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ASPECTS OF THE EARLIER DEVELOPMENT OF LAW AND PUNISHMENT

WILLIAM CHRISTIE MACLEOD¹

I.

The technique or method in the study of the phenomena and processes of social development has proceeded apace within the past two or three decades. In this development the study of the law, legal procedure, and punishment of the peoples popularly called primitive has received little or no attention.

Recently the writer attempted a reëxamination in the light of the newer methodology, of the general problem of the origin and development of political structures and political processes² and there gave some very brief mention to the problem of the law, with a view to having much more to say concerning the origin and development of law in a further volume.

The following pages here presented are intended merely as an introduction to several aspects of the general problem, embracing several illustrative case studies.

It seems to the writer that in the future the study of the origins and earlier development of the law and its enforcement must be considered with especial reference to three problems, two of them problems of interrelationships.

Traits and Systems of Law, Procedure, and Punishment

Firstly, there is the necessity of discovering the distribution in space: that is, the dispersion over the globe among various peoples, and the distribution in time: that is, of the relative antiquity of—the cultural traits which have gone into the building up of legal systems. For example, it is desirable to know the distribution of the practice of compounding for murder by payments of blood money; the distribution of one and another kind of public executioner; or, again, of the ignoring of intent in one and another class of offenses. It is out of such variously distributed elements that one and another

¹Wharton School, University of Pennsylvania.

²MacLeod: *Origin . . . Politics*, 1931.

people build their complexes of legal traits, which we know as legal systems.

Such study however informs us of little or nothing of the interrelations of the legal phenomena with the general social process.

In the latter sections of this paper we shall consider some data on the distribution of the ignoring of intent; and of the compounding for murder and other crimes.

The Problem of the Interrelationship of Political and Legal Systems

Secondly, there is the necessity of analyzing the interrelationships of the legal order and the political order, considered as structure and as process.

In *The Origin and History of Politics* I felt it necessary to throw overboard the old concept of stages of social development⁸ (in the political as well as in other spheres) and suggested the following as a tentative classification of political organizations—one which is at the same time not only genetic, but also, incidentally, racial and geographical. The earliest forms of political and quasi-political organization are the primitive or genealogical pyramid, and the gerontocracy.

The primitive or genealogical pyramidal state is formed of a simple gradation of chiefs or family heads from the lowest in the scale as the head of a single group up the pyramid to the head chief or king, who is overlord of all. This pyramid is to be distinguished from the medieval European, Japanese, and African medieval feudalisms, which were based essentially on contractual rather than kinship relationships and so may be denominated contractual pyramids. While the genealogical pyramidal state is probably one of the earliest forms of human political organization, the contractual pyramid appears to be exclusively relatively late, being everywhere the consequence of what we might call political decay, that is, of the breakdown and reconstruction on a ruder basis, of a bureaucratic state organization.

Gerontocracies are not actually states or governments; we may, to distinguish them from the anarchies, where there is an utter absence even of legal procedure, speak of them as quasi-political. Gerontocracies are characterized by the absence of political authority, that is, of chiefs proper, of officials with power to make or enforce laws; but they are also characterized by a usually elaborate develop-

⁸See Chapter 9: *Stages or Correlations in Political Development*; and Chapter 10: *Determinisms*.

ment of advisory councils of the upper age classes of the males of the community. These councils are merely community advisers; they interpret but cannot enforce the common law. Gerontocracy "it would seem, was evolved or developed by associated negroid and australoid peoples originally resident in southeastern Asia," and from there spread with these peoples westward into east and west Africa and eastward into Melanesia and Australia. It has not so far been evidenced for any peoples in the Americas.⁴

The ultimate historical (that is, genetic) relationship of the primitive pyramid state and the gerontocratic organization remains in doubt. At best we can designate them both as primordial.

Anarchy or the complete absence of any government or state is found here and there among primitive peoples. Its complete distribution remains to be worked out. It was characteristic of the native Indian tribes of the northwestern coast of the United States including the northwest section of California, and is typical of some regions in the Philippines,⁵ in New Guinea,⁶ and in Melanesia. Tentatively we consider anarchy not to be the survival of a primordial social pattern, but rather as the consequence of political decay, as the end result of the gradual disappearance of gerontocracy or other political or quasi-political form.⁷

The earliest fundamental change from primordial pyramidal states or quasi-political gerontocracies took place when, probably in the valley of the Nile, long before 4000 B. C. the first bureaucratic state was developed by the founders of the Archaic Civilization, which soon after the date mentioned was dominant in the valleys of the Nile, the Tigris and Euphrates, and the Indus, and which, by about 2500 B. C. was spreading down the Wei river branch of the Yellow river, creating the great Chinese civilization. The writer is in agreement, fundamentally, with Smith and Perry, the culture historians of the University of London, in opposition to most or all ethnologists in the United States, in considering the present available data on culture history to indicate overwhelmingly the probability that all bureaucratic states in human society have existed by virtue of the diffusion through migration and limitation of a single origination of bureau-

⁴On gerontocracy see my article on the same in the *Social Science Encyclopedia*, in addition to the study and exemplification in *The Origin and History of Politics*.

⁵Barton: *Ifugao*; and see Kroeber: *Philippines*.

⁶Mead: *Growing Up in New Guinea*; and Fortune: *Sorcerers*.

⁷On the problem of the relative antiquity of gerontocracy and anarchy see my *Origin*, 1931, pp. 80-89.

crazy developed within the earliest range of the Archaic Civilization in the valleys above named, the valley of the Nile being probably the ultimate source of the origination, even of the bureaucratic states of the Americas, including the remarkable organizations of the Chimú of the coast of Peru, of the Incas of the highlands of Peru, of the Chibchas of Colombia, and of the Mayas and Aztecs of Mexico.⁸

This interpretation of the origin and spread of the bureaucratic state involves serious consideration of the concept of the "degradation of culture."

A people of crude economy on the margins of an advanced civilization will tend to set up relatively crude imitations of the institutions of their more highly civilized neighbors; and cruder peoples beyond them will tend to set up even cruder imitations of the imitations. Thus, to mention some from the field of architecture, for example—the "mounds" or earth pyramids of the Indian tribes of southeastern North America and of the Ohio Valley are in all probability ultimately imitations of the magnificent cut-stone pyramids of the Mayas and Aztecs, derived by way of imitations passing northward from people to people finally reaching crude tribes whose economy was so crude that the building of cut-stone pyramids was quite impossible for them.

From this point of view, it becomes quite likely that the bureaucratic state organized by, for example, the Iroquois tribes of northeastern North America (made famous in social history by Morgan's "Ancient Society") *did not themselves originate or develop their complex bureaucratic institutions*; rather these institutions have been diffused to them ultimately from the range of central American culture.

*To the student of the development of law, procedure, and punishment it is of fundamental necessity to inquire into whether or not the legal institutions of the peoples he is considering represent institutions which they may be considered to have developed or whether these institutions represent "degraded" imitations of the institutions of more highly civilized people.*⁹ The institutions of the public defender, and of the public executioner, are important in the legal and

⁸On further development of states classification see my article *Conquest*.

⁹On the origin of bureaucracies and Perry's theories, and examples of "degradation of culture" see my *Origin*, 1931; and my two papers on the southeast Asiatic origin of central American culture, and the Central American origins of Northwest coast culture. On the Iroquois's state in the light of new interpretation see Chapter 8 of my *Politics* and Chapter 19 of my *Indian Frontier*.

enforcement systems of the range of the culture of the mound-building peoples of North America. One must ask if these are indigenously developed or if they are radiations of institutions of the advanced civilizations of the Mayas, into a frontier, "backwoods" or culturally marginal area. Studies of the origin and development of law have so far ignored such problems.

*The Problems of the Interrelationship of the Legal System
and the Psychological Set of the Culture*

Thirdly, there is the necessity of studying the development of legal systems from the point of view of the psychology of the peoples or culture under consideration: of its interrelationship with what Dr. Benedict has called the "configuration of the culture,"—a term which I think would best be supplanted by the use of "the psychological set" of the culture, used to mean the same thing.

In several papers by American ethnologists published very recently there has been a beginning of a new definition of cultures in terms of the psychological set of the culture, and of the influence of this set on the integration and interpretation of the elements of their culture by the people themselves.¹⁰ Dr. Ruth Benedict's most recent paper on this subject is of particular importance in the development of the necessary definition of the new approach being developed. Dr. Benedict's inspiration as regards theory or interpretation springs from the theoretical work of the German school headed by Wilhelm Dilthey which also includes Spengler and Spranger; but her analyses nevertheless are novel departures and she subjects the German work to incisive criticism.¹¹

Two cultures may have fundamentally and in detail similar patterns of political, legal, and other social institutions, and yet be noteworthy contrastable as of different psychological sets or types. Dr. Benedict, for example, has contrasted the two contrasting sets or configurations of culture in the arid southwestern United States, the culture of the Pueblo Indians and the culture of the surrounding peoples not resident in pueblos: "I have called the ethos of the Pueblos appolonian in Nietzsche's sense of the cultural pursuit of sobriety, of measure, of the distrust of excess and orgy." "On the other hand,

¹⁰Benedict: *Configurations*, 1932; Benedict: *Psychological types*, 1928; Bunzel: *Social forces*, 1928; Mead: *Individual in Samoan culture*, 1928 (in addition to the two books cited); MacLeod: *Pecuniary culture*, 1926.

¹¹Benedict, 1932; and see p. 24 for criticisms of Durkheim, Levy-Brühl, and Frazer.

Nietzsche's contrasted type, the dionysian, is abundantly illustrated in all the surrounding southwestern cultures. It values excess as escape to an order of existence beyond that of the five senses, and finds its expression in the creation in culture of painful and dangerous experiences, and in the cultivation of emotional and psychic excesses, in dreams, and in trance." The culture of the southwestern Pueblos . . . is a thoroughgoing, institutionalized elaboration of the theme of sobriety and restraint in behavior. . . . It hates disruptive impulses in the individual. . . . Among these disruptive impulses the Pueblo *ethos* counts . . . the will to power. Just as surely as it has acted to obliterate self-torture, it has acted to obliterate the human impulse toward the exercise of authority. Their ideal man avoids authority in the home or in public office. . . . Sanction for all acts comes from the formal structure, not from the individual. . . . The whole interest of the culture is directed toward providing for every situation sets of rules and practices by means of which one gets by without resort to the violence and disruption which this culture distrusts. . . ."

From a study of the contrasts of the dionysian and the apollonian in the southwest Dr. Benedict generalizes: "Traits objectively similar or genetically allied may be utilized in different configurations of culture, it may be, without change of detail. The relevant facts are the emotional background against which the act takes place in the two cultures. . . ." But more usually "the trait is reworked to express the different emotional patterning of the culture which adopted it." Configurations of culture build around certain human traits or psychological drives and work to the obliteration of others, and thus determine differential selections and emphases as regards elements of culture.¹²

The Psychological Set of the Culture of Northwestern North America

In a recent paper¹³ I characterized the set or configuration of culture among the primitive peoples of the northwestern coast of North America as pecuniary. All aspects of living are dominated by pecuniary concepts; all revolve around money and relative wealth. I was there interested largely in certain aspects of economic origins.

¹²Benedict, 1932, pp. 5-7; and see also Bunzel for the southwest.

¹³MacLeod: *Pecuniary culture*.

Miss Benedict has recently characterized this pecuniary culture as paranoid, her interest being in the psychological drives dominant, an interest perhaps closer to the problem of crime and punishment.

In contrast to the Pueblo culture, this culture of the remoter northwestern coast is a culture in which the pursuit of personal aggrandizement is encouraged by all the emphases of the culture. This pursuit concerns itself with, chiefly, the acquisition and display of property.

Our own modern American variety of contemporary West European culture may be held to display this characteristic. To a considerable extent the observation of Godwin made a century ago that among us "Wealth is acquired in overreaching our neighbor, and spent in insulting him," is valid. But the sly insults involved among us in the process of "overreaching Smith to keep up with the Joneses" cannot compare with the heights reached on the aboriginal Northwest Coast.

The complex of social relationships there Miss Benedict aptly describes as an "insult complex." "The pursuit of personal aggrandizement is carried out in such a way that it approaches the institutionalization of the megalomaniac personality type." There is no censorship, as among us, upon open insults in public, self-glorification in address, notably in the potlatch or contests in public property display. Other native peoples in North America had large numbers of secular songs dealing with the sort of things our songs and poems deal with, and oratory was a fine social art. But on the Northwest Coast secular songs, and even religious songs, and public speeches, reeked with open boasting of one's wealth and open insult of a poorer rival. In their potlatch speeches rich men or chiefs, speaking through their speakers, with gargantuan figures of speech boast of how much greater their wealth is than that of their personal rival or rivals, and, insulting them in public, put them to shame, to humiliate them. The poorer rich man bears his shame hoping some day to be able to show himself richer than his social rival. "The energy of the culture is frankly given to competition in a game of raising one's personal status and of entrenching oneself by the humiliation of one's fellows. "Probably the inferiority complex has never been so blatantly institutionalized." "All the circumstances of life are regarded, not as occasions for violent grief or equally violent jubilation, as occasions for freely expending energy in differentiated ways, but rather, primarily, all of them alike, as furthering this insult complex. . . .

They are occasions for the required fight for prestige." "The greatest range of acts are regarded as insults, not only personal derogatory acts, but all impersonal untoward events like the accidental cut of an axe or the accidental overturning of a canoe," since all such events threaten the ego security of the victim in this civilization of the paranoid.

In the culture of the Indians of the Plains and the Great Lakes region, again unlike the Pueblos, the pursuit of personal aggrandizement was encouraged. The individual there "is allowed institutionally guaranteed initiative in his life such as one cannot easily duplicate from other regions . . . There was a high cultural evaluation of the individual." But in contrast to the pursuit on the northwest coast, an individual in the Plains achieved most through the rendering of voluntary services to the community in defense, revenge, contributions of his wealth to the expenses of the state, actual giving to the poor, and in rendering ritual services. There was altogether no capitalization of the inferiority complex; no social paranoia.¹⁴

Aside for the native cultures of America, we have for Polynesia and Melanesia psychological analyses by Dr. Margaret Mead of the cultures of Samoa and of Dobu on the coast of New Guinea.¹⁵ Samoan culture is more nearly comparable to that of the Pueblos in its suppression of individuality; Dobu culture is more comparable to that of Northwest California in its anarchy and its emphases on pecuniary aspects of life.

It must be plain now that *a psychological set or configuration of culture will select, remodel, or emphasize traits of law, procedure, and punishment in a fashion peculiar to itself.* Note, for example, that the psychological type of individual who would be most likely to achieve fame on the Northwest Coast would be most likely to meet punishment in the Plains or in the Pueblos. The person of generous impulses who in the Plains would achieve note, on the other hand, would in the northwest, be a complete misfit in that culture dominated by the setting of group paranoia.

II.

The very general suggestions made above must not lead to the idea that the working out of the history of law and punishment will be a simple problem with social-scientific generalizations easily at-

¹⁴Benedict, 1932, pp. 18-19, 23.

¹⁵Mead—articles and books cited; and on Dobu see also Fortune.

tained. Almost nothing has as yet been done towards the working out of the distribution of elements and complexes in the field of law other than for European and Asiatic nations of advanced civilization; almost nothing has been done towards the solution of the underlying problems of political development; and social psychology is still in its earliest infancy. We must observe, furthermore, that the so-called primitive cultures are in form and process infinitely more complex than is generally thought. Therefore, rather than proceed in this preliminary paper by further outlining the problem with notes on method, I should like to exhibit briefly several case studies to illustrate for the reader the nature of the materials involved, while at the same time, I trust, contributing a mite to the solution of some of the problems raised. This being the case, rather than wander afield, I shall take materials mostly from the range of but one of the types of culture mentioned above, the pecuniary or paranoid culture of the northwest coast of North America.

Sub-Areas of the Northwest Coast Culture

This culture is uniform in so many aspects of its psychological set, economics, and social institutions that it does stand as rather clearly set off from other cultures in North America. This being the fact, it is important to note that on the other hand there are important and striking differences in the culture of the peoples within its range, and that sub-cultures are¹ distinguishable.

From and including northwestern California to the Columbia river was the region of anarchy.¹⁶ Here we note the absence of the exogamous clan, or rank and its associated heraldry, of formally organized war parties. Despite the absence of government, of chiefs with power to enforce law, of law-making bodies, even of councils to interpret or arbitrate, there was however throughout the whole region a fairly well defined body of common "law," constituted of understandings as to what was just and proper or equitable as between individuals and an understanding as to what were the proper damages in the case of one and another injury to one or another person or his property. There were no chattel slaves, but there were debtor servants; who were persons too poor to pay damages for which they were liable, who had chosen to work out the amount of the damages. Blood-money varied in amount with the social stand-

¹⁶On which see MacLeod: *Politics*, 1932, pp. 24-30, 86-87; and MacLeod: *Pecuniary*.

ing of the slain individual, this social standing being his money rating. Among the Yurok and some of their neighbors *the blood money demanded would be equivalent to the amount of the bride price of the slain person's mother*; among other tribes this would be weighed in connection with his own financial standing.

Among the tribes of Puget Sound and northward to include the Kwakiutl and the tribes of Vancouver Island the genealogical pyramid form of the state existed. Chattel slavery was important in the economic order. Social castes were rigid, with hereditary rank, which rank however had to be supported by displays of superior wealth. The chiefs of the political order had practically no functions with regard to law and punishment. The Kwakiutl, perhaps the most interesting and significant of the peoples of this region, were the center of the development of an elaborate development of secret societies and society religious ceremonials.

North of the Kwakiutl were the Tsimshian, Tlingit, and Haida.¹⁷ Their rudimentary political organization was, like that of the peoples below, a genealogical pyramid. They differ from the peoples to the south in that their social organization was matrilineal and based on the exogamous clan. The presence of the clan is very significant, as we shall point out, for the subject of punishment.

*The Irrelevancy of Intent, Offense by Indirection and
Construction, and the Liability of Agents*

One trait however appears to have been typical of the law all along the coast—intent was not considered relevant in the question of the penalty for an offense committed.¹⁸ This principle appears to be bound up with the further practice in which a person only indirectly responsible for the damage was held fully responsible for it. Owners of carriers, for example, were held responsible for damage incurred by passengers. Several examples will illustrate.

Among the anarchic Yurok of Northwest California a peculiar rule of the common law is mentioned by Kroeber, with some resulting features:

“Free ferriage must at all times be rendered. At least in theory it is extended even to those who, because boatless or in chronic poverty, cannot reciprocate. The underlying assumption of this appears to be that

¹⁷On the Kwakiutl see MacLeod: *Politics*, Chapter 7. On the Tlingit and their neighbors see MacLeod: *Northwest coast and Algonkian social organization*.

¹⁸Kroeber *Handbook*, pp. 51-57; Harrison, p. 73.

ferrige is a primal necessity to which everyone is at times subject and which everyone is at times in position to relieve.¹⁹ The traveller accordingly has much the status which a guest enjoys as regards food, but his claims are crystallized into a definite privilege.

The Yurok and their neighbors extended the right also to Americans resident among them, charging ferrige only to transient voyagers.

In the old days, even an enemy with whom one did not speak had to be taken as a passenger. Such a man on arriving opposite a village shouted. If no one were about but the one who bore him a grudge, the latter nevertheless paddled over.

The traveller sat in the boat with his back to the steersman, keeping silence."

For a refusal of ferrige, damages were claimable by the refused.

If a traveler found a settlement deserted he was privileged to use one of its boats without liability for payment and without obligation for having left it on the opposite side of the stream.

In view of these facts therefore it is amazing to find that:

The carrier being his passenger's agent, the latter becomes liable for any injury to him.

But on the other hand the passenger becomes liable for any loss incurred by the carrier due to his being occupied as carrier. One man, while being away from his home to ferry across a traveler, returned to find his house afire and burning down. For the loss of the house the passenger was liable, since the owner, had he not been occupied in the interest of the traveler, could presumably have been able to prevent the fire.

For the Yurok there is another interesting case where a poor man accidentally caused damage by fire to a rich man's property. Being too poor to pay the required damages, he became a debtor-servant to the other to work out the amount of the damages.²⁰

Among the Haida far to the north on the coast we read that if a passenger fall out of a canoe and drown, the owner of the canoe is liable for the blood-settlement.²¹

In 1878 the sealing schooner *San Diego* shipped six Sitka Tlingits for a voyage; five of these fell from a boat and drowned. The relatives of the drowned men demanded the full blood-money for them. Refused, the result was very nearly a war between the Indians and the Whites.

¹⁹This interpretation must be considered very tentative.

²⁰Kroeber *Handbook*, pp. 35.

²¹Harrison, p. 73.

Among the Sitka Tlingit a drunken Indian once broke into a White miner's cabin during his absence and emptied a demijohn of whiskey, dying in consequence of his spree. The dead individual's relatives exacted compensation for the death from the miner.

For Sitka there is also mentioned an instance where, among the Indians themselves there was a case of accidental killing. The American official there told the natives responsible that since the killing was accidental they need suffer no penalty; nevertheless they insisted on paying the blood money to the relatives of the deceased.

And again for Sitka there is mentioned a case where a Sitka Indian attended a dance festival given by a Hoonah Tlingit. He caught cold at the dance and died soon after. His brother demanded blood-money from the Hoonah who gave the dance and tried to have the local American official assist him in its collection.²²

Among the Klamath of northern California we read that "Even constructive adultery, such as accidentally touching another man's wife, was heavily fined."²³

Similar Rules of Law in the Southeastern Culture

This question of intent is so significant in primitive law that we shall leave the northwestern culture for a moment to examine the same subject for another North American culture where the same rule of law prevailed—the southeast woodlands of North America.

Data is available, to my knowledge, only for the Choctaw and the Creek confederacies. Among them the absence of criminal intent did not mitigate punishment; and indirect responsibility was as heavily punished as direct. There was even constructive adultery, as we noted above, among the Klamath—for among the Creeks²⁴ it was formerly reckoned adultery if a man took a pitcher of water off a married woman's head and drank it. But this law said, if he were a few steps apart, and she at his request set it down and retired a little way off, he might then drink without exposing her to any danger. The punishment for adultery fell heaviest among these people on the woman, and the punishment was most terrible. Moreover, adultery was one of the crimes in the southeast in which the state intervened, an elaborate procedure of investigation and trial was instituted, and public ceremonialization accompanied the infliction of the punishment.

²²Knapp and Childe, pp. 51-57.

²³Spier, p. 286.

²⁴Swanton: *Creeks*, p. 349.

One case evidences the liability of owners of things and recalls the data on the liability of the owners of carriers in the northwest:

If an unruly horse belonging to a White man should chance to be tied at a trading house and kill one of the Indians, either the owner of the house, or the person who tied the beast there, is responsible for it, by their *lex talionis*.

And from another source we note:

Even accidents are frequently made a matter of atonement, as, for instance, to be on business for another person and be killed by their horse the employer or one of his brothers or cousins must atone with his life for the death; for this reason, they say that had it not been for him and his business the death would not have happened.²⁵

Still another source illustrates a third aspect or rule. A case is given where a mother chided her son. He committed suicide. "His sister, as his nearest relation" felt duty bound to avenge his life. His mother was held liable for having caused his death; she expressed her willingness to make atonement and prepared herself to die. The daughter then shot the mother.²⁶

We may note here at this point, that among the Creeks and Choctaw, in contradistinction it appears, to some other peoples of the southeast, there was no money atonement for murder actual or constructive; life had to be given for life.

A case of accidental killing is noted: Boys were throwing stones with slings. One boy accidentally hit another and killed him. "The family of the deceased were taking the two boys and were preparing to bury them in the same grave. The uncles, who have a right to decide in such cases, were sent for . . ." A chief intervened at this point and persuaded the relatives involved not to take the life of the innocent boy. It is quite apparent here that the chief was under the influence of the Whites in his conception of "justice" and the failure to take the life of the accidental killer was an exceptional event. In the year 1840 we read of the Creeks that: "Their laws, in cases of accidental homicide, are still more barbarously rigid than those of other nations." In addition to the above we are afforded for the Creeks two other examples of life taken for life as the result of an accidental killing.²⁷

²⁵Adair, and Stiggins, in Swanton: *Creeks*, pp. 339, 341.

²⁶Roman, in Swanton: *Choctaw*, pp. 104-105.

²⁷In Swanton: *Creeks*, pp. 342, 344; 339 (Adair), 341 (Stiggins).

The above data is mostly on the Creeks, with only the Roman citation for the Choctaw. In a future paper we shall consider the question of distinctions, if any, between the law and procedure of the two peoples.

*The Effect of the Exogamous Clan and Rank on the
Problems of Punishment*

Returning to the data of the northwest coast we may now consider how the existence of the exogamous clan affects responsibility and punishment. We may explain regarding the clan, that the members of a clan are by no means for the most part relatives nor do they so consider themselves except in a mystical sense, as when members of secret fraternities among us address themselves as brothers. (I am speaking here specifically of the clan of the northwest coast, although the same is true of the clans of most peoples.) The clans of the three northerly coast peoples were divided into many branches scattered through the different villages, local groups, or tribes of each people. A branch of clan X, for example, might be found in the Yakutat villages at the northern end of the Tlingit country, and another branch of the same clan some two hundred miles south in some other Tlingit group; yet the two widely separated branches nevertheless shared together all the privileges and responsibilities of clansmen of the same clan.

The situation is almost exactly comparable to the facts concerning the several hundred exogamous clans into which the modern Chinese people are divided.²⁸ And on the other hand there was absolutely nothing in any way comparable among any of the peoples southward on the coast down into California.

So, whereas among the more southerly coast peoples a man's relatively small circle of immediate relatives on both the mothers' and fathers' sides would be held responsible for his crimes if the penalty could not be imposed on him (for example, if he fled), on the northern coast where the exogamous clan existed, the responsibility rested only on relatives and clansmen on the mother's side (these peoples being matrilineal) and, moreover, on the entire body of the clan however far dispersed geographically.

Moreover this widely spread responsibility of the clan was international (intertribal). The terms Tlingit, Tsimshian, and Haida are merely indicative of language. There was, for example, no Tlingit tribe or nation; there were many Tlingit tribes or local groups politically organized in village states, organized on the primitive feudal or pyramidal pattern.

Among the northern clan peoples it appears that any offense

²⁸On the Chinese clan and its organization see MacLeod *Politics*.

might be settled by the payment of money damages.²⁹ In the case of murder, however (including accidental killing), there was no social or legal obligation on the part of the relatives or clansman of the deceased to accept money satisfaction; they might require life for life, and would be likely to demand a life if there was any general bad feeling between the groups involved or if emotions were running high.³⁰

We have an example of a case where a member of the branch of the Klokwonton clan of Sitka Tlingit visited relatives resident among the Hoonah Tlingit. There, through accident, he killed a member of the Dokdonton clan. The Dokdonton's demanded compensation from the Sitka Klokwonton. The American governor at Sitka informed the Klokwontons that they should not pay, inasmuch as the death was accidental. But these clansmen insisted that they must pay; *for if they did not, some other branch of the Klokwonton clan would*, and they of Sitka would be put to shame before the eyes of other Tlingits. The equivalent in native blanket currency of \$1000 was paid for the life.³¹

Now we consider a typical situation where the relatives and clansmen of the deceased demand a life for the life, refusing money compensation. We must presume in this case that the killer was of rank equal with his victim. As is usual (but not universal) among North American peoples, the criminal does not deny his guilt and the crime needs no investigation nor the criminal any trial, nor does the criminal flee. In the case cited we also note the typical fact—that the native offender refuses the protection of the White authorities of the frontier.³²

In Sitka in 1891 a Tlingit killed a man while defending a friend in a quarrel. The "friends" (clansmen undoubtedly) of the slain man demanded the life of Katchkahook, the killer. The slayer refused to plead self-defense to the American authorities and so save his life; "If Goolzuc demands my life he shall have it." Goolzuc was, presumably, the nearest relative of the deceased. So:³³

At one o'clock that afternoon in presence of the whole town he

²⁹Knapp and Childe, p. 50; Jones, p. 95.

³⁰Knapp and Childe, p. 50.

³¹Knapp and Childe, pp. 51-52; here is described the very curious ceremony of interclan visiting for ceremonial payment of the damages and the ending of the incipient feud.

³²On native-frontier contacts see the sections on "*Crime and Punishment*," pp. 372 seq., and *Encroachments on Indian Sovereignty*, pp. 535 seq. in my *American Indian Frontier*.

³³Knapp and Childe, pp. 48-49.

bounded lightly down the steps leading from his home to the beach, turned abruptly and found Goolzuc, who raised his gun and shot him in the heart.

This terminated the blood feud.

Where the rank of the victim and the murderer are not equal a more complicated situation exists. Normally in such case the clan of the killer is required to surrender for execution by the relatives of the deceased someone of their number equivalent in rank to the deceased instead of the actual murderer. The liability for crime is the clan's rather than the murderer's. A procedure in such case is described by Swanton:

If a man were killed and the murderer escaped into his own house, the people of the murdered man held a council, and if they thought that he were not of high enough caste to make up for the dead person they went and called out the name of one belonging to the same clan who answered the requirements. This person then had to put on his best clothing and run out to be killed, though before dying he would try to stab one of his would-be slayers.

After that, the actual murderer was punished by his friends by being compelled to pay a great deal of property.³⁴

The attempt to stab one of the executioners and the consequences in case the attempt succeeds are left unexplained. The curious procedure of running out to execution recalls the above incident and is worth note. The money penalty of the actual murderer to his own clan is also of interest.

Knapp³⁵ describes with more detail and some variation, a Sitka Tlingit situation. The choice of the victim is indicated:

Custom gave the friends of the fallen the right to demand blood-atonement. If the murderer were of equal rank with his victim, justice was satisfied. If not, the atonement demanded a substitute, one of higher rank, who should voluntarily sacrifice himself for the honor of his family. Blood for blood; rank for rank—thus ran the stern Tlingit code.

Strange to say, this willing victim was seldom wanting. A natural spirit of bravado; the savage's easy nonchalance in regard to life and death, the certain eclat surrounding the martyr; the compliment of being considered more worthy than another—all contributed to produce the ready response.

The chief of the murderer's clan summoned his people together, told the story of the crime, and, in a loud voice, cried, "Who will pay our debt? Who is ready to die?" A moment of awful silence. Swift

³⁴Swanton: *Tlingit*, p. 449. The murderer I presume, paid for the life substituted for his.

³⁵Knapp and Childe, pp. 46-47.

searching glances swept the room. Suddenly as if by tacit consent the eyes of all fixed upon one man. The people had chosen their deliverer.

Without a moment's hesitation the man sprang to his feet, threw open the door, and bounded upon the beach, crying in a loud firm voice: "I am ready to die; ready to die." After him followed his friends taking up the refrain and chanting low and mournfully "O-o-o-o-o-o-o-a-haa-ha-a-ich-klu-kuk-ich-klu-kuk, O-o-o-a-ha-a-ha-a; Ready to die, ready to die."

On the beach he paused, turned, and erect and unflinching courted a martyr's death. In that long line of faces he saw no pity, only stern determination. He fell, pierced to the heart by the bullet of the executioner.

Apparently sometimes several commoner's deaths would be considered equivalent to one nobleman's. At Chilkat in 1891 a Tlingit woman was slain by a man. She was of higher rank than her murderer so her people demanded the lives of two innocent women of the killer's clan, women who had not even been near the scene of the crime. However, missionaries induced the relatives to accept money compensation and the equivalent of \$1500 was paid in native money. Besides, the clansmen of the murderer were obliged to give a feast to those of the victim. In this festival

The murderer and his best friends were obliged to dance as women and to dance with the women in token that their hearts were as gentle as those of their (female) companions.³⁶

Compensation for Murder Habitually Refused; and the Peculiar Property Duel Among the Kwakiutl and Their Neighbors

The Kwakiutl offer an interesting phenomenon in the high ceremonial development and elaborate procedure of their formal competitive displays of wealth called by us "potlatches." In a potlatch a man appears to be giving away his property; actually he is giving it to persons who are obligated socially to return him more than the equivalent. The procedure is a means of displaying his wealth and exhibiting it as being greater than someone else's. Sometimes, to show that he is so rich that he can afford to disdain wealth, he will destroy some.³⁷

The potlatch complex appears to have deeply affected Kwakiutl notions of punishment. I know of no reference at all to any money compensations for any offenses among the Kwakiutl. We are told

³⁶Knapp and Childe, p. 49.

³⁷See my article: *Primitive Clearing House*. The citations are from family histories in Boas *Kwakiutl*, v. 2, pp. 1361-1362.

that they were acquainted with the idea of money compensation used by their neighbors in the case of murder, but that among the Kwakiutl if a man paid blood money to avoid retaliation for a murder his *numaym* (a wide circle of relatives on both father's and mother's side) would be disgraced. "Therefore when a man kills his fellow-man he does not often pay for it for he thinks that when he gets a child the child will be disgraced if he has paid off in order not to be killed, and only those pay who are weakminded."

Moreover, although among the Salish peoples just below the Kwakiutl a class of assassins or professional killers existed who were feared by all because of the supposed possession of certain spiritual powers, and were hired by chiefs as revengers, among the Kwakiutl it was also considered a great disgrace to one's *numaym* for any member of it to pay anyone for killing somebody. The case given is one in which blood vengeance was taken by a man of one *numaym* for the death of a man of another and in token of appreciation the chieftainess of the revenged *numaym* paid the avenger a handsome sum. This disgraced her *numaym*. Professional assassins did not exist among the Kwakiutl.

How did the Kwakiutl exact compensation for offenses other than murder? Many, and I presume all, were settled in the property contest! The only parallel to this I am acquainted with is a sort of double suicide of persons who hate each other which exists as a formal institution in eastern North America. The property-contest complex permits that when one has been offended in some way by another, in any way which affects one's prestige, the offended person may publicly destroy an amount of his own property, greater according as the offense—a great deal, for example, if a son has been struck. The offender then is under social compulsion to destroy more than this amount. This contest of destruction continues until one or the other party wishes to stop.

It was the Kwakiutl who elaborated the potlatch, so presumably where we find like usage among the surrounding tribes who had borrowed much of the Kwakiutl potlatch procedure such usage may be ascribed to imitation of the Kwakiutl.

Some illustrations may be to the point. Jones writes of the Tlingit:

Two women were quarrelling. In a rage one of them said to the other: "I'll shut you up!" And with that she rushed into her house, came out with both hands full of silver money and scattered it to the

crowd which was watching the proceedings. This did shut the mouth of her opponent, *since she could not do likewise.*

A man in an altercation shoved a chief's wife and she fell. The chief owned a number of slaves. As soon as the wronged woman informed her husband, he sought revenge *by heaping a greater share* upon the man who gave the insult, accomplishing it by making a public sacrifice of some of his slaves. As the man who offered the "insult" had no slaves to sacrifice, he was thus put to everlasting shame.

This man had "*nothing to destroy in order to get even.*"⁸⁸

*The Professional Assassin as Executioner and as Exempt From
Punishment Himself Among the Columbia and
Puget Sound Peoples*

Among the peoples south of the Kwakiutl down to and including the Chinook of the Columbia river we find a further distinctively regional feature of their law and punishment complex—the existence and use of a class of professional assassins. Their existence must be understood at least in part through inquiry into the nature of certain religious beliefs.

Among the Chinook, boys at the beginning of adolescence retired to the woods, fasted, and sought a vision. In the vision a supernatural being might appear; this being would be their guardian spirit through the rest of their lives bestowing upon them particular spiritual or psychical powers. The acquisition of certain especial supernatural beings as guardians would qualify one to practice as a shaman (doctor). The acquisition of certain others, those which endow one with (in the native opinion) invulnerability would enable one to become a professional assassin (*itohuihl*). The *itohuihl*:

were men who in their visions had received *yuhlmah* (spiritual power) which gave them invulnerability and hence the privilege to kill or commit lesser crime. Inasmuch as it was their medicine [*yuhlmah* or spiritual power] which permitted these men to do evil, the people were in terror of them and usually submitted to their outrages.

Inasmuch as they were invulnerable there was no use trying to kill them.

Elsewhere our informant on this, Curtis, discusses the crime of adultery. In the case of a culprit of a rich family, money damages

⁸⁸Jones, p. 95. (My italics.) Curiously enough I find no illustration exactly of this usage anywhere else although there is abundant example of the destruction of goods to save face as a result of shame brought upon oneself by oneself, but from our knowledge of the history of northwest coast culture there can be no reasonable doubt that the practice as described above for the Tlingit originated among the Kwakiutl and spread north to the Tlingit through the Tsimshian or Haida.

are taken by the woman's husband. But if the offender is a poor man money damages adequate to the offense may not be collectible, and then the father of the wronged husband may complain to the village headman. *The chief or headman will then give the petitioner the right to have the offender slain by an itohuihl.* Curtis continues:

Itohuihl are men of bold, reckless spirit, made so by their medicine, which was especially for fighting, *some of whom served the public as professional assassins for hire.*³⁹

Serving as assassins, the *itohuihl* are then referred to as *idiahipshulit*—"He-Kills-In-Secret." Hired as such, the killer lies in wait for his victim armed with a heavy whalebone club, ready to strike the victim a fatal blow over the head. Apparently, however, it was sometimes necessary to kill the victim openly.

Among the neighboring Salish tribes of the lower Frazier river and the coast above and on Vancouver island (the Cowichan tribes), the professional assassin is known as *tselishum*, or, *stamish*. Curtis writes of three chiefs of different villages who were such.⁴⁰ These men

frequently ran amuck, and in their madness recognized no difference between alien and tribesmen. No one was ever quite safe in the presence of such a man.

At times after running amuck it was said such men sometimes expressed regrets, saying:

I am very sorry for what I have done in killing my friends. When I become mad I do not know what I do. I kill my friends and I am very sorry.

Useful as the ordinary assassin was for serving as death-dealer to offenders, it appears that the public did not enjoy having them. Two Chinook tales tell of two *itohuihl* who lost their invulnerability and were then immediately slain. In the case of the *itohuihl* Kihlktagwah, his own son discovered what his father's supernatural power was, and so was able to kill him. In the case of the *itohuihl* Tamkesa ("Never Smiles"), his supernatural power, it was known, required that he never smile. By smiling he would lose his supernatural power. He was at last seen to smile, and immediately the men around fell on him and killed him.⁴¹ Never-Smiles, like Tsohelim, one of the three village chief assassins mentioned above, made it a practice to demand the women of ordinary men.

³⁹Curtis: *Chinook*, pp. 89, 100 (my italics).

⁴⁰Curtis: *Cowichan*, p. 35.

⁴¹Curtis: *Chinook*, pp. 149-153.

I know of the use of professional assassins elsewhere in primitive culture only in Melanesian culture in the South Seas. My study of the phenomenon there leads me to consider it quite possible that the phenomenon there and on the northwest coast are ultimately of common genesis. The demonstration of this probability however would consume too much space here.

South of the Chinook of the Columbia river we enter the region of anarchy. Here the professional assassin does not appear.

CONCLUDING

Note on the Relative Primitiveness of the Northwest Peoples

The above by no means even begins to exhaust the various aspects of law, crime, procedure, and punishment in the pecuniary culture of the northwest. In a future paper in this journal we shall describe others, and proceed to a discussion of the very different complexes found associated with bureaucratic states in other North America, where for the Hurons and Iroquois, the peoples of the old Mound-building area, and the southeast, we find amazing facts concerning public defenders, formal trials, the swearing-in of witnesses, public executioners, elaborate and intricate measures taken to prevent as well as to punish crime, and an elaborate public ceremonial of punishment apparently designed publicly to impress the people with the need to avoid crime.

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