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## Punishment in Pre-Colonial Indigenous Societies in North America [original paper]

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### **Summary**

Using northern Athabascan villages as examples, the author discusses how punishment in indigenous societies was traditionally interwoven with other societal functions. The influence of alcohol and the western legal process changed post-colonial societies and their methods of punishment because punishment decisions in indigenous societies were traditionally arrived at through group deliberation, whereas the western legal system works in a hierarchical fashion. The author concludes that imposition of western-style decision-making disrupted traditional law ways in post-colonial society.

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PUNISHMENT IN PRE-COLONIAL INDIGENOUS SOCIETIES  
IN NORTH AMERICA

General Report

of

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A review of the literature on pre-colonial sanctions among the diverse indigenous cultures of North America has tested the analytic skills of more than one scholar, so diverse were the cultures in which the subject is found. A characteristic of many so-called primitive cultures was the extremely sophisticated means by which matters legal were melded and integrated into other societal functions requiring little or no independent superstructure that stands apart to mete out punishment. Put another way, when leaders, councils or Indian police emerged as significant agents of sanction, it was likely that a failure in the underlying, self-sustaining fabric of the society was the reason for the emergence of a legal system which seemingly stood apart.

Social control and the attendant sanctions for deviance from norms embedded in indigenous society are reminiscent of the large portion of an iceberg which remains hidden from public view and even from legal ethnographers. How else might one explain the characterization of Northern Eskimo societies by the brilliant scholar E. Adamson Hoebel as examples of "primitive anarchy?"

Eskimo societies, hunting and gathering groups which depended little, if at all, upon jural figures and institutions, offer a good starting point for examination of indigenous sanctions because of the absence of judges or police and their near total dependence on individual inculcation of social norms appropriate to the membership of the group.

In nearly every indigenous society children were carefully

prepared for membership in a society which looked to kin and allies to teach and restrain - to effectively be lawgivers and the agents of punishment - subject to constraints upon intervention in another person's behavior.

Through a process of child rearing which made a child acutely sensitive to subtle cues from other persons and very sensitive to teasing, ridicule and ostracism as child and as adult, Eskimo children were taught the limits of correct behavior. As in other societies young men lived apart in men's houses and sweat baths and were counseled in groups. This indirect mode of instruction and correction made all the more serious, later, more pointed teasing or ridicule.

Other themes that suggest precursors to forms and manner in which secular punishment occurred existed within this subtle society. So many and complex were rules against taboo violation that few persons could avoid breaking one or two. Eskimo society had shamen fully prepared to draw upon spiritual forces to repair damage done or to punish ordinary persons as they chose. Confession and contrition were the only logical responses to a process of supernatural sanctions which, whether secularized in the hands of shamen or others, were clearly beyond avoidance and beyond mortal control.

As a society dependent upon individual response to subtle cues, the watchword of personal behavior was to avoid involvement in interpersonal conflict at all costs unless one could get away with it. Only bullies or those with extraordinary supernatural

or physical power could be less subtle in their interpersonal activity. Yet, however guarded in one's interaction with others, mistakes were bound to occur. Ultimate protection was therefore impossible, as impossible as diligent avoidance of taboo violation. That one would be punished, for unexcused wrongs whether intentional or not, was more likely than not. That one should be prepared to punish transgressors and manifest this capacity was not only a personal safeguard but what later commentators might refer to as a civic virtue, a fundamental condition of group membership.

No less an authority on American Indian law than Wilcomb E. Washburn finds retributive justice as central to the concept of Indian law (1975). He writes, "Revenge was the form in which Indian justice was most often expressed. It was a noble passion, and an all-consuming one. A wrong had to be repaid, and it usually was, though it took years of patient effort to accomplish it (17)."

Of course, Washburn is not entirely correct. In Eskimo society as in others many wrongs were redefined as non-wrongs as a way to avoid the duty of retribution, a duty shared (or imposed) on others as well. Still, his point is central to our analysis of pre-state tribal societies in North America because it provides a clue to the social meaning of receiving and meting out punishment.

To prepare for retaliation to lesser or greater social infractions was a hallmark of one's membership in the group and

not merely a reflection upon one's personal honor. A civic responsibility reserved for public officials and public institutions in later societies was privatized and delegated back to kin groups, hunting alliances and other smaller units of the society in all but a select series of instances where the entire group was threatened by treachery, witchcraft or persons clearly endangering the group.

The social roots of retribution connect directly to the interdependence of indigenous societies and their subunits. Retribution connects directly to reciprocity as a positive social force within indigenous groups. Reciprocity is built upon the systematic construction of debts and obligations among group members. For a subunit to be called upon to retaliate, one must demonstrate persistent loyalty to it whether that loyalty is formed through hunting and gathering family ties or blood feuds.

Retribution in Eskimo and many other societies took the form of taking a life of equal status in the offender's group. In Eskimo groups a blood feud triggered by revenge set in motion a cycle of episodic violence that had no determined end at least until Western intervention plucked violent aggressors from the Eskimo's midst and labeled them "murderers" (Hippler and Conn, 1973). Washburn terms the League of the Iroquois as a confederation formed to put to rest blood feuds among tribal subunits (1975:136).

Concern that strangers to the group were persons imbued with an obligation to retaliate for near-forgotten wrongs strengthened

individual and group resolve to dispatch strangers or flee them (Spencer, 1959). So, also, did fear of retaliation for one's own wrong or that of one's group heighten anxiety and cause persons to react preemptively to threats real or imagined. Finally, it may be that the intra-group anxiety was turned outward by groups to nonmember groups in warfare.

While examples of each of these negative influences of retributive justice suggest how the duty to punish can be destructive to groups both internally and in their external relationships, more must be said about the positive and integrative forces of that same impulse.

Revenge as a socially acceptable form of punishment was reined in by several attributes of indigenous social control. In many societies compensation to the kin or allies of victims took the place of intra-group violence. Among Navajo Indians, for example, where injury to property or persons was established without concern for fault or guilt of the perpetrator, compensation was negotiated between clan groups. Drawing into play one's group in a dispute deepened one's own future obligations. In groups where leaders emerged beyond clan subunits and in times of peace, their political roles were usually that of consensus builders and not of dictators. Each of these social traits seems to have been influenced by the core impulse of revenge as a socially acceptable form of punishment.

Returning to the Eskimo example, one discovers other influences of the powerful outward reaching momentum of revenge on

sanctions within the Eskimo scheme of social control. Hoebel has written of song duels and other contests between would-be antagonists. Such contests had the obvious result of ventilating and concluding disputes short of interpersonal violence. Yet when the jibes associated with losing a song duel are coupled with the more pervasive role of teasing, gossip and ostracism, a clearer relationship to the duty of revenge emerges. These latter punishments put into question the offender's status in the group. These subtle forms of non-intervention in a society which questions all intervention as to its legitimacy even as it questions misconduct, create distance from an individual and those he hopes will protect him in future encounters.

Mentioned above was the tendency to overlook offenses or to redefine them as non-offenses (e.g., wife-stealing as wife-lending, theft as borrowing). Along with these traits, a more common approach in indigenous law systems is to treat interpersonal disputes at the lowest possible social level. Public transgressions were limited to the exceptional matter and often cast as religious violations. Individuals subject to public execution or banishment had disconnected themselves from the group by systematic rejection of group norms and subgroup ties. They had become strangers.

To become an outcast, whether banished or not, was (short of execution) an ultimate punishment for members of indigenous groups. Loss of membership and loss of the shared obligations attendant to retributive justice were very much the same thing. This noble and all-consuming passion of which Washburn wrote



flows not from barbaric impulse but from the same impulse which reduces most legal process in indigenous society to something other than guilt-discovering procedure. To evoke retribution or to confess and seek the punishment which the group deems appropriate is to test one's membership in the group. Whether offender or offended, one's status in the group was defined by punishment deemed socially appropriate.

To employ the Northern Eskimo pre-contact legal process as the basis upon which to explore the less visible realm of North American indigenous law may seem inappropriate. However, the underlying rationale of this non-system, an iceberg with no tip, offers the viewer an opportunity to understand the less visible portion of many other systems. Punishment in all systems are indications of the success or failure of private attempts at conflict avoidance and group preservation. In fact, the process of private conflict avoidance and adjustment that forms "the etiquette of the setting" gives over to the public setting only those matters which it cannot contain. Even then, the logic of the hidden system colors the activities which are private, just as that same logic has filtered into tribal justice in post-colonial settings. Let us test this proposition against commentary on North American tribes. If we return to child rearing we find that parents, though party to corporal punishment, may submit to being whipped themselves or even shield the child from blows (Driver, 1961:459). This does not mean that children are not whipped. What is relevant is that parents pass over to more remote relatives the task or raise in children the threat of the

supernatural. Ridicule also plays a part in nearly every society as an inducement to perform according to expectation (Driver, 1961:462). Yet personal criticism in public by one's immediate family was infrequent. Rather, the family "presented a united front to the outside and sought to protect and defend their members rather than ridicule them" (Driver, 1961:463).

Blood feuds were expected between family units and not within them. Whether the sanction was opportunistic revenge as in the Arctic, Plateau and Plains or the compensation in the Northwest and select areas of the Plains states, the expectation was not of brother killing brother. (See Reid, 1970:86.)

Offenses against property were generally considered private. These included sexual offenses as women were considered property in many indigenous groups. Their mutilation by aggrieved husbands was an oft-mentioned sanction. Unless one compares scratching of children to snipping away of noses, mutilation of errant women marks a rare departure in sanctions meted out to tribal members. Physical torture was usually reserved for prisoners from other tribes, e.g., strangers. Among Northwest tribes persons might be sent into debt servitude, but, unlike enslavement of prisoners, it was possible to buy one's relative out of enslavement.

To connect privatized legal process with development of a public superstructure and most importantly to explain the pre-colonial impetus for such structures is difficult given the quality of data available. Equally difficult is a precise divi-

sion between public and private offenses. To know the legal reaction to a particular offense one generally must know the exact situation in which the offense occurred, its practical consequences (the range of endangerment), the social status of the offenders and the community's expectations of them. Age, sex, clan affiliation and past behavior were all determinates not only of the sanction imposed, but also of the legal level in which the sanction was imposed. Indigenous justice was personalized as might be expected in tribal societies. The norms imposed were not abstractions unless experience had shown that they empirically impaired individual and group survival. Usually acts were measured against their ascertainable consequences that impaired property rights and group relationships.

This said, one can make crude divisions as did W.W. Hill in his ethnographic account of the Santa Clara Pueblo (edited by Lange, 1982) between "personal or private law" and so-called major crimes as to sanction and legal level. Hill determined that deviance which primarily concerned individuals such as "various types of assault, malicious gossip, nagging, slovenliness, lewdness, adultery, fornication, drunkenness and conflicts involving damages and ownership" (Lange, 1982) was dealt within families or subunits while behavior deemed offensive to supernatural entities or failure to participate in community work projects were matters appropriate for public resolution. Yet personal crimes in one context may be deemed public in another.

As Driver notes in his analysis of pueblo life, theft, adultery and even homicide were considered "torts" or private

matters which did not reach the council "unless they became too violent to be handled by the proper officials" (Driver, 1961: 338). In those instances, one can suggest that the offender had by his act set in motion a social process which threatened the well-being of the group. The Ojibway and Micmac reportedly had formal trials which structured negotiations between the friends and relatives of a deceased person over compensation in lieu of immediate public execution of the murderer (Wissaler, 1957:179). Among Apache and Navajo negotiations over serious offenses such as murder, witchcraft and adultery were held before headmen, but imposition of execution (if determined) was left to the victim's clan (Vicenti, 1972).

The Iroquois tried witches before a formal council but left murderers to the revenge of immediate families unless a peace token was accepted (Wissler, 1957:181).

These examples suggest that the need to draw into play the highest level of public authority may at times have related to the severity of the sanction: for some, execution by representatives of the entire society; for others, banishment to certain death (as in the Arctic) or for a period of years (as among Plains tribes). Imposition or at least enunciation of the sanction by the corporate tribe has the benefit of putting to rest blood feuds by removing their inner logic. This conclusion is bolstered by examples of tribal rituals among Southeastern and Plains tribes which afford amnesty, e.g., sun dance, green corn dance, to participants. As in the case of the song duel, putting to rest the crime among indigenous subgroups seems to have been a

fundamental role for supraclan legal authorities.

Of course, involvement of the larger indigenous unit where the individual is deemed a witch, in violation of supernatural edicts (as in Southwestern Pueblos) or clearly "crazy" and unfit for continued co-existence with the Eskimo group, allows for family and allies to put distance between themselves and the miscreant even as it allows the community to rid itself of a threat to its very existence. These serious cases appear to be the antithesis of the normal role of political authority of indigenous groups: to harmonize internal antagonisms and to confirm the authority of group subunits in the adjustment of conflict, but they are in fact a very logical outcome of that same process. The normal goal of most correctional process in indigenous societies is to reintegrate the offender back into the community. Heretics, witches and those who have repeatedly violated tribal norms are exceptional persons who cannot be reintegrated.

One other rationale for public authorities must be explored. Police or soldier societies among Plains tribes meted out punishments ranging from beatings and destruction of property to banishment and even execution when other penalties failed to reform the offender (Hoebel, 1960:52).

Does the existence of these tribal police and their activities refute or confirm what I have suggested is normally a system of privatized dispute avoidance and adjustment? Does it suggest a different role for public authority among Plains tribes?

A review of the literature (Provinse in Eggan, 1937:339-374) suggests that police societies are a logical outgrowth of the more typical indigenous system of law and sanction. Selected warriors dealt primarily with occurrences in tribal activities which were public, for example, in restraint of fellow warriors on war parties and on buffalo hunts. They also intervened in intratribal disputes during those seasons when the tribe came together for some common purpose (Id:348). Thus, order-keeping was connected to specific events and circumstances. When those circumstances ended, authority to act returned to kin groups when theft, murder, or assault occurred.

Provinse reports that punishments inflicted by police among the Plains tribes were uniform:

Whipping or clubbing was the most frequent measure resorted to, followed up in more serious cases by destruction of the culprit's personal property - his tipi, blankets, gun, bow, horses, etc. Infrequently, in the case of particularly stubborn individual, the death penalty was inflicted. . . (Provinse, 1937:349).

The context of these punishments suggests that police societies were well-integrated into the logic of tribal order keeping. The intent of sanctions with the single exception of execution was to induce reform on the offender. Argument and feasts preceded restraints on warriors. Immediate evidence of contrition and promises to behave resulted in tribal acceptance of the offender (Provinse, 350). McNickle recounts a case studied by Llewellyn and Hoebel of a member of the Southern Cheyenne who was set upon, beaten and left abandoned after persistent disrespect and horse thievery. After coming upon members

of the Northern band he confessed his bad conduct, promised to reform and became ultimately a member of its soldier society (McNickle, 1975:56-57). Even Plains Indians banished as a result of repeated killings ritualistically return to their tribe and, with appropriate contrition, are reintegrated into it.

The heightened role of police societies as an instrument of tribal law during events that draw together tribal subunits or that unleash youthful passions does not seem to withdraw from tribal subunits and tribal chiefs their ultimate responsibility for dispute processing. Rather, their emergence seems appropriate as to time and place. The punishments they mete out are also calculated to the sequence of persuasion deemed central to plains justice.

Community activities in other societies generate mutations in their law process. For example, when engaged in whaling, Eskimos who are normally immune from intervention by structured leadership fall under the control of the umalik or whaling captain. In short, the police societies are a logical extension of indigenous social control.

When we evaluate the role of private and public sanctions in indigenous societies we often discover that public and private wrongs are intertwined. Thus, sanctions must address both concerns.

Northern Athabascan villages offer a good example of the interlocking phenomenon which offers us an opportunity to understand punishment in indigenous societies. These groups, made up

of several small matrilineal family bands of hunters and gatherers in Interior Alaska were studied by me and Dr. Art Hippler less than seventy-five years after white contact (Hippler and Conn, 1972).

Village chiefs were chosen by lineage heads on the basis of their reputation for considering the entire group. They were never precipitate in their judgments. Disputes heard by the chief were only the most serious, those which might require severe sanctions. Yet, to mete out these sanctions, the chief depended upon adroit use of conciliatory techniques to mold village opinion, especially the opinions of other villagers respected as leaders within his lineage.

If an offender were called before village authorities both public and private implications of his conduct were addressed. First, his need to be reconciled with the village through acts that demonstrated his sorrow for his deeds that had potentially damaged the balance between lineages in the community. Second, he had to make amends to the victim and his kin for the wrong committed.

Demanded, then, of both the chief and the offender were great powers of persuasion. Although guilt was a foregone conclusion by his very appearance before the chief, his contrition would determine whether or on what terms he would be reconciled. Here, as in other societies, one observed a second role for ridicule and stigmatization, now institutionalized to mark and punish an offender.



Adultery was viewed as serious because it could lead to violence that in turn could strain the fabric of mutual obligations and responsibilities that tied together not only kin groups, but communities.

For adultery to be brought to the chief and his council was itself a form of sanction as it brought shame on the offending matriline for ignoring what could lead to a dangerous situation. When the guilty individuals appeared, they were expected to confess. If they refused at yet a second meeting, their clothing was torn from them by the council and the offended spouses who were called into the second meeting to bring down additional pressure. If the parties admitted their guilt, the offending husband would be ordered to remunerate the offended husband. The offended husband was then permitted to give a formal warning to the adulterer that if the act were repeated, he would kill the offender.

The impact of this formal warning made before the chief and his council was to create immunity for the offended husband if he killed. No revenge could be taken for this death. Even if he were an important man, the offender's relatives would get a very small death payment. If a child had been born to the woman, her husband could also obtain compensation.

Theft was also treated in a manner which had an impact on the thief's matriline as well as the thief. If the thief admitted his guilt, he repaid what he had taken plus an additional sum. His matriline was not expected to assist in the payment and, in

fact, had a vested interest in seeing that it was paid to put down antagonisms between the kin groups.

If, however, the thief could show mitigating circumstances such as hunger or great need, his matriline would be shamed into assisting in the payment of his fine.

If the thief did not repent or denied his guilt and could show no mitigating circumstances, he might be banished for several years and fined. Chronic recidivists were banished for life. They could be killed if seen without fear of retaliation.

Murder was the most serious of crimes and could be punished by death. The chief either had to persuade the kinsmen of the victim, the likely complainants, to accept a death payment from the killer, or persuade the kinsmen of the killer to accept the death sentence. If the matriline of the victim accepted the death payment, the matter ended. A death payment was usually accepted if it was felt that the victim had provoked the attack, or the victim had been of less importance than his killer. Of concern to the chief and council as well as the victim's matriline was the size of the killer's matriline. Even if it accepted the death penalty, it could remain angry at the victim's matriline. This could affect mutual expectations and obligations. If the death penalty was demanded and accepted with concurrence by the chief and council, an executioner would be appointed. If the murderer fled, he could be killed without fear of retaliation.

If an influential man killed a person of similar importance, the process, both private and public, was put into danger. The

offended matriline would not accept a death payment and the offending matriline would not accept a death penalty. This forced a further stage in the deliberative process. If the offender and his victim were from different bands as well as different clans, the offended matriline would contact all major family heads from surrounding villages. The issue would be not merely the private killing but whether clans should join in war against the offending clans. Here war sometimes did occur. In other instances protracted discussions allowed tempers to cool and some less onerous remedy to be found.

This rather lengthy description of the interrelationship between private acts and their consequences to clans and even villages, drawn from my field work and that of Dr. Hippler, offers the viewer more than the two-dimensional view of sanctions and indigenous legal process that most reviewers provide us.

We see that crimes in the indigenous context have profound implications for the subgroups of the tribal society if they are articulated and brought forward for a public airing. Deeper implications emerge than the impact of a punishment on the offender and his victim, implications that lead beyond the initiation of a blood feud to the very disintegration of the group.

The role of leaders in order maintenance and renewal of interpersonal relations becomes better understood as the decisions made are elucidated. The indigenous groups could not tolerate free floating aggression whether by its own instruments of punishment or by offenders. Subgroups could better afford to

forget about offenses than to pursue them to their limit. Ridicule or other techniques for ventilation of anger avoided the imbalances created by the very process which meted out justice.

Although this paper is a general report on the role of punishment in pre-colonial North America, there must be some focus on the damage done to sophisticated indigenous law ways by contact with Western society. That damage has been extreme.

We have seen that childhood socialization and family control play an important role in teaching members of the group how to behave, to be responsive to the cues and signals emanating from other persons and groups. This aspect of indigenous law ways was poisoned and destroyed by alcohol abuse in many indigenous societies. With alcohol came the social belief widely accepted that one who was intoxicated was temporarily insane and not responsible for his drunken comportment. Intoxication became a convenient excuse for unbridled aggression. Law systems which depended upon reeducation with or without further punishment could not adapt to this phenomenon. Alcohol and not the rational being was said to be to blame.

A second aspect of post-colonial justice was the tendency of nearly every law system to become more centralized as it engaged non-indigenous society. Chiefs and leaders who were no more than derivative compromise seekers were looked upon through Western eyes as leaders who could command without deliberation. Authority to deal with deviance at the lowest possible unit of tribal society was removed from these subunits. Indigenous

justice became less proactive and preventative in its focus and more like that of Western society. These changes did not occur overnight. Many tribal legal systems, even those imposed upon tribes in the form of Indian courts, tribal councils and Indian police, demonstrate in their day-to-day functioning appreciation for the role of family subunits and the impact of a punishment on the society's integrity. Yet, this said, the future does not promise a similar appreciation for the logic of law and punishment. As older judges and councilmen resign to be replaced with fully acculturated Native Americans, each society loses its ties with its own legal culture.

The sophisticated law ways of indigenous groups in North America is slowly displaced but not replaced by mutated forms of Western law and punishment.

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