satisfactory arrangement was reached.⁴²

But for the Tahltan in another connection we find impersonality achieved as follows. Among the Tahltan the exogamous clan was responsible for the act of each of its members and in the negotiations the chief of each clan, offending and offended, represented the clan. In the negotiations conducted in the house:

The chief of the aggrieved party would go *outside* and announce his position in a loud voice, *addressing no one in particular*, and when he had concluded, would reenter the lodge and remain silent.

Then the chief of the offended party would likewise state his case loudly outside to the open air, but loud enough to be heard inside. "In this manner the case was argued to a settlement."⁴³

Sapir affords a good description of the actual go-between among a southern anarchist group—the Takelma:⁴⁴

In cases of *more serious* feuds, the injured party often had recourse to the services of the so-called "go-between", who, after much persuasion and many threats of vengeance, prevailed upon the offender to pay an indemnity, the aggrieved party, to cement the new friendship, returning a nominal present.

The proceedings, in which the whole community were interested spectators was marked by a good deal of formality, the go-between, whose person was deemed inviolate, reporting the exact words of each party in the first person to the other, and being addressed accordingly; while the interested parties themselves often said hardly a word, each being represented by an "answerer".

Needless to say, the go-between was paid for his services out of the indemnity received.

He ran, rather than walked, between the two parties, and was generally accompanied by his wife and another.

Other Elements in the Central Algonkian System.

We have noted that unless and until stopped by the intervention of the Police and Piepholder, the Menominee blood feud was continuous. This is in sharp contrast to the facts for the pecuniary peoples of the west coast and likewise for all the eastern bureaucratic peo-

⁴²Teit: *Traditions*, p. 318; cited in MacLeod: *Servile Labor*, p. 102, where the facts are discussed with much comparative data.

⁴³Emmons: *Tahltan*, p. 29. (My italics.)

⁴⁴Sapir: *Takelma*, pp. 270-271.

The Pipeholder and ordinary Mikado among the Menominee also were paid by their respective clients.

ples, for among them the feud ended when the murderer was slain by the relatives of the deceased and the murderer was in no way defended from justice by his relatives. But among the northwestern Plains tribes—Assiniboin, Crow, Blackfeet, and others, according to what is perhaps our most reliable source on these peoples,⁴⁵ there was absolutely no kind of state intervention in offenses of any kind, and no other institutions to impersonalize the execution of justice; and the blood feud was continuous, the death of the murderer being avenged by his kin *and so on interminably*.

It is easy to consider this as being primordial or ultimately primitive and to begin an evolutionary outline of the development of penology with such utter uncontrol. But this subject needs further careful investigation; I think, possibly, it represents *a condition of social decay, rather than something primitive*. The tribes who exhibit the phenomenon are bureaucracies and there is good historical reason to lead one to suspect that their social systems decayed somewhat in the course of certain migrations. One might compare the phenomenon with the interminable blood feud of our White Appalachian mountaineers, whose counties are bureaucratic governments but whose social order is one of decay. However, such interminable blood feud, according to our informant, was an element in the background of the Menominee system.

Now, synthesized with the institution of the go-between and the interminable blood feud, in the Menominee system, are advanced juridical institutions, institutions whose history is readily traced. The institution of a state police is general among the peoples of the southeast (Creeks, etc.) and of the Plains. It is an institution which has diffused along with certain patterns of political organization from Central America up into North America.⁴⁶ As for the judicial functions, investigation, swearing in of witnesses, and such, such practices were very elaborately developed in the juridical systems of the Creek and Choctaw—though we have not had space to consider them here. As for the admission of extenuating circumstances in murder, notably the plea of self-defense, this is paralleled by related phenomena among southeastern peoples.

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⁴⁵Denig.

⁴⁶The police organization in North America I shall treat elsewhere.

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