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2004

"You Know How We Cheyenne's Try to Live:" Nineteenth-Century Cheyenne Property Offences and Anglo Comparisons

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"You Know How We Cheyennes Try to Live": Nineteenth-Century Cheyenne Property Offenses and Anglo Comparisons

Arthur G. LeFrancois*

Introduction

In June of 2001, I had the pleasure to be part of a Sovereignty Symposium panel devoted to "Traditional Practices in the Modern Justice System." The panel was moderated by Justice Daniel Boudreau and the other panelists were Chief Lawrence Hart, Judge Jacqueline Duncan, Connie Hart Yellowman, and Sue Tate. I focused then on Cheyenne homicide law.[1] Here I focus on two property offenses.

As was the case in 2001, the Cheyenne law I want to discuss is that revealed in Llewellyn and Hoebel's *The Cheyenne Way*,[2] law that was in place during the nineteenth century. Indeed, the inspiration for this paper is a project under the auspices of the Cheyenne Cultural Center that seeks to create a museum experience featuring a small number of the Cheyenne justice narratives laid out in *The Cheyenne Way*.[3] Our hope is that by illustrating the breadth and depth of Cheyenne law and justice we

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[1]Arthur G. LeFrancois, *Some Lessons from Karl Llewellyn and Cheyenne Homicide Law*, *in* SOVEREIGNTY SYMPOSIUM XIV- A TRIBAL ODYSSEY XV-1 (Okla. Sup. Ct. et al. 2001).

[2]KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

[3]Other members of the exhibit team are judges Robert Henry, Daniel Boudreau, and Jacqueline Duncan; Cheyenne peace chiefs Lawrence Hart, Harvey Pratt, and Gordon Yellowman; professors Phyllis Bernard and Taiawagi Helton; repatriation specialist Julie Droke; facilitator Karen Hill; alternative dispute resolution expert Sue Tate; Cheyenne language teacher Joyce Twins; and Cheyenne attorney Connie Hart Yellowman.

might raise some important questions, at least suggest some answers, shatter a few stereotypes, and celebrate native peoples.[4]

This paper focuses on two justice narratives from *The Cheyenne Way*. They each concern property offenses. One case involves improper borrowing and the other a more serious theft. They each raise issues regarding punishment. The improper borrowing rule fashioned in the case of Wolf Lies Down seems to carry as a consequence of its violation only a possibility of formal punishment, and only an implication of social stigma. The punishment in the case of Pawnee's theft, however, was severe, and the social stigma considerable. The likelihood that he was being punished for a host of offenses and for being a generally bad actor complicates the punishment issue. Each story - one featuring a formal rule that carried little, if any, punishment; the other featuring informal standards that entailed severe punishment[5] - helps illuminate the contours of Cheyenne justice.

Wolf Lies Down: An Improper Borrowing?

In this story,[6] a friend took a horse owned by Wolf Lies Down in order to ride it to war. The man left his bow and arrow as nominal security. A year passed and the horse had not been returned. Wolf Lies Down asked the Elk Soldier chiefs what he should do. He asked them to ask the taker - who was in another camp - what his intentions were. The chiefs said, "We'll send a man to bring him in, get his word, or receive his presents."[7]

The taker of the horse said he had always intended to return

[4]Lawrence Hart described this project in an address to the Sixteenth Annual Sovereignty Symposium in 2003. Lawrence H. Hart, *Cheyenne Way of Peace and Justice: The Post Lewis and Clark Period to Oklahoma Statehood*, 28 AM. INDIAN L. REV. 261, 264-67 (2003-2004).

[5]See *infra* note 61 for a discussion of the distinction between rules and standards.

[6]LLEWELLYN & HOEBEL, *supra* note 2, at 127-28.

[7]*Id.* at 127.

the horse (he had left the bow and arrow), but that he was waiting for the two camps to come together. His folks were in the other camp, and he could not get away. He offered to give Wolf Lies Down his choice of either of two horses, to return the taken horse, and to leave the bow and arrow.

Wolf Lies Down said the taker could keep the original horse, but he accepted the offer of one of the taker's horses. "Now I feel better... From now on we shall be bosom friends," said Wolf Lies Down.[8] The chiefs spoke:

> Now we have settled this thing. Our man is a bosom friend of this man. Let it be that way among all of us. Our society and his shall be comrades. Whenever one of us has a present to give, we shall give it to a member of his soldier society.
>
> Now we shall make a new rule. There shall be no more borrowing of horses without asking. If any man takes another's goods without asking, we will go over and get them back for him. More than that, if the taker tries to keep them, we will give him a whipping.[9]

We see a wealth of legal issues and phenomena here. Think first about the complex of legal roles assumed by the Elk Soldier chiefs. To begin, they assume their competence to render an outcome in the case before them. The chiefs act as a tribal enforcement body and as a judicial body. Additionally, upon the resolution of the dispute, the four Elk Soldier chiefs take it upon themselves to legislate a rule presumptively binding on the tribe generally, and there is no report of any resulting jurisdictional

[8]*Id.* at 128.

[9]*Id.*

friction.[10]

As in so many of the Cheyenne justice narratives, the criteria demarcating official actors and their competencies are unclear. While the Council of Forty-Four[11] seems to have been the original seat of legal and political power, the six military - or soldier - societies (such as the Elk Soldiers in the Wolf Lies Down story) increasingly assumed administrative and legislative powers during the nineteenth century.[12] And in some of the stories, we seem to have an absence of "state action" at all.[13] In those cases, the point may have been that sanctions visited by "the people," or even "a person," in the absence of any counter-sanction by the Council or by a soldier society, were at least allowed by the chiefs.[14]

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[10] "When a company on duty handled a violation of the law, it rolled police, judiciary, and correctional activities into one breathless action... 'The soldiers' were the police, a legislature, the voice of the People." *Id.* at 130-131.

[11] See *id.* at 67-98 for a discussion of this governing body that consisted of Cheyenne chiefs whose authority was at least theoretically superior to the military societies, and at 69-73 for a version of the story of the founding of the Council of Forty-Four.

[12] *Id. at* 67. See *id.* at 99-131 for a discussion of the six military societies - voluntary associations with important governmental authority.

[13] For example, She Bear was stabbed and chased by his mother-in-law for mistreating his wife. His mother-in-law refused his peace offerings. Her son finally accepted them and allowed his sister to re-join She Bear. *Id.* at 182-83. No "authority" is mentioned in this story.

[14] If so, this may be an example of what the great English utilitarian and legal positivist Jeremy Bentham called a sovereign mandate by adoption.

> [E]very mandate that is issued within the limits of the sovereignty and that is not illegal, is in one sense or the other the mandate of the sovereign... The mandates of the master, the father, the husband, the guardian, are all of them the mandates of the sovereign... If anyone should find a difficulty in conceiving this, he has only to

Moving to another of the legal aspects of the case, consider the significance of the bow and arrow left by the taker of the horse owned by Wolf Lies Down. We are told they are left as a "token security."[15] They are initially relevant largely because they revealed to Wolf Lies Down the identity of his horse's borrower. And this helps the borrower - as an evidentiary matter - establish his claim (a legal claim under principles of common law larceny) that he did not mean to steal the horse, even if he somehow had not returned it in a year. "I left my bow and arrow here. I intended to return his horse, but I was gone longer than I expected."[16] In the end, the bow and arrow are treated more clearly as a security, as one of two "presents" that, along with the offer to return the borrowed horse, will help make things right.

Wolf Lies Down Through An Anglo Lens

Common law larceny is made out where one by trespass takes and carries away the personalty of another with intention to steal.[17] Intention to steal essentially means an intention to expose the property to a risk of permanent loss.[18] These rules, or

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> suppose the several mandates in question to meet with resistance; in one case as well as in another the business of enforcing them must rest ultimately with the sovereign."

JEREMY BENTHAM, OF LAWS IN GENERAL 22-23 (H. L. A. Hart ed. 1970). Bentham's theory of law through adoption is particularly applicable to a small community, such as the Cheyenne, where "private" mandates can more readily come to the attention of the law-givers.

[15] LLEWELLYN & HOEBEL, *supra* note 2, at 127.

[16] *Id.* at 128.

[17] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 292 (3d ed. 1982). I do not deal here with related offenses such as false pretenses and embezzlement, and related doctrines such as larceny by a bailee, larceny by trick, and constructive possession.

[18] *Id.* at 328.

something like them, are still common as a matter of state law.[19] Under such laws, if the borrower in our case could show that he meant to borrow the horse for a brief time and then return it, there would be no larceny.[20] The essence of common law larceny is *animus furandi*, the intention to steal. As a matter of legal theory, that intention (or lack thereof) matters more than whether the owner suffers a permanent deprivation of her property.

Under common law principles, if the taker can show anything that negates the intention to steal, larceny cannot be established. Thus, if I unreasonably thought the thing taken was mine - through a mistake of fact or law - I cannot be guilty of larceny, because I cannot intend to dispossess another of her personalty if I believe - however unreasonably - that the personalty is mine.[21] It should be mentioned, however, that an initial taking without intention to steal can result in larceny, so long as the initial taking was trespassory (without the owner's consent) and so long as an intention to steal is developed afterward.[22] This doctrine is called continuing trespass.

The common law of larceny is rife with doctrinal complexities.[23] What, exactly, is a taking (distinct from

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[19]*See, e.g.*, OKLA STAT. tit. 21, § 1701 (1994) (defining larceny as "the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof"); Phipps v. State, 572 P.2d 588 (Okla. Crim. App. 1977) (treating larceny as requiring intention to permanently deprive).

[20]*See infra* note 27.

[21]*See, e.g.*, Linde v. State, 66 P.2d 527 (Okla. Crim. App. 1937) (finding mistaken claim of right to property a defense to larceny).

[22]PERKINS & BOYCE, *supra* note 17, at 321-22.

[23]A good number of the complexities and tortuous nuances of common law larceny are attributable to a wise judicial creativity that sought ways to avoid convictions of larceny at a time (the eighteenth century) when the penalty for larceny was capital punishment. AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Comment to § 223.1 at 128-29 (Official Draft and Revised Comments 1980).

asportation - the carrying away)?[24] How far must one go - if at all - in order to "carry away?"[25] If I take another's apple from a tree, have I dispossessed another of his personality, or am I the initial possessor of the apple *qua* personalty?[26] And most typically, was there intention to steal?

Notice how the borrower in the case of Wolf Lies Down immediately appeals to the evident morality of the issue. As does the common law, he wants the case to focus on his intention.[27] The year-long deprivation is less important than his initial intention to do better.

> "*I intended to return his horse*, but I was gone longer than I expected... [W]hen I got back to camp I found my folks there. Our camps were far apart and I could not get away. I was waiting for his camp and mine to come together. Now, *I always*

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[24]"There must be such a caption that the accused acquires dominion over the property..." WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 832 (7th ed., Marian Quinn Barnes ed., 1967).

[25]Moving a killed hog to facilitate bleeding is not asportation sufficient for larceny. Williams v. State, 63 Miss. 58 (1885). Neither is turning over a barrel from the end to the side, or turning up a bale of cotton. CLARK & MARSHALL, *supra* note 24, at 832 (citing cases). Asportation *is* made out, however, where a bag is lifted from the bottom of a coach, where a package is moved from one end of a wagon to the other, or when a sword is lifted part-way from its scabbard. *Id.* at 834-35 (citing cases).

[26]"At common law... it is not larceny... to sever and immediately carry away trees, grass, crops, fruit, vegetables, and similar objects." CLARK & MARSHALL, *supra* note 24, at 813. This is because such takings are thought to involve the dispossession of realty, not personalty.

[27]Clark and Marshall point out that "it has repeatedly been held that it is not larceny to take another's horse, when the intent is merely to ride it some distance, and then return it, or abandon it at such a place that it will return or be captured by the owner." *Id.* at 826.

intended to do the right thing.[28]

He's no thief. It's just that he didn't want to leave his people. After all, he left his bow and arrow behind as a sign of good intentions. Would a thief do *that?* And besides, he returned to camp with the borrowed horse and his own horses from which Wolf Lies Down could chose a present.

Pretend for a moment that the English common law or its American variants applied to this case. They would be concerned about just what the defendant intended at the time of the caption (the taking) and the asportation (the carrying away). Imagine a defense attorney making much of the carefully left bow and arrow - no thief is *that* stupid. There was clearly no intention to permanently deprive at the time of the taking and carrying away, and thus there was no larceny.

But remember what a clever prosecutor could do with the "continuing trespass" theory. As long as the taking - initially insufficient for larceny because of lack of intention to steal - was without the consent of the owner, it was trespassory. And in one of the mysteries of larceny law, this trespass continues forward in time to concur with a later intention to steal.[29] Was the initial taking trespassory? Yes, because it was without the consent of Wolf Lies Down. Was there a later intention to steal? Quite possibly. The taker still has the horse, and a year has passed. What might the jury make of that, on the issue of whether the taker might have developed an intention to keep the horse? And the defendant himself has said that "I have had good luck with that horse, though. I have treated it better than my own."[30] A prosecutor might make much of this developed fondness for the "borrowed" horse. And if we are of a mind to assume a cultural norm that would allow such lengthy borrowings (thus defeating an inference of an intention to steal), remember that Wolf Lies Down

[28]LLEWELLYN & HOEBEL, *supra* note 2, at 128 (emphasis added).

[29]*See supra* text accompanying note 22.

[30]LLEWELLYN & HOEBEL, *supra* note 2, at 128.

and the Elk chiefs can't seem to call one to mind.

There is one more thing an Anglo prosecutor might do, focusing, as always, on intention. The horse was taken "to ride to war."[31] Depending on the precise nature of the adventure to which the taker intended to subject the horse, the claim could be made - with some persuasiveness - that the initial intention was, however innocently, to subject the horse to a substantial risk of permanent loss.[32] And this intention would suffice for the common law's required "intent to steal," without regard to whether there was ever any permanent deprivation (again, intention trumps consequence in larceny theory).

The Cheyenne Rule of Wolf Lies Down

> Now we shall make a new rule. There shall be no more borrowing of horses without asking. If any man takes another's goods without asking, we will go over and get them back for him. More than that, if the taker tries to keep them, we will give him a whipping.[33]

This is a rule that turns the common law rule on its head. Conduct trumps intention.[34] Indeed, intention is immaterial. If an

[31]*Id.* at 127.

[32]*See supra* text accompanying note 18.

[33]LLEWELLYN & HOEBEL, *supra* note 2, at 128.

[34]Llewellyn and Hoebel observe, in another context, that "Cheyenne law was built to deal with action, not with intention." *Id.* at 124. They made this observation in relation to the case of the announcement by Sticks Everything Under His Belt that he was going to violate (but, according to Llewellyn and Hoebel, had not yet violated) hunting law.

See CLARK & MARSHALL, *supra* note 24, at 827, 831 for discussions illustrating the Anglo view of intention trumping conduct and consequences by treating as immaterial - apart from its evidentiary value relative to the issue of

unconsented-to borrowing occurs, no intention will "save" it. Token securities can be left behind, the taking can be announced to friends and family of the owner, and none of it will (formally) matter. If you borrow without asking, the property will be taken from you by force, if necessary.

But the rule turns common law inside-out as well. It would appear there is no punishment for the borrowing.[35] It looks as though such borrowings will be "un-done" through taking the object from the borrower (and returning it to its owner), simply returning the borrower to the status quo ante and no worse. The victim has been without his property for some period of time, and this loss is "uncompensated," either by a civil fine or criminal punishment. Doesn't such a rule encourage unconsented-to borrowings? Under this rule, why not borrow without asking in the hopes the borrowing goes undiscovered, or at least unattributed? If the taker is found out, all he need do is surrender the property, and so he is no worse off than before the borrowing.

Before addressing the matter of the pragmatic (deterrent) efficacy of the rule fashioned by the Elk chiefs, note how the rule surfs gracefully between strict liability criminality (you will be treated as a thief regardless of intention, whenever you borrow without asking) and the seeming infinitude of mens rea excuses in common law larceny cases (I was going to return it, I was joking, I thought it was mine). All unconsented-to borrowings will be treated as improper borrowings - no need to make allegations or defenses regarding intention. The rule makes litigation simple.

But importantly, the strict liability "offense charged" is not

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animus furandi - the return of taken property.

[35]The case of Pawnee (*infra* text accompanying notes 44-47) involves a severely punished theft, but it is likely that the offense there was aggravated by a number of factors, and that the punishment was increased because of a number of past offenses, both legal and social. *See infra* text accompanying notes 59-66. It is also the case that the taking there more closely resembled theft than an improper borrowing, or grand larceny rather than joy-riding. See *infra* note 36 for a discussion of this latter distinction.

stealing. It is the much less stigmatic "improper borrowing."[36] The borrower will be embarrassed by the whole production of a soldier society searching for and taking the borrowed object (and so we have our first reason for believing the rule likely has some deterrent effect). But the borrower can, after the conclusion of the "legal proceedings" - the surrendering of the borrowed property - make all sorts of intention-related claims to maintain his reputation within the tribe. "I forgot to ask," "I was going to return it," "I left my bow and arrow." He will not necessarily be thought a thief. But again, some stigma may attend the affair, particularly for those punctilious in their sense of honor.

If the borrower wants to proclaim himself a thief by refusing to surrender the item, he can do so - and suffer the punishment of a whipping. Of course, he will suffer the same punishment[37] if his grounds for refusing to surrender the property are that he lawfully borrowed the property, after asking, or that the property is rightfully his. Such claims might be translated as desperate attempts to maintain innocence at any cost (I'd rather be whipped than admit I improperly borrowed or attempted to steal). Thus, one of the subtle consequences of the rule is that some of those accused of the relatively minor offense of wrongful borrowing will be thought by other members of the community to be thieves. And so we have a second reason to believe the rule

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[36]Many American states have legislated similar rules. "Joy-riding" statutes criminalize the temporary taking of a vehicle and require simply that the taking be unauthorized. CLARK & MARSHALL, *supra* note 24, at 826-27. Joy-riding is often treated as a misdemeanor, while grand larceny is a felony. *See, e.g.*, State v. O'Brien, 317 A.2d 783, 784 (N.H. 1974) (noting the difference between the felony of grand larceny and the misdemeanor of joy-riding as intention to permanently deprive in the former case and no intention to keep the property in the latter); State v. Bailey, 220 S.E.2d 432, 437 (W. Va. 1975) (noting the difference between the felony of grand larceny and the misdemeanor of joy-riding as intention to permanently deprive in the former case and intention to temporarily deprive in the latter). These statutory modifications of common law theft are largely consistent with the Cheyenne approach discussed *infra* at text accompanying notes 34-36.

[37]This punishment would seem to be for the separate offense of failing to comply with a lawful order.

would have some deterrent effect against improper borrowing. Violating the rule against improper borrowing risks generating suspicions of thievery.

Third, we might think that a rule so easy to follow should be followed. One who violates it rightly raises our suspicions in this, and perhaps other matters. The clarity of the rule and the ease of abiding by it might thus carry their own deterrent efficacy.

Leaving aside such deterrence issues, consider the tone of the resolution of the case at hand. This tells us much about the Cheyenne conception of justice. The resolution begins with the taker simultaneously expressing remorse and innocence. In Anglo terms, he seeks to have his conduct excused, but not justified. Justifications celebrate the accused's conduct, while excuses seek to make us tolerate it. Put differently, justifications (like self defense) occur when there is no harm and no fault (it is not considered a social harm to lawfully harm one who attacks you), while excuses (like duress) occur when there is social harm but no fault (a person forced at gunpoint to steal has worked a social harm, but we understand that he was forced under threat of harm to do so).[38]

The taker in our case is sorry for the harm he has caused, but he asks for understanding. He initially meant no harm (he left his bow and arrow), he later wanted to return the horse (but his folks' camp was too far away), he did not mistreat the horse (indeed, he treated it better than his own), and he wants now to make things right (he offers an additional horse and the bow and arrow).

This constellation of explanations is accepted by Wolf Lies Down. Importantly, he "feel[s] better" and announces that he and the taker are now "bosom friends."[39] It is likely that the taker's demeanor, as much as his plea, causes this result. The taker has made clear that he wants continued good relations with Wolf Lies

[38]"Whereas a justification negates the social harm of an offense, an excuse negates the moral blameworthiness of the actor for causing the harm." Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1163 (1987).

[39]LLEWELLYN & HOEBEL, *supra* note 2, at 128.

Down, and he never questions the harm he has caused. Wolf Lies Down allows the borrower to keep the horse he took. The chiefs are pleased that the conflict has been settled, and they use this as an occasion to cement relations between the soldier societies of Wolf Lies Down and the taker. "Our society and his shall be comrades. Whenever one of us has a present to give, we shall give it to a member of his soldier society."[40] The evident desire of the chiefs to fashion a prospective rule for cases of borrowings does not cause them to rule precipitously in the case at hand. Indeed, they essentially seem to allow Wolf Lies Down to adjudicate the issue.[41] Because he is satisfied, so are they.

The conflict has served not simply as an occasion for rule-making,[42] but for strengthening personal and group relations within the tribe. This is no mere return to the status quo ante. The conflict has strengthened personal and group bonds and has served as the occasion for legislation designed to reduce friction in a broad run of cases in the future. These results are much more pervasive (they soak more deeply and more broadly into the social fabric) and beneficial than those typically found in Anglo law.

But not all wrongful takings were treated as simple improper borrowings. Shortly after the Wolf Lies Down rule was promulgated,[43] the following case arose.

Pawnee: Theft and Punishment

Pawnee was a reprobate as a young man.[44] He stole meat, took horses for joy-rides, and was generally disrespectful. He once

[40]*Id.*

[41]But it is important to remember that Wolf Lies Down sought their view as to what he should do.

[42]Llewellyn and Hoebel make clear that "[s]uch distinctive legislation was uncommon." LLEWELLYN & HOEBEL, *supra* note 2, at 129.

[43]*Id.* at 6.

[44]See *id.* at 6-9 for the text of this story.

stole two horses and traveled over three days away from camp. He was caught by Bowstring Soldiers. Their punishment was swift, certain, and severe.

> "You have stolen those horses," they cried as they pulled me from my horse. "Now we have trailed you down." They threw me on the ground and beat me until I could not stand; they broke up my weapons and ruined my saddle; they cut my blankets, moccasins, and kit to shreds. When they had finished they took all my food and went off with the horses, leaving me alone on the prairie, sore and destitute, too weak and hurt to move.[45]

Three days later - naked, bleeding, unable to walk, and waiting to die - Pawnee was saved by High Backed Wolf, a young chief. High Backed Wolf called for the other chiefs in camp. After a meal, the chiefs and Pawnee smoked High Backed Wolf's pipe. High Backed Wolf then instructed Pawnee to tell the truth about how he came to be in such a sorry state. "If you tell us straightly, Maiyun will help you."[46]

Pawnee told the truth. He then received a stern lecture. High Backed Wolf then gave Pawnee a horse, a gun, and a mountain lion skin. The others gave him two horses, moccasins, and other items. "Then High Backed Wolf ended it. 'Now I am not going to tell you to leave this camp. You may stay here as long as you wish. I shall not tell you which direction to go, west or south.'"[47]

Here we have a treatment of a taking vastly different from the "improper borrowing" model of the case of Wolf Lies Down. Why might this be? I think the likely explanations help show the depth of nineteenth-century Cheyenne law and help as well to

[45] *Id.* at 7.

[46] *Id.* at 8.

[47] *Id.* at 9.

compare it to Anglo counterparts.

The Severity of Pawnee's Apprehension and Punishment

Perhaps the first curiosity one notices here is the severity of punishment. High Backed Wolf seems to have happened upon Pawnee, and thus to have saved him, by sheer fortuity. The story contains no overt suggestion that the Bowstrings expected this contingency. They severely beat Pawnee far from camp, took his horses and food, ruined his moccasins and kit, and left him to die. At a time when the Cheyenne rejected the death penalty even for murder,[48] why would they (nearly) inflict it here? Two responses occur that reject the question's factual predicate.

The first response is that Pawnee is exaggerating. Pawnee's story (told by Black Wolf) is told as Pawnee used to tell it.[49] Pawnee "was all the time looking out after the people's morals and counseling the boys on good behavior. I have heard him tell his story many times when I was a youth, because he was always telling it to us as a lesson."[50] As a moralist who had done much early field work in bad behavior, Pawnee may well be coloring his narrative so as to more forcefully drive home its lessons to his young charges. His would hardly be the first prevarication in the service of good.

The second response is that Pawnee is mistaken. The Bowstrings may have known what they were doing and may have had no interest in killing Pawnee, given the taboo against killing a Cheyenne.[51] Young and scared, he may have thought he was about to die, but his punishers may well have known better. This

[48] See *id.* at 133 for a discussion of banishment as the penalty for murder.

[49] "This is what Pawnee used to tell us:... ." *Id. at* 6.

[50] *Id.*

[51] "The killing of one Cheyenne by another Cheyenne was a sin which bloodied the Sacred Arrows, endangering thereby the well-being of the people." *Id.* at 132.

inference (like the first) is inconsistent with the claim allegedly made by High Backed Wolf that Pawnee "would have died" had the former not ridden into the hills that day.[52] Assuming that High Backed Wolf really did say that Pawnee would have died without his intervention (assuming, that is, that Pawnee is not fabricating this part of his story), it is plausible that High Backed Wolf says this to Pawnee simply to seal the moral lesson - to corroborate Pawnee's overblown view of the severity of the punishment. And, of course, we should consider the real possibility that the appearance of High Backed Wolf was anything but a mere fortuity - that High Backed Wolf had been following Pawnee for some time to insure his safety. As Pawnee told the story (according to Black Wolf), "a hunter came up the hill from behind me. When he saw me he stopped and watched me for a long time... I did not hear him until he spoke from his horse right behind me... I fell over in a fright when I heard his voice start out in silence."[53]

Of course, these two responses may be wrong. Pawnee may have been as lucky to live as his account, reported by Black Wolf, suggests. With the rise of the police powers of the military societies, it is plausible that killing a Cheyenne would be justified if it was necessary in the execution of duty.[54] We see a similar notion in Anglo systems, where the common law allowed deadly force in the apprehension of fleeing felons.[55] And contemporary proscriptions against using deadly force to effectuate certain arrests[56] do not prevent deadly force from being used in the course

[52] *Id. at* 8.

[53] *Id.* at 7.

[54] Llewellyn and Hoebel suggest such a possibility (but only a possibility) in their codification of Cheyenne homicide norms. *Id.* at 168. But they also observe that "the Cheyenne police had no business to kill, even to enforce hunt-law." *Id.* at 107.

[55] WAYNE R. LAFAVE, CRIMINAL LAW 560 (4th ed. 2003).

[56] That is, arrests that are not for felonies accompanied by probable cause that the arrestee represents a threat of serious bodily harm or death to the officer or another. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

of those same arrests if the officer lawfully presses forward (without using deadly force) to make the arrest and is met with deadly force.[57] Put more simply, Anglo law recognizes its own principles of necessity that justify risking or taking the life of an arrestee.

Cheyenne and Anglo Ways of Punishment

But I think there are deeper complexities in the story of Pawnee's apprehension and punishment. First, his treatment at the hands of the Bowstrings is clearly a matter of punishment rather than mere apprehension. But the two are certainly mixed. The Bowstrings acted simultaneously in roles that in state systems today would be occupied by actors as divergent as police, judges, prosecutors, and corrections officials. It may thus be impossible to neatly separate out the elements of Pawnee's "punishment" from the elements of his "arrest." Understanding this "role-simultaneity" may allow us to see that it continues in present-day Anglo criminal justice systems. Consider - just as two examples - the punitive uses of the grand jury system[58] and the punitive uses of the power to search and seize.[59] It is unclear in such cases that there is a strict demarcation in our state and federal systems between investigation, apprehension, and punishment.

To better analyze a second complexity of the story, let us treat for a moment the disciplining of Pawnee as nothing but punishment. Pawnee is not being punished (merely) for theft. Nor is he being punished (merely) for violating a rule. He is punished,

[57] LAFAVE, *supra* note 55, at 559.

[58] *See, e.g.*, Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 126 (1995) (discussing claims that prosecutors use grand juries to "harass and intimidate witnesses").

[59] *See, e.g.*, Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 417 (2001) (discussing police "harassment, groundless stops and frisks, false accusations, humiliation and beatings" of minorities); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 571 (1992) (likening, in context of schools, strip searches and corporal punishment).

I think, for a multiplicity of offenses against formal (theft) rules, but also for offenses against less formal community rules and standards - less formal social norms. In important part, he is being punished for his character. The fact that all of these "violations" seem to merge here tells us much about Cheyenne law and life of the period.

The idea of "law" generally carries all sorts of formalistic associations. In examining Cheyenne "law," one tends to look for formal rules and rule-making and rule-applying institutions. And one does find them. But as might be expected in a small community, the lines between legal rule and informal norm and between legal institution and informal cultural practice are often indistinct. As Llewellyn's jurisprudential work makes clear, this indistinctness is often more descriptive of current legal systems than we think.[60]

Viewing Pawnee's story as a whole, it is as though he has failed to live up to an informal standard, as much as he has violated a formal rule.[61] To be sure, the immediate cause of his

[60]Karl Llewellyn was a founder of the jurisprudential movement known as American Legal Realism. He thought the role of rules in American law was exaggerated by writers about law and he was interested in studying the ways in which informal - and often ignored - practices constituted important parts of law. Finally, he was interested in how extra-legal practices and institutions helped do some of the work of law. *See, e.g.*, KARL N. LLEWELLYN, MY PHILOSOPHY OF LAW 183-197 (1941); KARL N. LLEWELLYN, THE BRAMBLE BUSH ix-xi, 1-17 (1960); LLEWELLYN & HOEBEL, *supra* note 2, at 239-269.

[61]Rules specify legal outcomes with more precision than standards. Standards thus call for more judgment. An example of the difference is the rule of Miranda v. Arizona, 384 U.S. 436 (1966) (holding that custodial interrogation must be preceded by warnings regarding Fifth Amendment rights to silence and counsel) and the standard of Brown v. Mississippi, 297 U.S. 278 (1936) (holding that due process is violated by interrogation methods that offend principles of justice sufficiently rooted in tradition so as to be considered fundamental). Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1024 (1995). A simpler example is a rule against driving in excess of a stated speed limit versus a standard that calls for safe driving.

It is important to note that the phrases "informal standard" and "formal rule" are not redundant. Formal norms, like laws, can take the form of either rules or standards. Informal norms can take either form as well. It is also worth making clear that rules and standards are points along a continuum, rather than

apprehension by authorities is his theft of horses. "You have stolen these horses," announce the Bowstrings before they beat Pawnee and destroy his belongings.[62] But Black Wolf's introduction of Pawnee's narrative provides helpful background.

> He had been an awful rascal down there in Oklahoma when he was young, stealing meat from people's racks, taking their horses for joy-rides without asking them for them, and then when he got to where he was going he would just turn the horse loose and let it wander back to its owner - if it did. He was disrespectful to people and sassed them back. Everyone thought he was a mean boy, and whatever happened in the camp he got blamed for it. This story I am going to tell happened just after that trouble Wolf Lies Down had over the borrowed horse when the soldiers made the rule that no one in camp could take another person's horse without permission.[63]

Pawnee's delicts are many. They include violations of

always clearly distinct. Earlier treatments of the differences between rules and standards include ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 56-71 (1922, rev. ed. 1954) and H. L. A. HART, THE CONCEPT OF LAW 120-132 (1961). Later treatments, besides Sunstein's, include Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1993); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); and Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

[62]LLEWELLYN & HOEBEL, *supra* note 2, at 7.

[63]*Id.* at 6.

clear, formal norms (rules against permissionless borrowing and against theft), and violations of informal norms (standards against disrespectfulness and meanness). The force of the story is that this compound of violations justified the rough treatment he got (or thought he got). Clearly, kinder treatment had gotten the tribe nowhere in its efforts to reform Pawnee.

If nothing else, Pawnee had supplied the Bowstrings with plenty of motivation to punish him with particular severity. And there is evidence in Pawnee's own account (again, as told by Black Wolf) that there was some discretion available to those executing a punishment. For Pawnee later became a Fox Soldier and again experienced this discretion first-hand, but from the other side of the law. "Still, I never got it out of my heart that it had been those Bowstrings. Whenever my Fox troop was on duty I was out looking for those men or their families to do something wrong. I always looked for a Bowstring to slip, so I could beat him well."[64]

The lecture High Backed Wolf gives Pawnee is consistent with the notion that Pawnee was punished for his character as much as for his recent theft.

> High Backed Wolf knew I was a rascal, so he lectured to me. "You are old enough now to know what is right," he preached. "You have been to war. Now leave off this foolishness... You know how we Cheyennes try to live. You know how we hunt, how we go to war.

[64] *Id.* at 9. Elsewhere, Llewellyn and Hoebel report that when Last Bull (a Fox Soldier chief) beat Two Twists for stealing a bowstring from him, Elk Soldiers arrived only to find that the people had hidden the two combatants. The Elk Soldiers then destroyed Last Bull's tipi (not typically a penalty for fighting), apparently because of built-up resentment for Last Bull's oft-exercised brutality in his law enforcement capacity as a Fox Soldier. "'They had always been waiting for Last Bull to slip so they could get him,' observed Calf Woman." *Id.* at 120. Enforcement discretion, it seems, had its limits, or at least its consequences. Enforcers used discretion to curb - or at least punish - abuses of discretion.

> When we take horses, we take them from enemies, not from Cheyennes. You had better join a military society. You can learn good behavior from the soldiers. Yet I ask only one thing of you. Be decent from now on! Stop stealing! Stop making fun of people! Use no more bad language in the camp! Lead a good life!"[65]

High Backed Wolf appeals to legal rules ("stop stealing"), informal norms that look like rules ("stop making fun of people," "use no more bad language in the camp"), and informal norms that look like standards ("be decent," "lead a good life"). Pawnee is rebuked for a multiplicity of sins.

This punishment mélange is not as "foreign" as it might seem; it has Anglo counterparts. Under non-guideline sentencing, sentencing discretion in the United States is largely unreviewable.[66] Incarcerative punishments for similarly situated offenders vary wildly, and it is often anyone's guess as to just why a particular offender draws the sentence she does.[67] Such judicial sentencing discretion is thought to be informed by processes such as the pre-sentence investigation, but the very relevance of this kind of information means that it is inevitably unclear just what one is (really) being sentenced for. Violating informal social norms (failing to be contrite, having no vocational skills, having a history of social maladjustment) can increase sentence severity.

[65] *Id.* at 8.

[66] *See, e.g.*, Cynthia K. Y. Lee, *The Sentencing Court's Discretion to Depart Downward on Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government's Motion Requirement*, 23 IND. L. REV. 681, 682 (1990) (noting unavailability of appellate review of non-guideline sentences, so long as statutory maxima not exceeded).

[67] See *id.* at 683-84 for a discussion of some of the factors causing sentence disparities.

Additionally, it is common for punishments to be aggravated for a variety of formal reasons - possession of a weapon[68] and past crimes[69] being two examples.

Even under "structured" sentencing, such as guideline sentencing in the federal (and the occasional state) system - a scheme designed to reduce or remove prior judicial (and department of corrections) discretion - prison terms are generally determined by a combination of offense and offender characteristics. These characteristics include prior convictions[70] and even previously acquitted conduct.[71] And departures from presumptive guideline sentences can occur - for example - for abiding by informal social norms such as turning against one's criminal cohorts.[72] The "sentencing mix" in Pawnee's case seems, by now, quite familiar.

As in Anglo criminal law, there is guilt in Pawnee's case because there is capacity.[73] The reason for the lecture is that

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[68]*See, e.g.*, 18 U.S.C. § 924(c)(1) (1994) (imposing five-year mandatory minimum for carrying or using firearm during drug trafficking or violent crimes).

[69]*See, e.g.*, Lockyer v. Andrade, 123 S. Ct.1166 (2003) (upholding against Eighth Amendment challenge the imposition of two consecutive sentences of 25 years to life for "third strike" felonies that could have been prosecuted as misdemeanors).

[70]*See* Lee, *supra* note 66, at 684.

[71]Barry L. Johnson, *If at First You Don't Succeed - Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 153-54 (1996).

[72]*See* Lee, *supra* note 66, at 688-89 (discussing law of downward departures for "substantial assistance" to the government).

[73]Anglo criminal law claims as a bedrock precondition of guilt the voluntary choosing to do wrong. This value manifests itself in a number of doctrines, including the requirements of actus reus (crime always requires a willed act) and mens rea (crime nearly always requires a proscribed mental state), and defenses such as insanity. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250-252 (1952) (discussing importance of conception of "evil-meaning mind" and "evil-doing hand").

Pawnee was a "rascal." He is capable of knowing "what is right." "You know how we Cheyennes try to live." Pawnee has voluntarily chosen - repeatedly - to violate formal and informal community norms. What may have started out as youthful indiscretion has developed into serious misbehavior that threatens tribal harmony. And Cheyenne justice was nothing if not swift when it came time to quash the disposition to dissonance.

Cheyenne Redemption

Swift punishment was not the only route from dissonance to harmony. Very often Cheyenne punishments were followed by "the authorities" reaching out to the violator and mitigating (refining?) the effects of the punishment. Llewellyn and Hoebel suggest that this was due in part to a general "generosity" that responded to "a fellow citizen in straightened circumstance."[74] They also suggest a wise pragmatism was at work. The Cheyenne typically did not allow feelings of vengeance to get in the way of the purposes of punishment (or did not allow punitive purposes to interfere with larger social purposes). These purposes were importantly more than simply "maintaining order." They included "reform," "richer living," and "the greater end of a finer life for all."[75] And so the justice stories include a case of a soldier society inflicting punishment for a hunting violation by destroying the hunters' guns and killing their horses and then immediately making

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[74]LLEWELLYN & HOEBEL, *supra* note 2, at 114. High Backed Wolf, upon seeing Pawnee's miserable state after his punishment by the Bowstrings, "hugged" Pawnee and "wept, he felt so bad at seeing [Pawnee's] plight." *Id.* at 7.

[75]*Id.* at 114. In contrast - to take a local example - one of the signal failings of Oklahoma criminal justice (and there are many) is that the punishment it metes out has little conscious point, other than revenge. Oklahoma would do well to imitate the nineteenth-century Cheyenne view that punishment, like other law, has as its purpose the harmonious flourishing of individuals in community. It is a notable irony that current American political systems purport to be much more individually oriented than did the (comparatively) communal nineteenth-century Cheyenne.

a gift of a gun and horses.[76]

Pawnee's rehabilitation is delayed, and comes at the hands of an uninvolved chief, rather than his punishers, unlike the case just mentioned, but it is powerful rehabilitation all the same. After lecturing Pawnee, High Backed Wolf begins the formal rehabilitation.

> "Now I am going to help you out. That is what I am here for, because I am a chief of the people. Here are your clothes. Outside are three horses. You may take your choice!" He gave me a six-shooter. "Here is a mountain-lion skin. I used to wear this in the parades. Now I give it to you." He offered me all these things and I took them.
>
> The others gave me beaver skins to braid my hair, beads, and extra moccasins, and two more horses.[77]

Pawnee has been apprehended, punished, lectured, and - in the end - re-born into the tribe. But reputations are neither made nor unmade overnight. And the sting of punishment can be exquisitely sharpened through an apparent palliative.

> I had a sweetheart in the south, but when these people did this for me, I felt ashamed. I had all those things with which to look beautiful, but I did not dare to go back, for I knew she would have heard what the Bowstrings had done

[76] *Id.* at 112-13.

[77] *Id.* at 8-9.

> to me. I thought it wisest to go north until the thing was dead. ...
>
> ... Though I came to be a chief of the Fox Soldiers among the Northern people, I never amounted to much with the Southern bands. Those people always remembered me as a no-good.
>
> You boys remember that. You may run away, but your people always remember.[78]

Being seen as a bad actor did not shame Pawnee into going north (or straight). What operationalized his sense of his social standing - what finally gave him a sense of obligation to the community - was the punishment inflicted by the Bowstrings and the rehabilitation afforded by High Backed Wolf and the other chiefs.

The Cheyenne notion of redemption, of rehabilitative healing, is manifest in many of the justice stories. It took the form of immediate succor by the punishers in the case of the hunting violation by Two Forks' sons.[79] Pawnee was rehabilitated some days after his punishment by an interloping chief.[80] For his (possibly) inchoate hunting violation, Sticks Everything Under His Belt[81] was rehabilitated by the giving of a Sun Dance.[82] Central to these property and hunting stories - as with the homicide stories - are the ideas of tribal harmony and individual redemption. The stories of Pawnee and Wolf Lies Down tell us not only that the community was too important to endanger, but also that each Cheyenne was too valuable to lose.

[78] *Id.* at 9.

[79] This is the case discussed *supra* at text accompanying note 76.

[80] *See supra* text accompanying notes 44-46.

[81] *See supra* note 34.

[82] LLEWELLYN & HOEBEL, *supra* note 2, at 10-11.

Cheyenne justice revered Cheyenne life, rejecting death whether biological or cultural. Informed by this conception of law and justice, a leader responds to a reprobate brought low: "Now I am going to help you out. That is what I am here for, because I am a chief of the people."[83]

[83] *Id.* at 8.