

## REVIEW

*A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact*, JOHN PHILLIP REID. The Pennsylvania State University Press, University Park and London, 1976. Pp. vi, 249. \$14.50.

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John Phillip Reid's latest book, *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact*,<sup>1</sup> is ostensibly a study of trade relations between South Carolina and the Cherokee Indians during the first third of the eighteenth century. But taken in conjunction with his earlier book, *A Law of Blood: The Primitive Law of the Cherokee Nation*,<sup>2</sup> the new book is, in truth, much more. At the deepest level, Reid's achievement in the two books is to suggest to white Americans, first, some ways in which our understanding of other more "primitive" peoples with whom we have come into contact has been limited; second, the wounds sustained by those other peoples as a result; and third, how the limitations upon our understanding of other cultures are simultaneously limitations upon our understanding of our own.

In some respects, Reid's first book, *A Law of Blood*, resembles many earlier studies of American Indian legal systems, notably the classic study by Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*.<sup>3</sup> In his effort to understand the law of the Cherokee, Reid begins *A Law of Blood* in much the same way that Llewellyn and Hoebel began *The Cheyenne Way*—by describing the social and political context in which Cherokee law grew. Reid then proceeds, as did Llewellyn and Hoebel, to discuss various fields of substantive law, such as the law of homicide, the law of marriage, property law, the law of inheritance and status, international law, and the law of capture and adoption.

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<sup>1</sup> J. REID, *A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT* (1976) [hereinafter cited as *A BETTER KIND OF HATCHET*].

<sup>2</sup> J. REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* (1970) [hereinafter cited as *A LAW OF BLOOD*].

<sup>3</sup> K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) [hereinafter cited as *THE CHEYENNE WAY*].

There is, however, a significant difference between John Reid's study and earlier works like *The Cheyenne Way*. The authors of *The Cheyenne Way*, despite their many poignant descriptions, were not seeking merely to depict primitive law for its own sake. Instead, they were attempting to construct "the skeleton of a general theory of the nature and function of law-stuff and of the law-jobs with which any group is faced in the process of becoming and remaining a group"—a theory applicable "to groups of any size or complexity."<sup>4</sup> They believed that they had found "less contrast than parallelism" between modern and primitive law<sup>5</sup> and that their study had identified "the perennial common ground of the law-stuff of all societies . . ."<sup>6</sup> Their goal was similar to that of the early American anthropologist Frank Hamilton Cushing, who, according to Claude Levi-Strauss, "was aiming less at giving an actual description of . . . [primitive] society than at elaborating a model . . . which would explain most of its processes and structure."<sup>7</sup> Llewellyn and Hoebel hoped to use their model of Cheyenne law to obtain insights into the solution of contemporary American legal problems—that is, to illuminate "modern law by [turning to] a primitive problem."<sup>8</sup> They wanted to know, for example, how the Cheyenne dealt with "the occurrence of *divergent*" urges or desires among members of the group<sup>9</sup> so that they could better advise Americans of the 1940's how to deal with nonconformity, divergence, and dissent.

Studies that generate models through a process of cross-cultural comparison are obviously useful and valuable. We can, indeed, often gain insight into our own problems by seeing how other societies have dealt with similar ones. Nonetheless, models of the sort generated by Llewellyn and Hoebel have their limitations. By focusing upon how other societies have solved legal problems similar to our own, the student of a foreign culture may tend to pay scant attention to or, perhaps, even ignore problems of that culture that have no analogue in our own. Hence, he will present us with a distorted picture: the foreign culture will be understood and depicted in our terms rather than its own.

John Reid tries to counterbalance this distortion by portraying the law of the primitive Cherokee nation in its own terms—that is,

<sup>4</sup> *Id.* at 273.

<sup>5</sup> *Id.* at 51.

<sup>6</sup> *Id.* at 49.

<sup>7</sup> C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 290 (C. Jacobson & B. Schoepf trans. 1963).

<sup>8</sup> *THE CHEYENNE WAY*, *supra* note 3, at 44.

<sup>9</sup> *Id.* at 274.

by giving us an "actual description."<sup>10</sup> To accomplish this, he urges his reader, in a phrase he repeats frequently, to "think Cherokee"<sup>11</sup>—to understand Cherokee legal culture as a Cherokee would have understood it and to be "careful not to force primitive facts into current theories or to use contemporary legal categories to rearrange primitive concepts."<sup>12</sup>

Having said this, Reid introduces his central claim—that a primitive Cherokee did not understand law to be a mechanism that "coerced submission to sovereign authority . . ."<sup>13</sup> He suggests that "[t]he Cherokees had no adjudicatory system, no method of ordeal, no remedial procedures or concepts, because Cherokee jurisprudence did not contemplate public wrongs or adjudicable private disputes."<sup>14</sup> But even though "[t]he Cherokees may have lacked forensic institutions, . . . they recognized certain rules of right conduct and knew the consequences that resulted from their breach."<sup>15</sup> Hence they had law. It was a law backed by "taught moral values," such as "the tradition of sharing property, . . . the attitudes that made avarice and the accumulation of goods a disgrace," and "the shared tradition that harmony was the measure of moral excellence."<sup>16</sup> These values, in turn, were enforced by the sanction of withdrawal. Sometimes, withdrawal occurred when an individual left "a situation of potential trouble,"<sup>17</sup> but the more important "side of Cherokee withdrawal was for the group to withdraw from an aggressor; withdrawal which, if the offender persisted, might develop into ostracism."<sup>18</sup> Such ostracism, according to Reid, "was the chief sanction . . . utilized by the Cherokee legal system to discourage antisocial behavior."<sup>19</sup> It was a fully adequate substitute for our more aggressive habits of "forc[ing] a man to do something he . . . [does] not care to do"<sup>20</sup> and punishing him "with blows" if he fails to do it.<sup>21</sup>

It would be pointless to pursue my summary of Reid's description of the primitive Cherokee legal mind in greater detail. I trust

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<sup>10</sup> C. LEVI-STRAUSS, *supra* note 7, at 290.

<sup>11</sup> A LAW OF BLOOD 230.

<sup>12</sup> *Id.* at 229.

<sup>13</sup> *Id.* at 231.

<sup>14</sup> *Id.* at 232.

<sup>15</sup> *Id.* at 233.

<sup>16</sup> *Id.* at 236.

<sup>17</sup> *Id.* at 240.

<sup>18</sup> *Id.* at 241.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 267.

<sup>21</sup> *Id.* at 242. See also *id.* at 267-69.

that I have already said enough to establish the genuinely interesting and original quality of Reid's scholarship. On that ground alone, *A Law of Blood* deserves far more attention than it has received. What I have yet to establish, however, is the book's profundity or utility; unlike *The Cheyenne Way*, it is not a book that is addressed explicitly toward giving us insight into our current situation, but in conjunction with *A Better Kind of Hatchet*, that is precisely what it does.

*A Better Kind of Hatchet* begins with a detailed, perhaps overly detailed, description of the rise of trade and institutions for trade between South Carolina and the Cherokee Nation during the 1710's and 1720's. However, Reid does not content himself merely with this recitation of detail and in the book's final chapters draws some powerful conclusions.

One important point is his distinction between cultural and technological inferiority. In a chapter entitled "An Unequal Equality—The Vise of Trade,"<sup>22</sup> Reid argues that the Cherokee legal system depicted in *A Law of Blood* was the cultural equal of the English legal system, in that the Cherokee system solved Cherokee problems as well as the English system solved English problems. In addition, he notes that Cherokee law, rather than English law, served as the foundation upon which relations between the two nations were structured. On the basis of the details he has previously reported, Reid concludes that, at least during the early years of contact, "European culture did not carry all before it. Native institutions were not easily supplanted. It was British law, not Cherokee law, that had to be altered, and it was the British, not the Cherokees, who had to change their ways."<sup>23</sup>

Nevertheless, the Cherokees were soon caught in an English-made vise, for they were quickly conquered by English products and became dependent on English technological skills. The opening wedge for English conquest was the gun. Reid writes:

A Cherokee man's most prized possession, the gun was also his most disastrous acquisition, marking the beginning of Cherokee dependence. No Cherokee could make a gun, keep it in repair, or manufacture powder. Already a Cherokee warrior without a gun was at a disadvantage. A Cherokee hunter without a gun could not match his neighbor's kill of deer. Guns were needed and so were the British to supply them.

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<sup>22</sup> A BETTER KIND OF HATCHET 189.

<sup>23</sup> *Id.*

. . . Trade put the nation at a distinct disadvantage. The reason does not lie in the fact that the Cherokees had to accept British supervision of Carolina traders and British enforcement of South Carolina-made trade regulations. The reason is found in the basic positions of the bargaining parties. South Carolina could survive without Cherokee deerskins; the Cherokees could not survive without Carolina-supplied ammunition. Charles Town merchants, on one hand, might find the mountain Cherokees the most convenient source of the best leather, but there were other nations to whom they could turn if the Cherokees did not accept their terms. The Cherokees, on the other hand, had only one dependable source of weapons without which they would be the easy prey of their enemies.<sup>24</sup>

This dependence would become, as Reid notes, "the first chapter of a fearful drama."<sup>25</sup>

The second chapter in the drama is a story of the failure of white Carolinians to understand their Cherokee neighbors. Reid does not make this point systematically, but only by way of illustration. Two examples must suffice for present purposes, both of which manifest the white man's incomprehension of the Cherokee's abhorrence of punishment. In one case, the English asked the Cherokees for information about one of their traders, a man named Sawney Long, who had gone over to the French. The Cherokees, however, knowing that a British subject who deserted to the French would face charges and possibly punishment, "were Silent . . . not carring to Complain of him."<sup>26</sup> Such silence was, one suspects, incomprehensible to our white ancestors, because it was motivated by concern for communal harmony rather than individual self-interest, and our ancestors never made the effort to understand the importance of harmony to a Cherokee tribesman. The other case, which is more pointed, occurred when George Chicken, South Carolina's commissioner for Indian trade, received one of many complaints from the Cherokees concerning misconduct committed by white traders within their nation. In this instance, the complaint was that horses belonging to traders often ran loose and did much damage in Cherokee towns, particularly to unfenced crops. Chicken, in response, told the Cherokees that "the English did not Suffer any such thing and that if they would Shoot some of the horses they

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<sup>24</sup> *Id.* at 193-96 (footnotes omitted).

<sup>25</sup> *Id.* at 190.

<sup>26</sup> *Id.* at 185.

would take more care of them for the future . . . .”<sup>27</sup> But the Cherokees would not shoot horses belonging to white men for that would “disrupt harmonious relations with them, cause an uneasiness in the town, and introduce an element of aggressiveness to a situation that, if ignored, might go away.”<sup>28</sup> Instead, the Cherokees would use their own sanctions, such as “ridicule, sarcasm, shame, satire, or withdrawal.”<sup>29</sup> The problem with these sanctions, as George Chicken must have known, was that white traders “did not feel the sting of Cherokee ridicule, they were not shamed by Cherokee withdrawal. For the traders, Cherokee sanctions were no sanctions at all, they were invitations to commit abuses . . . .”<sup>30</sup> However, Chicken, unable to educate the traders, could only issue the following proclamation:

To all White men Traders and Men in the Cherokee Nation:

Having had Several Complots to me and Especially by the head Men of Tamusey that the Several White Men there without any Manner of regard to the friendship betwixt us and the Cherokees do Suffer their Several horses to destroy and eat up their Corn which is Contrary to our good Will towards them.

These are therefore to Charge and Comand all White men as aforesd not to Suffer or Comitt such ill practices for the future, having given the Indians a particular Charge to Shoot any Such Horsses as may at any time hereafter be seen in their Cornfields destroying their Corn or doing them any such damages as they have heretofore done.<sup>31</sup>

With illustrations such as this proclamation by George Chicken, John Reid makes his profound contribution. By demonstrating how little our ancestors understood one group of people strikingly different from themselves, Reid makes us wonder how well we understand different peoples with whom we come into contact today. To those readers who are interested, *A Law of Blood* and *A Better Kind of Hatchet* suggest a systematic strategy for obtaining greater understanding of such peoples. This strategy merits analysis.

Let me begin by mentioning the obvious fact that we can learn little about another culture by randomly accumulating and reporting data. Although there may have been a time when the almost

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<sup>27</sup> *Id.* at 186.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (footnotes omitted).

<sup>31</sup> *Id.* at 191-92.

total lack of information in fields such as anthropology seemed to justify accumulation of data as an end in itself, scholars in most areas of study today are nearly overwhelmed by undigested factual material. In the words of the late Ludwig Wittgenstein, scholars should abandon efforts to produce comprehensive compendia of knowledge that will "spare other people the trouble of thinking" and concentrate instead upon generating ideas that will "stimulate someone to thoughts of his own."<sup>32</sup>

If scholarship is to turn itself away from the humanly unattainable end of comprehensive knowledge to the quite different objective of stimulating thought, scholars must select rather than merely report facts; but they need strategies that will enable them systematically to select and focus upon facts in thought-provoking ways. One valuable strategy is that of Llewellyn and Hoebel; to focus upon the ways in which another culture is similar to our own. But that strategy, as I have already suggested, has its limitations, because it does not provide a systematic device for focusing upon elements in a foreign culture that have no analogue in our own. It is precisely here that Reid suggests an alternative strategy: to focus upon the ways in which another culture differs from ours. Both *A Law of Blood* and *A Better Kind of Hatchet* systematically pursue the strategy of examining cultural differences and illustrate the powerful synthesis to which such an examination can lead.

Systematic analysis of the ways in which other legal cultures differ from our culture can be particularly useful for the insight such study can give into the limits of our own cultural perspective. Our cultural presuppositions restrict our capacity to understand not only the structure and values of other societies but also the structure and values of our own society. Indeed, these presuppositions themselves are often hidden from our consciousness. We can begin to transcend our presuppositions, however, when we expose the structure and values of another society by describing how they differ from our own; the process of description compels us to identify the presuppositions that we must discard in order to portray a culture that does not share them. In this manner, attaining an understanding of a different culture deepens our understanding of our own.

One must not, of course, claim too much for that sort of history which, from among the random facts that have been preserved, focuses upon those facts that illustrate how past societies differed from ours. Such history obviously cannot give us a complete picture

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<sup>32</sup> L. WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* x (G. Anscombe trans. 1953).

of the past. Thus, like any piece of historical scholarship that sets forth a coherent view of the past, Professor Reid's study of Cherokee law is subject to the criticism levied by anthropologist Frederick Gearing in his review of Reid's work. Gearing asserts that Reid makes "selective use of . . . materials," deploys "data and received opinion insofar as these fit," and "disregard[s] . . . roughly equivalent materials as these do not."<sup>33</sup> It is also true, as Gearing contends, that Reid has eschewed "systematic analysis" of primitive Cherokee law in accordance with modern conceptual categories and has accordingly refused to draw "that difficult but analytically critical distinction" between legal and extralegal forms of social control "by the bald assertion . . . that Cherokees made no analogous distinction."<sup>34</sup>

Although the general tenor of Gearing's criticisms is clear, their precise level is not apparent from the face of his review. They can be understood on at least three possible levels. First, Gearing may be charging Reid with a failure to disclose evidence that directly contradicts his hypothesis. Such a charge would be a serious one to levy against a work of nonfiction. While it is possible to read Gearing's review in this manner, such a reading does not strike me as a likely one; moreover, as far as I can tell, Reid is innocent of any such charge.

It is more likely that Gearing is criticizing Reid on a second level. Gearing, the anthropologist, may be accusing Reid, the historian, of failing to use analytical categories developed by anthropologists in examining his data. In other words, Gearing may be criticizing Reid for focusing upon the ways in which the Cherokee legal system differed from our own system, while ignoring evidence of similarity between the two that was not related to Reid's study in contrast. If this is the criticism, it must be understood for what it is: a comment upon the genre in which Reid writes, rather than upon the quality of his work within that genre. To demand of Reid that he report equally upon all of the random facts preserved in archival records or that he analyze those Cherokee facts by reference to modern Western conceptual categories is to ask him to abandon his genre and thereby lose his special focus upon the ways in which the Cherokee culture differed from our own. Although Reid's portrait of the Cherokee legal system as informal and noncoercive may, in places, strike some readers as slanted and perhaps even as some-

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<sup>33</sup> Gearing, Book Review, 73 *AM. ANTHROPOLOGIST* 1326, 1327 (1971).

<sup>34</sup> *Id.* at 1326.



what incredible, we must resist the temptation to portray the past only in familiar ways, lest we ignore the special instruction that the different and the unfamiliar can give. We must also remember that the classic study of Llewellyn and Hoebel, like the work of Reid, necessarily sifted through and selected from among the available facts; if its portrait of Cheyenne law was less jarring, that was only because the portrait was more familiar. Like Reid, Llewellyn and Hoebel necessarily told only part of the story. While we should not want to be without the part told in *The Cheyenne Way*, neither should we want to be without the part told in *A Law of Blood* and *A Better Kind of Hatchet*. The distinctive points of view presented in each of these two vastly different studies, although neither is final nor complete, foster thought in more varied, interesting, and perhaps fruitful directions than any single unstructured study would.

A third possibility is that Gearing, building upon the work of another anthropologist, Paul Bohannan, is making a claim that a student of a foreign culture must synthesize that culture's distinctive "folk system" while simultaneously dissecting that system with our own culture's analytical categories.<sup>35</sup> Gearing's criticism may be that by focusing only upon the ways in which the Cherokee legal culture, viewed in its own terms, differed from ours, Reid fails to consider the ways in which the two cultures, viewed in our terms, are similar. Initially, this third possible line of criticism seems more powerful than the first two.

Assuming that focusing upon similarity and focusing upon difference are both useful strategies with which a scholar can approach a foreign culture, it would seem that a third, more complete, and hence better, strategy would be to focus upon both.<sup>36</sup> I suspect, however, that rigorous pursuit of this third, comprehensive strategy is impossible. The difficulty is apparent in the work of Reid, who, in a manner typical of an historian, develops his generalizations about the ways in which Cherokee legal culture differed from ours by first identifying innumerable specific differences between our law and Cherokee law and then searching for characteristics which those

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<sup>35</sup> See P. BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* 4-6 (1957). For a summary of the debate among anthropologists engendered by Bohannan's work, see Nader, *The Anthropological Study of Law*, in *THE ETHNOGRAPHY OF LAW* 3, 11 (L. Nader ed. 1965).

<sup>36</sup> It may be that comparativists are limited by the nature of language to a strategy of analyzing difference, a strategy of analyzing similarity, or a combination of the two. Whenever we attempt to discuss another culture, we must define its concepts through the use of words that have meaning to us, and such definition will usually take the form of a description of the ways in which a new concept is similar to or unlike a better-known one. This whole question of the limits which language imposes upon the study of other cultures is, however, well beyond the confines of the present review.

specific differences have in common. If a scholar were to begin by examining specific similarities between two legal systems as well as specific differences, threads common to all or nearly all of the points of law discussed—threads with which to weave broader generalizations about a society as a whole—would not exist. All that would exist would be threads common to the differences and threads common to the similarities—threads with which to weave broader generalizations about either difference or similarity, but no more.

We have returned, in short, to the central weakness of any attempt at comprehensive scholarship. It is possible for the scholar, who focuses upon specific similarities between two cultures separated in either time or space, to formulate slanted and incomplete generalizations about those cultures that emphasize similarity. It is also possible for the scholar, who focuses upon specific differences, to formulate slanted and incomplete generalizations emphasizing difference. On the other hand, the scholar who, in the interest of comprehensiveness and balance, discusses both specific similarities and specific differences will tend to lose sight of the possibility of generalization. Even if he does not, the processes of generalization will permit only the same slanted and incomplete generalizations about similarity and difference to be drawn.

Hence, I am not at all troubled by Gearing's charge that John Reid has selected evidence to illustrate his particular point of view and that *A Law of Blood* and *A Better Kind of Hatchet*, taken together, constitute something less than a fully comprehensive synthesis. For me, at least, the object of scholarship should not be to restate and synthesize comprehensively all knowledge in a field. Abandonment of the effort at comprehensive restatement or synthesis does not, however, leave scholars without an equally worthy and demanding task. That task, as I have already suggested, is to stimulate others to thoughts of their own. The best scholarship, in my view, is that which recognizes the tension between comprehensiveness and provocativeness and accordingly trades off that degree of comprehensiveness which must be sacrificed so as to preserve a work's unique point of view and hence its capacity to stimulate thought.<sup>37</sup> *A Law of Blood* and *A Better Kind of Hatchet* more

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<sup>37</sup> I have in mind for present purposes legal scholarship, especially that of a historical character, the object of which is to deepen or broaden our understanding of legal systems in general. It may be that the standard should be different for another variety of legal writing, that which advocates legislative or judicial adoption of a legal rule or a related set of rules. It is difficult to see what an advocate gains by being provocative. Perhaps the ultimate test of an advocate's quality is his ability to explore a problem comprehensively and to offer

than meet this high standard.

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solutions that are within the range of experience of and accordingly are more likely to be acceptable to as large a range of the populace as possible. This is not the place, however, to explore this interesting and important question.

