A Classic in Spite of Itself: *The Cheyenne Way* and the Case Method in Legal Anthropology

John M. Conley and William M. O'Barr

KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*. Norman: University of Oklahoma Press, 1941. Pp. x + 360.

A little over a year ago, we published an essay in this journal about the enduring legacy of Bronislaw Malinowski's *Crime and Custom in Savage Society* (Conley and O'Barr 2002). We argued that Malinowski was the single most important figure in the history of the anthropology of law because he was the first to demonstrate two things that anthropology now views as self-evident: that all societies can be presumed to have law, regardless of the presence of Western trappings; and that anthropology's signature method—field ethnography—can be profitably applied to the study of law. Another way to characterize Malinowski's contribution is that he was the first to investigate the nature of law from a cross-cultural perspective. However one describes what he did, we concluded, *Crime and Custom* remains the most influential book ever written about the anthropology of law.

In this essay we take up the second entrant into legal anthropology's putative canon of Great Books: Karl Llewellyn and E. A. Hoebel's *The Cheyenne Way*. In the summer of 1935, Llewellyn, a Columbia Law School professor with a substantial reputation in jurisprudence and commercial law, and Hoebel, a young and unknown anthropologist, visited the Northern Cheyenne Indians on a reservation in Montana. They interviewed a group of elderly Cheyenne who told them stories about tribal life in the

John M. Conley is William Rand Kenan Jr. Professor, University of North Carolina School of Law.**William M.O'Barr** is professor of cultural anthropology, Duke University. This is a joint work. The authors alternate priority of authorship in their publications.

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mid-1800s, when the Cheyenne roamed the American Great Plains, still unconquered, hunting buffalo and making war on neighboring tribes. These stories, which Llewellyn and Hoebel refined into cases, would become the core of *The Cheyenne Way*, which appeared in 1941. They used these cases to investigate the "law-ways" and "law-stuff" of Cheyenne culture—terms that, as we shall see, they never really defined.

The Cheyenne Way is certainly second in the canon in terms of chronology, appearing 15 years after *Crime and Custom* with nothing memorable in the interim. Whether it is second in any substantive sense is a more complicated question. The literature contains many encomia to its influence. Following this conventional wisdom, we have both taught the book to more than a generation of law students, undergraduates, and Ph.D. candidates. However, with no exceptions we can remember, the response has always been, "Why did you make us read this turgid/impenetrable/unpersuasive book?" (or stronger words to that effect). For most of our careers, we have dismissed these student complaints with the usual epithets: shallow, lazy, philistine. But as we dissected the book in the preparation of this essay, we discovered that our students' grievances deserved a more respectful hearing. Indeed, whereas our *Crime and Custom* essay asked, How did such a little book have such a big influence? the central question in this essay might be, How did such an immensely flawed book have such a big influence? We have ultimately concluded that *The Cheyenne Way* does deserve its canonical status, but for reasons that are subtle and sometimes ironic.

In a 2001 essay in this journal, Ajay K. Mehrotra characterized *The Cheyenne Way's* reception and subsequent influence as "dichotomous." He observed, correctly, that "legal scholars have paid scant attention" to the book. On the other side, he quoted anthropological sources for the propositions that *The Cheyenne Way* marks "the 'beginning of modern studies in the anthropology of law,'" and that it stands "as one of the 'great classics of legal anthropology'" (Mehrotra 2001, 742). He went on to praise the book as "an integral part of the law and society heritage," with particular reference to "its methodology of studying dispute resolution." But he criticized Llewellyn and Hoebel because "their nostalgic view of Cheyenne 'law-ways' only reified as evident and natural the neo-evolutionary binary between primitive and modern societies," and for having "reproduced a view of native culture as somehow untouched and isolated from the greater context of continental migrations and capital flows" (Mehrotra 2001, 771).

Our focus and, consequently, our conclusions differ somewhat, though we dispute very little of what Mehrotra says. We necessarily agree about the inattention of legal scholars; few lawyers have ever heard of, let alone read, the book. Nonetheless, we concur with David Ray Papke (1999) (one of those few who have) that, by shaping Karl Llewellyn's approach to the drafting of the Uniform Commercial Code, the Cheyenne research exerted more influence on the content of American law than almost any other social

science research project. From the anthropological perspective, we would also have to agree with Mehrotra that a survey of legal anthropologists would probably accord it "classic" status. We will explore whether and why this status is merited.

The Cheyenne Way is often credited with turning legal anthropology toward the case analysis method. On a theoretical level, this is true. Llewellyn and Hoebel described and argued forcefully for a case method that had seemingly unlimited potential for illuminating the law of societies that lacked formal legal trappings. Again at a theoretical level, almost every claim they made for their method seems true. The problem is at the level of application. By its own example, *The Cheyenne Way* makes a poor case for the case method: its "cases" are hardly that and the analysis is sparse and unpersuasive. While Llewellyn and Hoebel raised provocative questions that have had lasting influence, their answers rarely follow from the evidence of their cases. Indeed, it is almost as if they offered the case method as a working hypothesis and then refuted it. To borrow a concept from patent law, if Llewellyn and Hoebel did invent the anthropological case method, they never successfully reduced it to practice. In fact, we shall argue, the first credible implementation of the case method would not be seen until the work of the post–World War II Africanists Max Gluckman and Paul Bohannan.

Ironically, it was Malinowski (1942) himself who best captured the problematic nature of *The Cheyenne Way*, in a posthumously published review essay in the *Yale Law Journal*. Although most of the essay was devoted to Malinowski's final exposition of his own theory of law, his analysis of *The Cheyenne Way*'s strengths and weaknesses was as incisive as it was understated. He acknowledged that "'the curious and lovely Cheyenne material,' as the authors lyrically describe[d] it, allow[ed] them to lay bare certain aspects of primitive justice and primitive judicial process." But the material was "difficult to handle," compromised by the unavoidable strategy of reconstruction. This "complicate[d] matters[,] and not all the resulting tangles seem[ed] to have been unraveled" (Malinowski 1942, 1237). These "tangles" were exacerbated by the book's style, about which Malinowski had "misgivings." While sometimes "magnificent" and "candid" (Malinowski 1942, 1250), on one occasion even "racy and inspiring," Malinowski found it too often "cryptic," "picturesque, but lack[ing] precision," crying out for "a sober translation into ordinary and accepted language" (Malinowski 1942, 1251). On the critical question of the nature of Cheyenne law, he simply could not figure out what they were talking about. He concluded that Llewellyn and Hoebel needed to write a second volume in which they presented "additional data," this time in "the plain, conventional English of social science" (Malinowski 1942, 1253).

We agree with Malinowski, but think the problems he identified are even more fundamental. The style of the book is indeed cryptic. Perhaps the best illustration is the related concepts of law-ways and law-stuff,

terms which pervade the book. Llewellyn and Hoebel defined law itself—aptly—as that which "purposes to channel behavior in such manner as to prevent or avoid conflict," and also "has the peculiar job of cleaning up social messes when they have been made" (p. 20). About law-ways and law-stuff, however, we can only make educated guesses. While law-ways appear to correspond to legal practice and behavior, and law-stuff to comprise all the legal content of a culture, these presumably powerful terms are never defined—an idiosyncrasy that epitomizes everything that is right and wrong with the book.

The Cheyenne Way's problems go beyond literary merit, however. We shall argue that Llewellyn and Hoebel's rhetorical imprecision corresponds to a more significant intellectual imprecision. By any reasonable evidentiary standard, their cases do not support many of the inferences they draw. In hindsight, it is perhaps surprising that the case method survived their demonstration, so we shall explore the reasons why it did. We will begin by reviewing how Llewellyn and Hoebel's interesting collaboration came to pass. We will then reexamine their methods, looking closely at their case presentations and analyses. Finally, we will compare *The Cheyenne Way*'s version of the case method with the subsequent work of Gluckman and Bohannan.

I. THE COLLABORATION

Like so many milestones in intellectual history, *The Cheyenne Way* began casually, almost accidentally. By the time he first met E. Adamson Hoebel in June of 1933, Karl Llewellyn was already a significant figure at Columbia Law School, and was well on his way to becoming one in the larger arena of American jurisprudence. How he got to that point is an interesting story that is worth a brief digression.

Raised in Brooklyn, Llewellyn spent three years after high school in Germany as an exchange student.[1] He then went on to Yale. When World War I broke out in August 1914, Llewellyn was in Paris completing a term abroad at the Sorbonne. By now a lover of German culture and an admirer of all things German, he resolved to enlist in the German army. Unable to cross the Franco-German border, he traveled via England and Holland, finally entering Germany on a refugee train. After several German refusals, he eventually managed to enlist in the 78th Prussian Infantry regiment, but his official status was muddied by his refusal to take the oath to the kaiser and thereby jeopardize his American citizenship. In fact, the Germans never

1. Our account draws on Twinning (1973, chap. 6 and app. A; 1968).

issued him a uniform, and he served in items of clothing taken from a wounded German sergeant and a dead French peasant.

When his parents got wind of this, they sought the help of the American diplomatic authorities (the United States was still neutral), who procured Llewellyn's formal dismissal from the German army. But when his regiment headed out for the front, Llewellyn got aboard the troop train, hidden by his army buddies. The officers took a "don't ask, don't tell" attitude toward the stowaway they labeled "the fool American." Llewellyn went into combat with the regiment near Ypres in November 1914 and was wounded in the lower back. After three months of hospital convalescence, he sought permission to return to active duty. The German government refused and sent him back to the United States, but not before promoting him to sergeant and awarding him the Iron Cross. As far as we can determine, he was the first American so honored, and remains the only one.

When he returned to Yale, Llewellyn's exploits made him an instant campus celebrity. But as anti-German sentiment rose in the United States, he became increasingly uncomfortable with his notoriety and tried to enlist in the U.S. Army. To his consternation, he was rejected as "morally unfit" and instead spent the war studying at Yale Law School. While a moral analysis of Llewellyn's wartime conduct is well beyond the scope of our inquiry, the reasons Llewellyn himself gave for fighting for Germany—admiration for and gratitude to Germany, a youthful lust for adventure, and sympathy for the underdog—seem to us entirely plausible. It should also be emphasized that the Germany of 1914 was not the Germany of 1940, either in fact or in perception.

Llewellyn graduated from Yale Law School in 1918 but stayed on in New Haven through 1920, pursuing a graduate law degree and performing a number of teaching and editorial tasks in the war-depleted school. After a couple of years of banking law practice in New York, he joined the Yale faculty in 1922 and then moved to Columbia in 1924. He spent 1928–29 back in Germany, at the University of Leipzig, where he wrote two books on American law in German.

To return to our intellectual story: In 1930, Llewellyn had published *The Bramble Bush* ([1930] 1951), a short book that quickly became something of a sacred text in the legal realist movement. The book was a compilation of a series of lectures that Llewellyn had given to incoming law students at Columbia in 1929. In bursts of evangelism that would probably evoke snickers from contemporary students, he urged them to give themselves over fully to the study of the law.[2] But he also delivered the more sober message of realism.

2. See, for example, his exhortation about reading assigned cases (Llewellyn [1930] 1951, 152): "Put yourself into them [the cases]; dig beneath the surface, make your experience count, bring out the story, and you have dramatic tales that stir, that make the cases stick, that weld your law into the whole of culture."

Before realism gained ascendancy in the thirties, formalism dominated Anglo-American legal philosophy. In the words of a 1945 U.S. Supreme Court opinion (*Guaranty Trust v. York*, 326 U.S. 99, 102 [1945]), formalism viewed the law as "'a brooding omnipresence' of Reason." Law was a Platonic ideal, out there to be discovered—not made—by judges. Formalist judges no more "made" law than Newton had "made" the law of gravity. The judges' function was essentially oracular: to let the law speak through them. In it purest manifestation, formalism denied that economics, culture, or psychology played any role in the judicial process of discovering the applicable law and applying it to individual cases. The law, like science, developed and improved as judges made new discoveries and got progressively closer to legal "truth."

To the realist, the same messy humanity that the formalist relegated to the margins was the law's very essence. As Llewellyn ([1930] 1951, 152) put it in *The Bramble Bush*, "each opinion [is] a human document; each case a human struggle, warm with life." For the realists, the critical question for the law became, "What does it mean to people in society?" (Llewellyn [1930] 1951, 12). Rather than excluding social data to focus exclusively on legal rules, the realists believed such data to be highly relevant to legal decisions. Llewellyn therefore exhorted his law students not to lose themselves in the labyrinth of legal doctrine, but to enhance their connections to other branches of learning: "Work at your art, your science, your philosophy—work even at your Mencken, if you must" (Llewellyn [1930] 1951,153).

The realists also had a radically new perspective on how judges made decisions. First, they admitted that legal rules were not sufficiently precise to determine the outcomes of most cases. Instead, the rules left significant wiggle room within which judges could exercise discretion. In Llewellyn's words, "rules guide, but they do not *control* decision" ([1930] 1951, 180). As a result, judges themselves became much more important than they had been for formalists. Whereas the formalists held that judges did what the law said, the realist view was that the law was what judges said. Rather than being pawns of the brooding omnipresence, judges were relatively free agents who, in the best circumstances, sought reasonable results after taking account of all relevant factors. Because they had so much authority, it mattered who they were and where they came from. In a pronouncement that was shocking in its day, Llewellyn argued that "[d]ivergencies in training, ability, prejudice, and knowledge still occur, and lead to differences in the results upon like facts" ([1930] 1951, 32).

The category of law makers, moreover, included not only "judges" in the sense of law school graduates in black robes, but also anyone with practical responsibility for dealing with disputes—in Llewellyn's language, all those who did "law-jobs." In what might be the most frequently quoted passage in *The Bramble Bush*, Llewellyn said:

> This doing of something about disputes, this doing of it reasonably, is the business of law. Among the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.* ([1930] 1951, 3)

Llewellyn subsequently repudiated these remarks as oversimplified and misleading.[3] Nonetheless, they are, as we shall demonstrate, an accurate reflection of an outlook that permeates both *The Cheyenne Way* and Llewellyn's later work on the Uniform Commercial Code.

It should come as no surprise that a realist like Llewellyn searched far and wide for interdisciplinary materials on law and disputing. If the law is what those charged with resolving disputes do, then one ought to be able to find it almost anywhere. And since the realist outlook minimizes the significance of the trappings of "official" law, comparisons between societies with radically different technologies and political arrangements should be both possible and instructive.

By the time of his initial meeting with Hoebel in 1933, Llewellyn's realist curiosity had led him into the emerging field of legal anthropology.[4] When he read Malinowski's *Crime and Custom in Savage Society* ([1926] 1985), he was both excited and disappointed. Llewellyn was impressed by Malinowski's development of the participant observer method, his demonstration of the gap between how norms are stated and how people behave, and his argument that the Trobrianders' informal, reciprocity-driven means for controlling deviance deserved to be called "law." He was frustrated, however, by how few cases Malinowski had relied on, and by the lack of detail with which even those were presented. Llewellyn felt that Malinowski's ethnographic materials failed to answer basic realist questions about who actually resolved disputes and how and why they did so.

It was an ideal time in Llewellyn's intellectual development for Hoebel to appear, and appear he did. The first meeting apparently took place after Franz Boas, Llewellyn's Columbia colleague and probably the most famous anthropologist in the world, suggested that he contact an orphaned graduate student. Hoebel was generally interested in Malinowski's subject, "primitive" law. His specific objective was to study the law-ways of the Commanche of the American West. However, no established anthropologist would take him on, because of a pervasive belief that peoples like the Commanche had no law worth studying—a belief, Llewellyn and Hoebel later concluded, that was based on the "primitives'" inability to answer law-school-style questions about rules and results.

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3. He issued a qualified retraction in the second edition of *The Bramble Bush* (Llewellyn [1930] 1951, ix–x).

4. This portion of the account draws primarily on Twining (1973, chap. 8).

When Hoebel related his dilemma, Llewellyn responded with a detailed outline of a new field technique, a novel adaptation of the law school case method to the circumstances of a people who lacked familiar, formal legal processes. His idea was to focus in painstaking detail on actual "trouble-cases" (p. 29), instances in which aberrant behavior strained the social fabric.[5] He proposed to examine such cases from every possible angle, including the words and actions of the protagonists, the reactions of others, the resolution reached, the reasons given for it, and the effect of the whole affair on the handling of cases that followed. Llewellyn's approach would improve on the traditional method of direct inquiry about norms (what he and Hoebel called the "ideological" approach [p. 20]) by allowing the data to set the theoretical agenda, rather than vice versa, and by facilitating a comparison between stated norms and actual behavior. And it would add depth to Malinowski's embryonic field method by following individual cases in far greater detail and by focusing as much on procedure as substance. In concept, it was pure induction, starting with a broad realist definition of law and following wherever the trail led. In Hoebel's words, a "case, a situation, was not to be let go until it been wrung of its last possible implication for the whole" (Twining 1973, 160).

An excited Hoebel listened intently as Llewellyn redirected both his own career and the future of legal anthropology. With Llewellyn as his dissertation advisor and Llewellyn's new method in mind, Hoebel finished his Commanche project in a year. After some inconclusive fieldwork among the Shoshone, Hoebel returned in 1935 to propose a joint project on Cheyenne legal behavior. Hoebel was attracted to the Cheyenne as the subject of a definitive demonstration of Llewellyn's method because, although they had lived in nomadic foraging bands during their nineteenth-century heyday, they were reported to have had a more institutionalized system of governance than other Plains Indians.[6]

Llewellyn accepted the proposal, and Hoebel began the fieldwork immediately, in the summer of 1935. Later that summer, Llewellyn and his first wife, an economist, joined Hoebel in Montana for 10 days—the only days he ever spent among the Cheyenne. A photograph taken at the time shows Llewellyn and his wife seated in the back seat of an open convertible with elderly Indians being led up to him to be interviewed. The scene is reminiscent of the relationship between producers and star reporters in network news organizations: the former doing all the digging required to develop the story, the latter making a brief appearance to interview the well-rehearsed key witnesses, film the talking-head report, and take all the credit.

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5. He had foreshadowed this approach in a book he had written for Germans about American law in the late 1920s (Llewellyn [1933] 1989). There, he had argued that the case law method of the common law needed to be seen from an anthropological perspective.

6. Cheyenne history is summarized succinctly in Hoebel (1978, 1–11).

There was apparently much more to the Llewellyn-Hoebel collaboration, however. The summer of 1935 fairly reflected an agreed-upon and sensible division of labor. Llewellyn had conceived the method and stated the overarching goals of the project, and he later, during the writing of the book, imposed a theoretical coherence on the data. For his part, Hoebel was responsible for the data collection in the field and the descriptive portions of the book. Moreover, the 10 days were of great significance in qualitative terms, since Hoebel had reserved the most important informants for joint interrogation.

Hoebel returned to Montana, alone, for the summer of 1936. There followed years of analysis, writing, and editing before *The Cheyenne Way* finally appeared in 1941. To those familiar with the individual writings of the two authors, the book comes across as pure Llewellyn. The quirky, airy, sometimes off-hand diction is far closer to *The Bramble Bush* than to the straightforward prose of Hoebel's (1954) later book, *The Law of Primitive Man*.[7] Compare, for example, the methods chapters of *The Cheyenne Way* (chap. 3: A Theory of Investigation) and *The Law of Primitive Man* (chap. 3: Methods and Techniques). The content of the two chapters is largely identical. But whereas the former is abstract and theoretically ambitious, and aspires to be literary, often at the expense of readability, the latter is concrete, restrained, and relentlessly clear. Another useful comparison is to Hoebel's (1978) ethnographic monograph *The Cheyennes: Indians of the Great Plains*, which he did not publish until 1960. Although only a fraction of the length of *The Cheyenne Way*, it conveys essentially the same information, expressed with didactic concision. In fact, we have found that most students can understand *The Cheyenne Way* only if they are required to read the eight-page "Law and Justice" chapter of Hoebel's book first—to find out what *The Cheyenne Way* is about, and then to try to wade through it.

These observations are intended as more than literary criticism. On the contrary, *The Cheyenne Way*'s stylistic idiosyncrasies reflect two fundamental truths about the book that, in the context of its reception and subsequent influence, are extraordinary. First, it was the lawyer, not the anthropologist, who set the theoretical agenda for the project that the book reports. Second, the concern that evidently animates the book is much more with the jurisprudential question of the nature of law than the anthropological goal of extending the ethnographic record. It is ironic, then, that *The Cheyenne Way* became one of the two most famous works in the history of legal anthropology, while in law it was quickly relegated to the status of a largely forgotten curiosity. (As we shall see, however, while the Cheyenne work

7. When Llewellyn published two books in German in the 1930s, some of his contemporaries were reported to have said that he had a better command of German than English (Twinning 1991, 1093).

may not have influenced the legal literature, it had a profound effect on Llewellyn himself, and through him on the substance of American law.)

II. LLEWELLYN AND HOEBEL'S EXPOSITION OF CASE METHOD

Llewellyn and Hoebel began their exposition of the case method by positing three approaches to discovering and understanding "law-stuff": the ideological, which seeks norms; the descriptive, which explores patterns of behavior; and theirs, the "search for instances of hitch, dispute, grievance, trouble" (p. 21). The three are clearly related: All societies have norms, which are likely to have behavioral correlates, and which are also likely to be injected into "cases of breach" (p. 21). Nonetheless, Llewellyn and Hoebel saw the third approach as the key to understanding a culture like that of the Cheyenne. The problem with the first is that attempting to study norms as the point of entry into the legal system would meet "in some cultures . . . bafflement on the part of the informant," because discussing norms in the abstract is an uncustomary way of thinking for many people (p. 22). Even if one overcomes this difficulty, the gap between norm and practice is often wide, so the ideological approach must necessarily be complemented by the descriptive. As Llewellyn and Hoebel put it, "there is no need that what 'is done' even approach the law-stuff of culture" (p. 24).

The only means to bridge the gap, to distinguish the empty norm from the real law-stuff, is to focus on *trouble cases:*

> Norms, "right ways," departure from which involves somebody's doing something about it, are significantly different from norms whose disregard has no such consequence. And the feature of something's being done about it, and done with felt propriety, the feature of who does something, and of what that something is—these are sufficiently significant in what a developed society conceives of as "law" to give some hope of being worth watching accurately in a less developed one. A person can watch them effectively, however, only in cases of departure, of dispute, of trouble. (P. 24)

The focus on cases of trouble also permits "various other discriminations that warrant making" (p. 24). For example, norms whose violation would bring about only supernatural sanctions and situations where people are simply following or not following cultural practices do not involve law (p. 25). To be evidence of *law*-stuff, the case needs to present "conduct-after-grievance" or "conduct-in-a dispute" (p. 26). Or put more simply, law can be seen most clearly when a norm is violated and human action is taken

to fix things. This is the stuff of law—whatever its specifics, whoever or whatever group may undertake the corrective action, in whatever tribunal, and by whatever ritual or means that is understood to be able to fix the trouble. The idea of legality thus carries the notion of both a norm and a remedy. In addition, widespread social sharing of norms and support for them are critical to the notion of law, because law is a property of the group, not merely the idea of an individual or a family.

The methodological model that emerges is to investigate instances of trouble as the best window on shared norms, sanctioned remedies, and the processes of settling grievances that arise when problems occur in social life: "The trouble-cases, sought and examined with care, are thus the safest main road into the discovery of law. Their data are most certain. Their yield is riches. They are the most revealing" (p. 29).

This is also a cross-cultural method, useful "among primitives as well as moderns" (p. 29). It cannot be expected that trouble-case investigations in "primitive" cultures will turn up such familiar features as written laws, legal professionals, enforcement personnel, courts, and penal institutions. Nonetheless, although the structural arrangements will likely vary across cultures, the essential content of law—norms, sanctions, and remedies—will be consistent.

To be fair, although they were vigorous in extolling the general power of the trouble-case method, Llewellyn and Hoebel did ask the obvious questions about its limitations when applied to the Cheyenne. Thus, they commented, "Cases are valuable, provided they are valid. What of the present cases?" (p. 29). The most compelling problem was that the cases actually took place between 1820 and 1880, from 55 to 115 years before Llewellyn and Hoebel collected their stories. Accordingly, all "were reached through memory or hearsay" (p. 29); the memory might have originated in the elderly storyteller's youth, or been passed down from an earlier generation. In addition, the accounts were given to Llewellyn and Hoebel through an interpreter and recorded only in written notes.

The problem of memory is straightforward. Given that memory formation and retention are now understood to be complex processes rather than a simple act of photographic preservation, what is the relationship between a set of events that took place in a person's youth and an account of the events that the person gives—on request—50, 60, or 70 years later? The difficulties can only be exacerbated when intermediate accounts intervene.

In our studies of how people talk about their legal problems before, during, and after going to small claims courts (Conley and O'Barr 1990), we found no single, authoritative, pure, or "accurate" version of a person's account. Rather, people's stories about the troubles that took them to court varied over time in response to changes in the audience and in conjunction with the collaborative and supportive (or nonsupportive) work done by

listeners. The lesson to take from contemporary studies of legal narratives to a reading of *The Cheyenne Way* is that variation in accounts is not a flaw, but rather a regular phenomenon. Consequently, while stories are highly valuable sources of data for the study of law, they must be treated as a research problem in themselves.[8]

A related issue is the typicality of the cases they studied. The 53 cases that Llewellyn and Hoebel investigated formed the entire basis for their understanding of the shape and form of Cheyenne law. Would another 50 cases have profoundly changed that understanding? A good rule of thumb is that the number of cases is enough when additional ones simply confirm what previous ones have already shown or add minimal new information. It would seem ludicrous to claim that even a few hundred cases studied in a similar manner would reveal the law-stuff and law-ways of American culture. In the same vein, it is important not to oversimplify Cheyenne culture, to presume it to have consistency because of its small size and relative technological simplicity. Judging the typicality of Llewellyn and Hoebel's material from a distance of 68 years is very much like the problem they faced in evaluating Cheyenne law across an even greater temporal chasm: One simply cannot know.

Llewellyn and Hoebel's initial response to these questions was to personalize the issue of validity. They poignantly, even lovingly described the skill and diligence of their interpreter, High Forehead, and the intelligence, circumspection, truthfulness, and dignity of their other ten informants. They concluded that the varied personalities of the Cheyenne who assisted them "lent both validity and meaning to the cases." They were particularly sanguine on the issue of validity, arguing that the evidence was "full enough not only to raise problems, but to admit of what seems sound solution for most of them" (p. 36). With respect to meaning, they celebrated the powerful confluence of ordinary "personal experience" cases and atypical "great figure" cases (p. 38).

Llewellyn and Hoebel did reflect on the problems of memory and narrative process. They began their discussion with the extraordinary assumptions of "a tendency for early memory to be vivid in the aged," and an "accuracy of memory impression" that is "peculiarly developed among the non-literate" because memory is "undisturbed by the daily wash of headline and sensation" (p. 33). But they expressed a sophisticated concern about the possible idealization and consequent distortion of the cases:

> First, if the narrative has assumed fixed verbal form, repeatable by rote, the process of its verbalization is extremely likely to have introduced conventionalizations. The repeaters of it may have added glosses, conventionalizing and rationalizing any extraordinary feature.

8. For an excellent discussion of legal narrative, see Ewick and Silbey (1995).

> Whereas, on the other hand, the unfixed narrative is subject to omission, substitution, and improvised conscious or unconscious artificial coloring. (P. 33)

This passage suggests that Llewellyn and Hoebel had almost talked themselves out of the method they had invented. But the recognition of these problems did not deter them from the vigorous interpretation of their cases. The question that lingers is whether such problems warrant qualification or even dismissal of their analyses, a topic to which we shall turn in the next section.

A final methodological issue in *The Cheyenne Way* arises from the degree of apparent similarity between the law-ways of the Cheyenne and the Western legal system from which the authors—particularly Llewellyn—had emerged. As an astute lawyer-reviewer wrote in the *Harvard Law Review* in 1942 (Cairns 1942, 710), to see "the Cheyenne cases through the spectacles of Anglo-American law, as in this volme, is to see a great deal that probably is not there." In considering the appropriateness of using terms like war, government, theft, police, and private property in talking about Cheyenne culture (p.17), Llewellyn and Hoebel foreshadowed a debate in the 1960s about the utility of Western legal categories for describing traditional societies. They explained the position they took in *The Cheyenne Way* as follows:

> The best one can do is to try to make his own conceptual structure somewhat explicit, so that the reader may be warned by it. If that be done, and if that structure be taken, so far as may be, not as something given in nature, but as a working hypothesis, then it may be possible to let any odd, sharp corners of the cases be felt and continue to be felt in whatever intellectual discomfort they may offer, until the conceptual frame reshapes itself to hold all the cases—each of their uncomfortable corners still sharp—in their own unique relation to one another. This we have tried to do. (P. 19)

Whether this is an adequate response was the subject of an elaborate debate between Gluckman and Bohannan, the two anthropologists who brought the case method to its fullest development. We will review this debate in section IV below.

III. LLEWELLYN AND HOEBEL AS PRACTITIONERS OF THEIR OWN METHOD

We turn next to an assessment of how successful Llewellyn and Hoebel were in practicing the case method. We begin as they did, by

jumping right into the case materials. The first chapter of *The Cheyenne Way*, entitled "Five Histories," consists of the presentation of five cases. The purpose is to illustrate "the Cheyenne material as it comes from the informants" (p. 15). These extended case descriptions are in fact the only such presentations in the entire book; the cases introduced in the rest of the volume range from a paragraph to a page. The first chapter concludes with four pages of analysis, with other analytical comments about these five cases scattered throughout the book. Because an appreciation of Llewellyn and Hoebel's method requires exposure to "the Cheyenne material as it came from the informants," we will present two of the "Five Histories" in their entirety. Following each, we will review Llewellyn and Hoebel's analytical remarks. We will then delve into their analytical process in greater detail.

A. The Tribal Ostracism and Reinstatement of Sticks Everything Under His Belt

One of the more memorable stories, told by a 67-year-old man named Black Wolf, recounted a series of events that happened in 1869, seven years before the annihilation of Custer at Little Bighorn (pp. 9–12):

> Once, at a time when all the Cheyenne tribe was gathered together, Sticks Everything Under His Belt went out hunting buffalo alone. "I am hunting for myself," he told the people. He was implying that the rules against individual hunting did not apply to him because he was declaring himself out of the tribe—a man on his own.
>
> All the soldier chiefs and all the tribal chiefs met in a big lodge to decide what to do in this case, since such a thing had never happened before. This was the ruling they made: no one could help Sticks Everything Under His Belt in any way, no one could give him smoke, no one could talk to him. They were cutting him off from the tribe. The chiefs declared that if anyone helped him in any way that person would have to give a Sun Dance.
>
> When the camp moved, Sticks Everything Under His Belt moved with it, but the people would not recognize him. He was left alone and it went to his heart, so he took one of his horses (he had many) and rode out to the hilltops to mourn.
>
> His sister's husband was a chief in the camp. This brother-in-law felt sorry for him out there mourning, with no more friends. At last he took pity on his poor brother-in-law; at last he spoke to his wife, "I feel sorry for your poor brother out there and now I am going to do something for him. Cook up all those tongues we have! Prepare a good feast!"
>
> Then he invited the chiefs to his lodge and sent for his brother-in-law to come in. This was after several years had passed, not months.

When the chiefs had assembled, the brother-in-law spoke. "Several years ago you passed a ruling that no one could help this man. Whoever should do so you said would have to give a Sun Dance.[9] Now is the time to take pity on him. I am going to give a Sun Dance to bring him back in. I beg you to let him come back to the tribe, for he has suffered long enough. This Sun Dance will be a great one. I declare that every chief and all the soldiers must join in. Now I put it up to you. Shall we let my brother-in-law smoke before we eat, or after?"

The chiefs all answered in accord, "Ha-ho, ha-ho [thank you, thank you]. We are very glad you are going to bring back this man. However, let him remember that he will be bound by whatever rules the soldiers lay down for the tribe. He may not say he is outside of them. He has been out of the tribe for a long time. If he remembers these things, he may come back."

They asked Sticks Everything Under His Belt whether he wanted to smoke before or after they had eaten. Without hesitation he replied, "Before," because he had craved tobacco so badly that he had split his pipe stem to suck the brown gum inside of it.

The lodge was not big enough to hold all the chiefs who had come to decide this thing, so they threw open the door, and those who could not get in sat in a circle outside. Then they filled a big pipe and when it was lighted they gave it to Sticks Everything Under His Belt. It was so long since he had had tobacco that he gulped in the smoke and fell over in a faint. As he lay there the smoke came out of his anus, he was so empty. The chiefs waited silently for him to come to again and then the pipe was passed around the circle.

When all had smoked, Sticks Everything Under His Belt talked. "From now on I am going to run with the tribe. Everything the people say, I shall stay right by it. My brother-in-law has done a great thing. He is going to punish himself in the Sun Dance to bring me back. He won't do it alone, for I am going in, too."

After a while the people were getting ready for the Sun Dance. One of the soldiers began to get worried because he had an ugly growth on his body and which he did not want to reveal to the people. He was a good looking young man named Black Horse. Black Horse went to the head chiefs asking them to let him sacrifice himself alone on the hilltops as long as the Sun Dance was in progress.

"We have nothing to say to that," they told him. "Go to the pledger. This is his Sun Dance."

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9. The Sun Dance was an elaborate ritual sponsored, or "pledged," by a member of the tribe. Its purpose was to promote tribal unity and renewal. During a Sun Dance, individuals sometimes engaged in acts of self-torture in order to gain supernatural favor for themselves or their relatives in times of crisis like sickness or war. The best known of these acts involved hanging from a pole suspended by strips of rawhide that passed through holes cut in the skin of the chest, see Hoebel (1978,18–23).

> Black Horse went to the brother-in-law of Sticks Everything Under His Belt, who was a brother-in-law to him as well. "Brother-in-law," he begged, "I want to be excused from going into the lodge. Can't you let me go to the hills to sacrifice myself as long as you are in there, to make my own bed?"
>
> "No," he was rebuffed, "you know my rule is that all must be there."
>
> "Well, brother-in-law, won't it be all right if I set up a pole on the hill and hang myself to it through my breasts? I shall hang there for the duration of the dance."
>
> This brother-in-law of his answered him in these words, "Why didn't you take that up when all the chiefs were in the lodge? I have agreed with them that everyone must be in the lodge. I don't want to change the rule. I won't give you permission to go outside."
>
> Then Black Horse replied, "You will not make the rules my way. Now I am going to put in a rule for everybody. Everyone in there has to swing from the pole as I do."
>
> "No," countered the brother-in-law. "That was not mentioned in the meeting. If you want to swing from the pole, that is all right, but no one else has to do it unless he wishes to." When they had the Sun Dance everyone had a good time. Black Horse was the only one on the pole, and there were so many in the lodge that there was not room enough for all to dance. Some just had to sit around inside the lodge. Though they did not dance, they starved themselves for four days. This dance took place near Sheridan, Wyoming, seven years before Custer. I was only a year old at that time, but what I have said here was told by Elk River and others. We call this place, "Where The Chiefs Starved Themselves."

What did Llewellyn and Hoebel make of this extraordinary story? It was, in their view, a trouble-case: a "case in which the rules have come into question, or have been challenged or broken" (p. 26). Such cases, they believed, provided the best window on the principles that lent order to Cheyenne society, and the procedures that would be followed when that order was disrupted. The legal principles that Llewellyn and Hoebel inferred from the story of Sticks Everything Under His Belt included the following:

1. The Cheyenne had a law that prohibited hunting buffalo alone.
2. "The problem there to be met by the Cheyenne authority was what to do with a person who set up an open anticipatory claim to personal immunity from the tribal law, though proposing to maintain his position within the tribal community" (p. 124). In other words, what should the Cheyenne do with someone who *threatened* to break tribal law?
3. Two councils of chiefs—the soldier chiefs and the tribal chiefs—comprised "the Cheyenne authority" (p. 124), which functioned as both court and legislature.

4. The chiefs dealt with the novel problem of a mere threat to break the law by treating the threat as if it were a reality: "He says he is Out-of-Tribe; so be it—Out-of-Tribe he is" (p. 125).

5. Having treated the threat as a crime, the chiefs needed to come up with a punishment. Because of the seriousness of the offense, they chose banishment from the tribe, which previously had been the punishment only for murder.

6. Because the threat was defined as the crime, and the punishment was banishment, all could be undone if the wrongdoer withdrew the threat. "The road to recantation, readmission, rehabilitation is made clear" (p. 125).

7. All of this was evidence of the Cheyenne legal genius.

B. When Walking Rabbit Raised a Problem

A second of the "Five Histories" was also told by Black Wolf. This account could be dated only to the mid-1800s (pp. 13–15):

> A war party was organizing. Walking Rabbit approached the leader with a question. "Is it true that you have declared we must all go afoot? If so, I would like to be able to lead a horse to pack my moccasins and possible [sic]." The leader gave him an answer. "There is a reason for my ruling. I want no horses, that it may be easier for us to conceal our movements. However, you may bring one horse." Then Walking Rabbit asked for instructions concerning the location of the first and second nights' camps, for he would start late and overtake the party.
>
> Walking Rabbit's sweetheart had been married only recently to another. "My husband is not the man I thought he was," she told her former suitor. So Walking Rabbit took her to join the war party. [The Cheyenne have a phrase for the single man who marries a one-time married woman—"putting on the old moccasin."] In this way, it turned out that the "moccasin" he was packing was a big woman.
>
> When they saw this woman there, the warriors got excited. The party turned into the hills and stopped. The leader opened his pipe. The leader's pipe is always filled before they left the camp, but it was not smoked until the enemy was seen or their tracks reported. Now the leader spoke. "When we take a woman with us it is usually known in camp. Here is a man who has sneaked off with another's wife. Now what is going to happen?" That is what they were talking about.
>
> The leader declared, "The only thing this man can do is return and make a settlement with the husband." Everyone gave one or two arrows to be sent as well.
>
> In the meantime Walking Rabbit's father had fixed it up with the aggrieved husband. Since he and his wife were incompatible, he was willing to release her. When Walking Rabbit came in and told his

father the story of the soldiers' action, the father said, "Just let that stand. The thing is fixed. When those fighters come back they may want to give to the girl's parents. You go back after your party." But Walking Rabbit preferred to stay at home.

When Walking Rabbit did not go out, his closest relatives raised a big tipi. When they heard of the approach of the returning war party, everything was in readiness.

The warriors came charging in, shooting; they had taken many horses. The first coup-counters were in the van. Walking Rabbit's father had a right to harangue; he was a crier. "Don't go to your homes! Don't go to your own lodges! Come here to the lodge of Walking Rabbit, your friend! "

When they were all in this lodge the old man entered and told them his story. "I had this thing all settled before my son returned. You have sent arrows and promised horses. Now I have kept this girl here pending your return. I shall send her back to her parents with presents. I have waited to see what you are going to do."

The leader replied for his followers. "Yes, we will help you. We promised to help your son. When you send her back, we'll send presents with her." The men who had promised horses went out to get them. Others gave captured horses.

Sending her back with these presents was giving wedding gifts. Her relatives got them all. They gathered up their goods to send back. The war party was called together once more; to them this stuff was given. It was a great thing for the people to talk about. It was the first and last time a woman was sent home on enemy horses the day they came in.

Llewellyn and Hoebel thought that this story was "one of the most delightful" they had heard (p. 191). Their interpretation focused on the following points:

1. It was a case of absconding, or running off with another's spouse, which was quite common among the Cheyenne.

2. It would have been undignified for the aggrieved husband to chase after his wife. In fact, it would have been undignified for him to do anything.

3. The warriors' decision was that Walking Rabbit and the woman would have to go back. They also promised him some horses that he could use to mollify the husband.

4. But when Walking Rabbit got back to the camp, his father had already straightened everything out with the husband and his family. The warriors' promised horses would now be wedding presents, which would go to the woman's family.

5. The case resulted in a new rule: "War parties were definitely barred from participation in divorce-and-remarriage procedure." This was an extraordinary rule, "handed down to remain an unaltered part of the tribal

constitution." It was "constitution, not merely law, because it dealt with the allocation of powers." The whole affair exemplified "the almost unique Cheyenne legal resiliency" (p. 191).

C. The Analysis of Llewellyn and Hoebel's Case Analysis

We turn now to the question of how effectively Llewellyn and Hoebel analyzed these and other cases. The stated objectives of *The Cheyenne Way* were twofold: to present "law-stuff" and "law-ways" in vivid detail, and then to extract from that material the "Cheyenne way" of maintaining order and dealing with deviance. As should be clear from the preceding discussion, they achieved the first objective within the limits of their reconstructed ethnographic data. For the reasons already discussed, however, "vivid" does not necessarily imply "accurate" or "representative." Nonetheless, through trouble cases like those just reviewed, they gave readers a lively picture of how the Cheyenne resolved disputes and dealt with deviance. Reading just two of the five histories, it is easy to see why those who followed them in the anthropological study of law were so attracted to the case method.

But how successful were they in meeting the second objective? In other words, how effective were Llewellyn and Hoebel themselves in using their own method? This is a much more difficult question to answer. Let us first look more closely at what they had to say about the two introductory cases we have just presented.

The first, the case of the ostracism of Sticks Everything Under His Belt, came in for two pages of analysis later in the book. Llewellyn and Hoebel stated the underlying social problem as "what to do with a person who set up an open anticipatory claim to personal immunity from the tribal law" (p. 124). This was particularly vexing because "Cheyenne law was built to deal with action, not with intention" (p. 124). Nonetheless, it was "such a challenge to authority as the Cheyennes were unwilling to pass by" (p. 125).

The solution of the extraordinary council that assembled to respond to the threat (the soldier and tribal chiefs meeting together) was, according to Llewellyn and Hoebel, the ingeniously simple expedient of adopting Sticks Everything Under His Belt's own position: that he was on his own and thus outside of the tribe. This enabled the council to impose a punishment—banishment—which previously had been exacted only in cases in murder. The punishment was ultimately ended by an action—the pledging of a Sun Dance—that was also borrowed from another context, the readmission of a member of a soldier society who had violated its rules. This sort of resolution was particularly appropriate here because the pledger was required to make an economic sacrifice on behalf of the community (the very opposite of what Sticks Everything Under His Belt had done), and the ritual of the dance emphasized community solidarity.

In this case, it is hard to disagree with the particulars of Llewellyn and Hoebel's analysis. It is equally hard not to admire the insight that led them to find legal principles and processes in tribal ritual. We should not let our critical faculties be disabled by their facility, however. Note, for example, their initial characterization of the problem as "an anticipatory claim to personal immunity from tribal law." Anticipatory wrongs and immunity are both well-developed Anglo-American legal concepts.[10] Even tribal law is a category developed by Western anthropologists. The analysis thus began with a large if surreptitious assumption: that a set of analytical tools drawn from Western law are an appropriate fit for these Cheyenne materials. Our reaction is that they are, that the Cheyenne case plausibly suggested the analogy. But even so, the abruptness of the categorization of the problem and the brevity of the analysis leave the reader to wonder about the extent to which such assumptions were in place before the cases were selected and studied. Too much depends on a preliminary judgment that Llewellyn and Hoebel failed to develop and support in an inductive way.

A related set of issues involves what Llewellyn and Hoebel did not say. The entirety of their brief analysis focused on the case as a story of crime and punishment that revealed the subtle legal genius of the Cheyenne. But there was much more to be said about such issues as culture and ecology, societal values, husbands and wives, brothers and sisters, personal kindness, testing limits, vanity, and the place of individualism in small-scale societies. Why, in an avowedly inductive project, did they choose to frame their response to the materials as they did? Their response would presumably have been, Because it's a book about law and not about those other things. Fair enough; but is it not equally fair for later generations of readers to ask, Should it have been? In this and other cases, are Anglo-American legal categories the right first—and thus limiting—response to the story?

Similar issues emerge from a review of Llewellyn and Hoebel's handling of the case of Walking Rabbit. After its introduction, this case got only two brief mentions. The first made a point largely unrelated to the case itself. Llewellyn and Hoebel remarked that after the Walking Rabbit affair, no one ever attempted to sneak a woman along on a war party. This was because, they said, that controversy had led to the informal adoption of a rule that war parties were not to participate in divorce-and-remarriage procedure. They characterized this decision as "constitution, not merely law, because it dealt with allocation of powers" (p. 191). The second reference reiterated this latter point and added the observation that the new rule effectively decoupled the specific case from

10. To illustrate the point, *Black's Law Dictionary* (1991) includes definitions of anticipatory breach of contract, anticipatory nuisance, anticipatory offense, anticipatory repudiation, and anticipatory search warrant. There are also five subdefinitions under the heading of *immunity*.

the general rule being promulgated. The rule was that war parties should not meddle in domestic affairs, but it emerged from a case in which a war party did meddle and got away with it.

Ironically, Llewellyn and Hoebel's analysis did the same thing, separating the specifics of the case from the general inferences that were drawn. The case poses a seemingly thorny social problem. But their analytical point concerned not the case itself, but subsequent developments that they described in only the most conclusory terms. These unspecified sequelae became the sole support for sweeping generalizations about such quintessentially Anglo-American concepts as the distinction between laws and constitutions and the separation of powers. Other legal and cultural issues that seem to jump out of the case—questions about the stability of marriage, the recognized grounds for divorce, the autonomy of women versus their role as tokens of economic exchange, the power of the persuasive individual, and civilian versus military authority—were left untouched.

Once again, we come away with mixed feelings. Our first reaction is appreciation for the case itself and Llewellyn and Hoebel's ability to discover it. But this is tempered by unease about what they did with the case and disappointment over what they failed to do. Their headlong rush to an Anglo-American legal conclusion raises fundamental questions about the relation between fact and analysis throughout *The Cheyenne Way*. Why, in an avowedly empirical work, did they ignore the ethnographic data at hand and instead build an argument on events that were never reported? The reader begins to suspect that the only details that were pursued were those that were congenial to the evolving argument; those that suggested the complexity of law and culture were discarded.

Another approach to assessing Llewellyn and Hoebel's case analyses is to look at how they used case materials to develop a substantive area of law. For example, the second half of the chapter called "Marriage and Sex" took up the problem of wife absconding, the subject of the case of Walking Rabbit. The authors presented a series of brief cases, each of which was said to reflect a different legal response to the problem of a wife running off with another man. They discerned six possibilities, some with subcategories (pp. 201–2). Each possibility presumed that the aggrieved husband was the central actor and provided an answer to the question of what he was permitted to do:

1. The wronged husband does nothing; a tribal chief or other emissary comes to him on behalf of the "aggressor" and offers compensatory goods or asks what the husband wants. Such an offer was characterized as the aggressor's "legal duty" (pp. 201–2). If the deal is accepted, the matter is closed, and the wife remains with the aggressor.

2. The aggressor does nothing; the wronged husband sends a chief to state his demands.

3. Self-help: The wronged husband takes his pick of the aggressor's horses, and this action is either acquiesced in or resisted by the aggressor and his relatives.

4. In an alternative form of self-help, the husband shoots one of the aggressor's horses.

5. "Rarely," the husband might try to kill the aggressor without any effort at settlement. "This must be regarded as illegal" (p. 202).

6. The husband demands that the aggressor return his wife. This was "old law," arguably no longer valid during the period that Llewellyn and Hoebel were trying to reconstruct (p. 202). In any event, they found no cases in which such a demand had been honored.

Llewellyn and Hoebel characterized these possibilities as "the factors of law pertaining to the violation of the marital rights of a husband through wife-absconding" (p. 201). The implication is that they reflect a limited set of permissible responses, drawn from a larger universe of logical possibilities. The Cheyenne presumably arrived at these "patterns of action" (p. 201), as opposed to others, because they were consistent with "the Cheyenne Way." But there is another equally plausible way to interpret the materials: Their six patterns of action constitute all the logical possibilities. Consider the outcomes represented on their list, reordered according to the relative assertiveness of the aggrieved husband: The husband does nothing (1); the husband demands that his wife be sent back (6); the husband takes the initiative in seeking a settlement short of return of the wife (2); or the husband seeks direct revenge against the wrongdoer's person or property (3–5). What else could happen? Might one not reasonably conclude that the Cheyenne had no law of wife absconding, and that when it occurred, anything at all could ensue?

Insofar as can be discerned from Llewellyn and Hoebel's case materials, the outcomes in particular cases were utterly unsystematic. They seemed to depend on the personalities of the protagonists rather than on precedent, legal principle, or underlying structural factors. For example, Stump Horn, one of Llewellyn and Hoebel's informants, told of the day his own wife ran off with another man. He did nothing, but thought about what he might like in compensation. When a chief appeared as an intermediary and offered him a horse, he accepted it, although he complained that he would have preferred a saddle. Llewellyn and Hoebel characterized Stump Horn's apparent indifference as "ideal conduct," and his thoughts about compensation as "deviation" (p. 193). But why? Stump Horn's behavior seemed to lead to a generally accepted outcome.

In another instance, Young Two Moon ran off with Black Coyote's wife. Again, no one said anything initially. But then the aggrieved husband went to the residence of the aggressor's relatives and took three horses. It turned out that one of the three belonged to Black Cayote's uncle, who was also related to Young Two Moon through marriage. The uncle asked Black

Coyote to return it, and he did. The outcome was apparently satisfactory to all concerned. This process, although it "reversed the usual method," was said to reflect "delicacy" and "the best Cheyenne manner" of righting wrongs (p. 194). But, again, why? Might the combination of this and the previous case simply reflect an absence of legal principles among a people who tolerated just about anything?

It is possible to go through each of the wife-absconding cases and come away with a similar reaction. If one relies only on the case material itself, no compelling pattern emerges. To the extent there is a guiding principle, it seems to be no more specific than "anything goes." As for legal rules or processes, their existence seems to depend on unreported source material or axiomatic assumptions.

In fact, if any story leaps out of these cases, it is not one of law, but of gender relations. In the paradigmatic case of Walking Rabbit, for example, Llewellyn and Hoebel reported that his "sweetheart had only recently been married to another" (p. 14). She, however, told Walking Rabbit, "My husband is not the man I thought he was" (p. 14), and followed Walking Rabbit on a war party, apparently of her own accord. In a subsequent case, the wife of Red Eagle absconded with Coyote. When Red Eagle began to spread the word that he was looking for her, she "announced that she hated him for the trouble he had caused her" (p. 198). And in a final case involving unnamed parties, it was reported that "one man's wife ran off with another" (p. 199).

Is there an organizing theme in these cases? If there is, it seems to be that women enjoy considerable autonomy in choosing partners. At the beginning of the "Marriage and Sex" chapter, Llewellyn and Hoebel described marriages as matters of contractual arrangement between families. "Correct etiquette" required the bride's wishes to be consulted, but in the end "her duty to submit [was] quite plain" (p. 170). Indeed, in one case a man killed himself out of shame when his sister resisted the marriage he had arranged for her. Such instances paint a picture of women as property. In the absconding cases, however, women seemed able to walk away (literally) from unsatisfactory marriages, without adverse consequences to themselves.[11]

Where does the truth lie? Were women property, or were they autonomous actors? The answer, clearly, is "both." In some cases they were pawns of their male-dominated kin groups; in others they did what they chose without apparent regard to social consequences. This tension is not

11. Our reaction to these cases is not idiosyncratic. In his 1942 (708–9) review in *Harvard Law Review*, the U.S. Treasury Department lawyer Huntington Cairns discussed a case of abortion, which Llewellyn and Hoebel characterized as a "crime," of which the woman was "judged guilty and banished." Cairns's reaction was, "To put it mildly, this is an extraordinary interpretation, and one which certainly is not justified by the statement of the case or other facts set forth in the book."

surprising to contemporary anthropology, which has finally learned to live with the conflicts and contradictions that inhere in every society. But it was problematic for anthropologists of the 1940s striving to find Western-style rules amid the fluid process of Cheyenne conflict resolution.

The last question is whether this process of reassessment demonstrates that Llewellyn and Hoebel were "wrong" in any meaningful sense. Does reopening their interpretation amount to repudiating it? Although some might answer this question in the affirmative, we, in spite of our dissatisfaction with so many aspects of the book, do not. As our example of the six principles of wife absconding suggests, we are not convinced that the principles that Llewellyn and Hoebel deduced flow inevitably from the case materials. On the contrary, we find other themes and interpretations at least equally plausible. We arrive at our particular conclusions, though, not because we are superior analysts, but because we practice anthropology in a different time. For Llewellyn and Hoebel, the central question was whether a loosely organized foraging society could be said to have law. For us, this possibility is self-evident. For anthropologists of their era, variability in rules and processes represented an exceptional finding. For those of our era, variation, inconsistency, and even contradiction within a single culture are taken for granted. Finally, whereas Llewellyn and Hoebel would presumably have assumed a male-centered legal domain, the current sensibilities of the discipline would incline us toward agnosticism on that issue. In each of these instances, our ability to deconstruct their analysis by approaching the material from a new perspective is the strongest possible demonstration of the power of their method. Far from being a brief for dismissing their work, our critique is a powerful if ironic compliment.

In the end, the assessment of Llewellyn and Hoebel's own use of the case method reveals two things: the essential genius of the method and the practical and theoretical shortcomings that limited their ability to take advantage of it. The genius of the method is revealed in our ability to reevaluate their interpretations. From the same set of materials, we extract different themes. Where they saw a set of rules that circumscribed the behavior of the aggrieved man, we find an almost infinitely fluid situation that invites autonomy on the part of the disappointed woman. The anthropologists who preceded Llewellyn and Hoebel—even Malinowski—did not provide such a resource for those who followed them. But Llewellyn and Hoebel gave us the raw materials of law in action—albeit flawed by the necessity of reconstruction—and then showed us how to use them by testing asserted principles against the realities of conflict. In doing so, they invited people like us to challenge, to go beyond, and even to reject their own interpretations. This method, qualitatively different from anything that had come before, laid the foundation for the entire contemporary enterprise of

reassessing anthropology's conventional wisdom. From this perspective, Llewellyn and Hoebel achieved lasting influence almost in spite of themselves. Our response to our complaining students has been to continue to assign the raw materials (the "Five Histories") at the start of the book as an exercise in analysis, but to ignore the rest.

IV. THE LEGACY DEVELOPS

Having considered the reasons for *The Cheyenne Way*'s lasting influence, we now examine two manifestations of that influence. We turn first to an underappreciated story: the influence of Llewellyn's Cheyenne experience on his drafting of the Uniform Commercial Code. This is, we believe, a unique instance of social science research having a direct and palpable impact on the state of a fundamental body of law. We then return to anthropology, considering whether and to what extent *The Cheyenne Way* influenced anthropology's best-known practitioners of the case method, Max Gluckman and Paul Bohannan.

A. Llewellyn and the Uniform Commercial Code

The subsequent career of Karl Llewellyn represents perhaps the only definitive instance of anthropology exerting a significant influence on the of normative law of a developed society. Llewellyn went on to become the principal draftsman of a major, often radical revision of the American law of sales and commercial transactions, the Uniform Commercial Code. In both its general approach to creating a law of the marketplace and in many of its specific provisions, the UCC bears the unmistakable imprint of Llewellyn's ethnographic experience among the Cheyenne.

Llewellyn's principal intellectual biographer has characterized the UCC as "one of the most ambitious legislative ventures of modern times" (Twining 1973, 270). Virtually every civilization that has left written records has had a well-developed law of the marketplace. In the modern West, commercial law covers such topics as sales, negotiable instruments (documents like checks and bills of lading), and secured transactions (for example, the purchase of a car in which a bank lends money and then takes custody of the title). In the United States, commercial law has historically been in the domain of the states rather than the federal government. Predictably, this led to major inconsistencies, which became major impediments to the development of an integrated national economy. Different states, for example, had different standards for the formation of an enforceable contract, which could lead to chaos in interstate transactions.

By the beginning of the twentieth century, several private law-reform organizations had begun to promulgate "uniform" bodies of commercial law: Model laws that, the reformers hoped, significant numbers of states would adopt. For example, a Uniform Sales Act written in 1906 had been adopted in 34 states by 1958 (Twining 1973, 273).

On the eve of World War II, the legal community believed that these piecemeal efforts had proven inadequate. In many areas, the law was not sufficiently uniform; where it was, it often was out of date. A federal sales law was proposed but never enacted during the 1930s, and during the same period Llewellyn himself led an effort to redraft the old Uniform Sales Act. Then, in 1940, the president of a private expert organization called the National Conference of Commissioners on Uniform State Laws—in close consultation with Llewellyn—proposed the creation of "a great uniform commercial code" that would become the national law of the marketplace (Twining 1973, 279). Llewellyn secured his own appointment as chief reporter, or director, of the entire project, and chose as his assistant Soia Mentschikoff, his former student and future third wife.

With Llewellyn intimately involved in all phases of the project, a first draft was completed between 1944 and 1949. The promulgation of a 1952 official text provoked several years of comment and criticism, culminating in the publication of a revised official text in 1957. The process of adoption progressed steadily, with 48 jurisdictions enacting the UCC by 1966. In the words of a drafting colleague who wrote Llewellyn's obituary in the *Yale Law Journal*, "Make no mistake: this Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress" (Gilmore 1962, 814).

"Llewellyn's Code" was a revolutionary document that was the product of a revolutionary drafting process. On a general level, the project and its product were suffused with Llewellyn's ethnographic sensibility. As early as 1930, he had criticized existing commercial law for its "academic abstraction and remoteness from life" (Llewellyn 1930, ix). To remedy this, Llewellyn insisted that the drafters of the UCC pay close attention to the day-to-day life of the marketplace. For example, they conducted "three-day sessions every six to ten weeks [with] a group of advisors which included experts in the field of law concerned, experts in the field of business or finance concerned, and also lawyers or judges of general experience and *no* expertness whose important business it was to see that it all made sense and that each part could be understood by men who were *not* experts . . . There was constant correspondence and consultation with any experts in the business or law concerned who could be discovered and who would give the time" (Llewellyn 1954, 534). He called this process "use-testing" (Llewellyn 1954, 535). Whereas prior law had often consisted of "some mere *word-formula which does not fit the situation and the situation's set of problems*," he

believed that the new Code was written in language "which *really fits the need*" (Llewellyn 1954, 538; emphasis in original).[12]

Llewellyn's drafting process was novel in the legal world. Before and since, the principal players have usually been legislators responding to special interests and law professors offering theoretical prescriptions from ivory towers. The empirical, ground-up process that Llewellyn laid out for the UCC was very much like the ethnography that he and Hoebel had done among the Cheyenne. And the result is very much like the practical, easily understood, and readily adaptable Cheyenne law-ways that they claimed to have discovered. Like the Cheyenne law-ways, Llewellyn's UCC emerged from its cultural context rather than being imposed from on high.

A number of substantive correspondences are also evident. The structure of the UCC, for example, was unusual for its time.[13] It consists of nine major sections, or articles. Article 1 sets out a number of definitions that apply Code-wide; the other eight articles (which add supplemental definitions) deal with specific areas of law—Article 2 on sales, Article 9 on secured transactions, and so on. Many of the UCC's key terms are highly amorphous concepts that become meaningful only in specific applications: things like good faith, reasonableness, whether an action is "seasonably" taken, and "usage of trade." Moreover, their meaning is to be determined in most cases by reference to the cultural norms of the marketplace and the history of interaction between the parties.[14] The result is that legal outcomes across a broad range of commercial transactions depend on a relatively few, culturally defined principles, and these principles are themselves flexible in the extreme.[15] This is thoroughly reminiscent of Llewellyn and Hoebel's view of the adaptive genius of Cheyenne law.

On a more specific level, law professor David Ray Papke (1999, 1472–79), a UCC specialist, has analyzed possible Cheyenne influences on Article 2 of the UCC, which deals with sales of goods (and which carried forward much of Llewellyn's earlier work on the Uniform Sales Act). Papke's first example concerns the formation of a sales contract. In classic contract law,

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12. For an engaging discussion of how successful Llewellyn and Hoebel's empirical approach was, see Macaulay (2000).

13. It still is unusual. Almost all statutes have introductory definitions sections. Few if any, however, employ such highly flexible concepts to regulate such a tremendous range of transactions as does the UCC.

14. "'Good faith'... means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade" (UCC § 2-103[1][b]). With specific reference to time, *reasonable* means "not manifestly unreasonable," taking into account "the nature, purpose and circumstances" of the action being taken (UCC § 1-204[1-2]). In turn, an "action is taken 'seasonably' when it is taken at or within the time agreed at or within a reasonable time" (UCC § 1-204[3]). "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question" (UCC § 1-205[2]).

15. For a critique of the UCC's "incorporation strategy" and reliance on usage and custom, see Bernstein (1999).

the would-be parties must undergo a "meeting of the minds" for a contract to be formed. That is, there must be a moment when both grasp the essential terms of the contract in fundamentally similar ways. Absent persuasive evidence of a meeting of the minds (a signed document or an unequivocal conversation, for example), neither side will be able to enforce the terms of the putative agreement against the other. Under Article 2, by contrast, a binding contract can be formed "in any manner sufficient to show agreement," "even though the moment of its making is undetermined" (UCC § 2-204 [1] and [3]). An offer can be accepted "in any manner and by any medium reasonable in the circumstances"; the drafters' official comment to this provision emphasizes that the "section is intended to remain flexible" and is to be interpreted with an eye toward "ordinary commercial understanding" (UCC § 2-206[1] and Official Comments 1 and 2). In practice, as long as competent members of the relevant trade or business community would look at the circumstances and infer the existence of a contract, the law must do the same. If party A acted like he wanted to order 10,000 bricks, and party B delivered them, A could be forced to pay for them, regardless of the specific words that had passed between the two. The classic conceptual definition of a contract has become practical, operational, and culturally determined, in the manner of Cheyenne legal principles. The question of whether a contract has been made now looks very much like the Cheyenne question of whether an enforceable marriage agreement has been made: In both instances the answer is always "it depends."

Papke's second example is the modification of contracts. Under pre–UCC law, modifying a contract was a demanding process. As Papke (1999, 1474) describes it, "a number of doctrinal features made contract modification more difficult than the parties wanted it to be. They had to fret about whether a change was indeed a contract modification or perhaps a rescission, that is, a tearing up and throwing out of the contract. Often critical in these determinations was the consideration, the proverbial *quid pro quo*." The UCC repudiates all of these technicalities, and allows "all necessary and desirable modification of sales contracts without regard to the technicalities, which at present hamper such adjustments" (§ 2-209, Official Comment 1). Once again, this was the sort of pragmatic, seat-of-the-pants approach with which the Cheyenne were comfortable, but Anglo-American lawyers typically are not.

A third example involves the pervasive concept of "usage of the trade," which is often decisive in the interpretation and enforcement of ambiguous or incomplete sales contracts. It is defined in Article 1 as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed" (UCC § 1-205[l]). As Papke observes (1999, 1478), this definition is purely operational. The UCC does not require a usage to be consciously appreciated by the parties. Rather, if those in the marketplace regularly act in accordance

with a particular usage, then it should be given the force of law. This is consistent with the idea of cultural norms, which are identified by their capacity to account for behavior. By directing the courts to give effect to such norms, the UCC strives for consistency with cultural values, which was one of the principal virtues that Llewellyn and Hoebel saw in the Cheyenne law-ways.

By incorporating concepts like usage of the trade into the Code, Llewellyn also set in motion a particular form of legal evolution. In many cases, rapid changes in the commercial environment have quickly rendered a body of law inadequate or obsolete. In copyright law, for example, judges and lawyers now struggle to figure out how to treat computerized databases, which were barely envisioned in 1976 when the current statute was enacted. By making commercial law derivative of commercial culture rather than vice versa, Llewellyn sought to immunize the UCC against such problems. His theory was that as the marketplace evolved, the law would, too, automatically, without the need for formal intervention.[16] This self-amending feature of the UCC is also strongly evocative of Cheyenne law-ways, with their seemingly infinite capacity to adapt informally to changing cultural circumstances.

These and other examples that Papke adduces make a persuasive case that the Cheyenne experience was a significant influence on some of the most innovative features of the UCC. In its emphasis on flexibility, its willingness to tolerate ambiguity, its elevation of the practical over the theoretical, and above all, its respect for the cultural norms of the marketplace, the UCC reflects those very features of Cheyenne law that Llewellyn and Hoebel most admired. It is difficult to imagine the UCC emerging in the form it did had its guiding genius been a lawyer of more conventional experience.[17]

B. The Case Method Reborn: Gluckman and Bohannan

For legal anthropologists of our generation, the names most prominently associated with the case method of research may be Max Gluckman

16. Although the UCC has proven to be remarkably sturdy, the immunity has not been complete. As Papke (1999, 1481–84) points out, much current criticism and demand for reform have focused on the original Code's relative inattention to the consumer perspective. Another problem that has attracted extensive commentary is the ongoing effort to adapt the UCC to deal with computer software licenses, an issue that could not have been foreseen in the 1940s (Article 2 covers only sales, which are legally distinct from licenses). Thus far, years of effort to follow Llewellyn's process and draft an "Article 2B" to cover licenses have met with failure. Some might view this failure as evidence of the Code's inadequacy. But the difficulty that contemporary lawyers have had in crafting a commercial code for the computer age might also be taken as a reflection of the magnitude of Llewellyn's accomplishment.

17. Llewellyn had one other, seldom-discussed experience in turning implicit cultural norms into codes. In 1947, three pueblos in the Southwest invited him to draft their legal codes. He did so, although it is unclear whether any of them was ever applied (Twining 1973, 546).

and Paul Bohannan. Gluckman, a South African who took law degrees at both Witwatersrand University and Oxford, taught social anthropology at the University of Manchester until his death in 1975. Bohannan, an Oxford-educated American, taught anthropology for many years at Northwestern before retiring from the University of Southern California in 1987. Both are best known for their work on law and politics in African tribal societies during the waning years of British imperial control: Gluckman, from 1942–47 among the Barotse of present-day Zambia (then Northern Rhodesia); and Bohannan, from 1949–53 among the Tiv of northern Nigeria. Gluckman's writings about the Barotse include at least two books that have achieved "classic" status in both legal anthropology and African ethnography: *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)* (1973), originally published in 1955, and *The Ideas in Barotse Jurisprudence* (1965). Bohannan's principal contribution to the canon of legal anthropology is *Justice and Judgment Among the Tiv* (1989), originally published in 1957.

These two bodies of work are heavily case centered. *The Judicial Process among the Barotse*, for example, contains 57 named and numbered case reports and analyses, some of which go on for many pages, while *Justice and Judgment* includes 84 comparable cases. Both sets of cases are extraordinarily rich, with extensive background information about the parties, vivid descriptions of the antagonists and their actions, and detailed accounts of the legal proceedings and outcomes. (We continue to present these materials to students of both anthropology and law as exercises in comparative legal reasoning; the law students, obsessed as they necessarily are with the dissection of Anglo-American case reports, always seem especially fascinated.) In their analyses, Gluckman and Bohannan seemed to follow Hoebel's admonition that a "case, a situation was not to be let go until it had been wrung of its last possible implication for the whole" (Twining 1973, 160). As Llewellyn and Hoebel had done, they used their cases as the basis for strong inferences about legal rules, legal reasoning, and dispute resolution processes.

Bohannan acknowledged his methodological debt to Llewellyn and Hoebel briefly but explicitly, while Gluckman did so back-handedly. In the preface to the original 1957 edition of *Justice and Judgment*, Bohannan (1989, xxiii) wrote that "it became an absolute necessity that my work be done by the 'case method,'" but did not mention any of his forbears in that practice. Then, in his 1989 preface to the third edition, Bohannan (1989, vii) recalled why he had been drawn to the method, and why he had stuck with it:

> I used the case method first because I admired the method as it had been used by Llewellyn and Hoebel in *The Cheyenne Way*, and I had been taught it by Max Gluckman. Moreover, the Tiv drove me to the

> case method. My self-assigned task was to discover as much as I could about what they were interested in. They put a lot of their time and effort into cases.

The Judicial Process among the Barotse makes more than a dozen references to Llewellyn, Hoebel, or both, most on substantive issues of law or anthropology.[18] In the first of two methodological references, Gluckman (1973, 226 n.1) argued that the analyst must examine actual disputes in order to understand how rules work in practice, then observed (in a footnote) that "Llewellyn and Hoebel's *The Cheyenne Way* is one of the few monographs on the law of a simple society which makes this the starting-point of analysis." Later, in a self-critical "Reappraisal" chapter he wrote for the second edition in 1966, Gluckman (1973, 372) took himself to task for failing to pursue the social contexts of his cases, but he blamed it on "the then state of our discipline." He pointed to similar shortcomings in the work of every other prominent legal anthropologist of his and previous generations, including Bohannan and Llewellyn and Hoebel, who failed to "connect up their various cases in their brilliant *The Cheyenne Way*."

The explanation for these sparing acknowledgments may lie in the differences between the practical circumstances that Gluckman and Bohannan confronted in collecting their cases and the realities that Llewellyn and Hoebel had faced. The latter had been relegated to collecting what Laura Nader and Harry Todd (1978, 6) later called "memory cases." Gluckman and Bohannan, by contrast, worked in Africa during the period of "Indirect Rule" in the British Empire. This system, instituted in 1929, involved British recognition of "Native Courts" and "Native Authorities." These local institutions had jurisdiction over most disputes, excluding (in the case of Barotseland, which was typical) those involving homicide or witchcraft, or in which a "non-native" was a witness (Gluckman 1973, 3). Appeals could be taken from Native Courts to British-supervised colonial courts.

Gluckman (1973, 33) viewed the Native Courts of Barotseland as authentically indigenous institutions:

> The modes of reasoning involved in this complex process [of dispute resolution] are so deeply imbedded in Lozi [the particular group he studied in Barotseland] institutions and thought, that I consider my whole analysis emphasizes their indigenous existence. There is no evidence that in these respects the Lozi have been influenced by the work of British courts.

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18. For example, Gluckman (1973, 391–96) devoted almost six pages of the second and third editions to a defense of his use of the "reasonable man" concept against criticism by Hoebel (1961).

Bohannan rejected such claims, exhibiting, characteristically, a more contemporary sensibility. He contrasted two "folk systems" that were "seldom congruous" (Bohannan 1989, 7). The first was "that scheme of looking at social institutions which characterizes the tribal Africans and which includes their views not merely of 'indigenous institutions' but also of European inspired and dominated institutions." The second was "the scheme of looking at things which characterizes a colonial administration." Given the incongruity of the two, it was "not surprising" to him that what the Europeans called "native courts," the Tiv referred to as "government courts."

Most if not all present-day anthropologists would side with Bohannan, rejecting the idea that the British Empire could have co-opted local courts without influencing them. In fact, many would probably treat Gluckman's attitude as virtual collaboration in the practice of imperialism. But the resolution of this argument is largely irrelevant to our methodological story. The critical fact is that British Indirect Rule needed native courts, regardless of how much it influenced them. Moreover, in order to supervise them and process appeals, it needed them to function more or less like British courts, with complaining and defending parties, witnesses, arguments, and articulated decisions. In other words, it needed *cases*. Thus, Gluckman and Bohannan confronted a living system that resolved legal disputes in a way that was generally familiar to a Westerner. The case method would inevitably have struck them as the only logical approach. It was true for both of them, as Bohannan (1989, vii) later wrote, that the societies they studied "drove [them] to the case method."

The available raw materials were far richer than the "memory cases" that Llewellyn and Hoebel reconstructed. As noted above, Gluckman and Bohannan made the most of them. Still, even *their* elaborate case treatments have been criticized on grounds of incompleteness, selection and editing bias, and lack of linguistic sophistication (Danet 1980, 516–18; Gulliver 1969, 16; Conley and O'Barr 1990, 3–8; Conley and O'Barr 1998, 98–101). Nonetheless, their work may represent the highest development of the art of case reporting and analysis to be found in the ethnographic literature.

Gluckman's case analyses drew him to expansive cross-cultural comparison. He is perhaps best known in anthropology for the claim that the Anglo-American tort concept of the "reasonable man" was also central to Barotse jurisprudence. As Gluckman (1973, 387) memorably recounted his original ethnographic insight, "this vision of the reasonable man in Barotse law suddenly burst on me during the hearing of the Case against the Violent Councillor." Despite vigorous criticism, Gluckman continued to insist on the validity of comparative generalization. In the "Reappraisal" chapter he wrote in 1966 for the second edition of *The Judicial Process among the Barotse*, Gluckman accepted a number of clarifications and qualifications of the reasonable man concept, but he did not budge on the essential point: "I

would like a demonstration that the cases can be better analysed otherwise" (1973, 390).

Bohannan proved to be one of Gluckman's principal antagonists. Bohannan's position is evident from a simple visual examination of *Justice and Judgment:* almost every page is peppered with italicized Tiv words that Bohannan was reluctant to translate. His reluctance was rooted in his insistence "that Tiv institutions be understood in their own terms" (1989, xvi). As for Gluckman's comparative approach, Bohannan wrote: "I was convinced in 1957, and I still am, that filling Tiv data into a model of Western jurisprudence is squeezing parakeets into pigeonholes and not a way to go about ethnography" (1989, vii).

Gluckman and Bohannan debated the comparison issue, in person and in print, throughout the 1950s and 1960s. Gluckman devoted his 1966 "Reappraisal" to rebutting his critics, while Bohannan did the same in the prefaces to the 1967 and 1989 editions of *Justice and Judgment*. As Bohannan observed in the 1989 preface, the debate was part of a larger controversy in 1960s and 1970s anthropology between "emic" and "etic" approaches. According to Bohannan, "[e]mic means only that the ethnographer takes the people's point of view"; the etic analyst takes an external, presumably objective vantage point (1989, vii). Bohannan disclaimed both, disparaging the emic as "anemic" and the etic as "riding a preconception" (1989, viii). Nonetheless, Bohannan was clearly closer to the emic end of the spectrum, and others came to see the two famous Africanists as avatars of the competing theories.

The Gluckman-Bohannan debate reached perhaps its fullest expression in an influential collection of essays edited by Laura Nader in 1969. Entitled *Law in Culture and Society*, the book was based on the proceedings of a conference held three years earlier at Burg Wartenstein in Austria. Both Gluckman and Bohannan had participated, and their published essays went directly to the heart of the dispute. Gluckman's (1969) was entitled "Concepts in the Comparative Study of Tribal Law," Bohannan's (1969) "Ethnography and Comparison in Legal Anthropology." Much of Nader's (1969) brief introduction to the book was devoted to an exposition and analysis of the controversy.[19]

In hindsight, most contemporary legal anthropologists might say that Bohannan had "won." In subsequent decades, anthropology in general and political and legal anthropology in particular have become increasingly focused on the local. Respect for local nuance has become a paramount concern (e.g., Greenhouse, Yngvesson, and Engel 1994; Geertz 1983). As Sally Falk Moore (1978c, 69) wrote in a 1973 essay about the Chagga of Tanzania, "although universality of application is often used as one of the

19. For another contemporaneous review of the controversy by a fellow participant in the Burg Wartenstein conference, see Moore (1978b).

basic elements in any definition of law, universality is often a myth." Moreover, "translation" has come to be viewed as a problem to be studied, not a routine process that can be taken for granted (e.g., Berk-Seligson 1990). Anthropology has been moving away from grand generalizations about the human condition on the order of Gluckman's "reasonable man."

In a more subtle sense, though, comparativism has survived and even prospered. Although anthropology has lately eschewed the sorts of comparisons to which Gluckman aspired, it has, over the past half century, become ever more theoretical. This may be a theory of processes and particulars, but it is theory nonetheless, and it is theory that is ultimately based on comparison. We therefore conclude that Gluckman and Bohannan fought to a draw. Comparison continues, but it is a different kind of comparison than Gluckman practiced, thoroughly suffused with Bohannan's values and sensibilities.

However inconclusive the Gluckman-Bohannan debate may have been, it did establish two things beyond any doubt: the supremacy of the case method in legal anthropology and, consequently, the methodological canonization of *The Cheyenne Way*. One of the four parts of the Nader (1969) book was devoted to "Case Studies of Law in Non-Western Societies," and a second to "Case Studies of Law in Western Societies." In his introduction to the former, the British Africanist P. H. Gulliver wrote:

> But undoubtedly a major watershed was passed with the publication in 1941 of *The Cheyenne Way* by Llewellyn and Hoebel. This book marks the beginning of modern studies in the anthropology of law, and particularly in its clear identification and detailed treatment of the case study as the unit of analysis. (1969, 11)

Although the operative boundaries of "the case" have been continually redefined, it has remained "the unit of analysis" for much of legal ethnography. In 1978, Nader and Harry Todd, a lawyer-anthropologist, edited another collection of essays that has itself entered the canon of legal anthropology: *The Disputing Process—Law in Ten Societies*. In their introduction, Nader and Todd noted that "[o]f course, all ethnographic fieldworkers collect cases." In studying law, they observed, anthropologists "have used the case method in the search for systematic aspects of procedural and substantive law, for uncovering important jural postulates, for abstracting values important to a society." Paying particular homage to Llewellyn and Hoebel's notion of trouble cases, they wrote, "The collecting of trouble cases has provided anthropologists with a focus apart from law as a set of rules or customs. It has caused the fieldworker to look at the actual workings of law in society, and in so doing, has turned the focus to the examination of disputing" (1978, 6). Llewellyn and Hoebel could not have stated their ambitions for their method any better themselves.

Nader herself is a distinguished practitioner of the case method, her holistic approach combining the best of Llewellyn and Hoebel, Gluckman, and Bohannan. Her 1990 book, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*, explores the complex legal ideology of Mexico's Zapotec people. The thesis of the book is that, as a consequence of colonialism, the Zapotec have come to idealize harmony as the ultimate end of law. As a result, challenges to the established legal and social order, which necessarily involve the disruption of harmony, have little chance of success. Of her method, Nader (1990, xvi) wrote, "I make central use of the dispute case: cases that were observed in court, reported to me, recorded in the archives, recorded on film, and elicited from hypotheticals. I followed cases out of the courtroom and into the community."

The methodological lineage has continued, relatively unbroken, even as legal ethnographers have sharpened their focus on such topics as ideology and consciousness, discourse, and narrative. For example, in her 1990 study of legal consciousness among working-class Americans, Sally Merry (1990, 88) wrote of "problems and cases," describing them (in the tradition of Bohannan) as "both folk categories: terms used by people themselves and the institutions they work in to talk about conflict situations." She characterized contemporary anthropology as focusing more broadly on "disputes," but traced the lineage of that concept through "Malinowski's cases, Llewellyn and Hoebel's trouble cases, [and] Gluckman's extended cases" (Merry 1990, 90). Susan Hirsch began her analysis of gender and legal discourse in East Africa with extended presentations of "a typical and atypical case" from a Kenyan Islamic court (1998, 4). And the sociologists Patricia Ewick and Susan Silbey have organized their narrative-based study of "the different ways in which people use and think about law" in America around eight stories of ordinary people's encounters with the law and the legal system (1998, xi). Even those who have not used the case method have usually taken the time to explain why (e.g., Greenhouse 1986, 24). We might continue with such examples at great length, but the point should be clear: It is still true, as Laura Nader and Harry Todd wrote in 1978, that "of course, all ethnographic fieldworkers collect cases." For all its flaws, *The Cheyenne Way* lives on.

V. CONCLUSION

Few contemporary students of anthropology ever read *The Cheyenne Way* (the exceptions are those taking a specialized course in legal anthropology, and even there it is far from universally assigned), although many will hear it mentioned. Few law students—or even law professors—have ever heard of it. Yet it has had a profound and lasting impact on both disciplines. In anthropology, deservedly or not, it still stands as a

methodological landmark. In law, it represents the first and most significant bridge between postformalist theory and the real world of day-to-day legal practice.

The idea of law as an anthropological topic antedates Llewellyn and Hoebel by more than three-quarters of a century. Maine's *Ancient Law* (1861), one of the first recognizable works of anthropology, originally appeared as Fort Sumter was being shelled. But the *ethnography* of law remained largely unexplored terrain. The introductory chapters of *The Cheyenne Way*, for example, cited only six works that might be so characterized. With respect to the specific problem of inferring unwritten law from the analysis of actual disputes, Llewellyn and Hoebel had little to go on beyond Malinowski's ([1926] 1985) *Crime and Custom in Savage Society*. And Malinowski had devoted most of his attention to only two cases.

It is thus fair to say that Llewellyn and Hoebel invented the case method as it has come to be taken for granted in legal anthropology. The essentials are all there: attempting to distance oneself from the categories and concepts of Western legal culture, assuming that law could take on an infinite variety of forms, searching for the "trouble cases" that the society regarded as problematic, collecting as much information as possible about disputes and their outcomes, seeking to infer principles from a comparative analysis across disputes, and comparing one's inferences to native explanations.

Of course, Llewellyn and Hoebel could not or did not adopt a number of now-standard practices. Because they were attempting to reconstruct a social regime that no longer existed, they could not follow disputes as they unfolded, as Malinowski had done and as Gluckman and Bohannan were to do so effectively in Africa over the next two decades. Nor did they anticipate Bohannan's convincing demonstration of the need for attention to the details of the language in which disputes are waged. This failing was due in part to lack of facility with the native language (Llewellyn was entirely dependent on interpreters), in part to the fact that they could work only from the case summaries given by elderly informants, and in important part to the current state of ethnographic theory, which still treated language as medium rather than data. Despite these shortcomings, it is fair to characterize what has come after them as elaboration and refinement. Methodologically speaking, almost everything we do in legal anthropology today can trace its roots to Llewellyn and Hoebel's notion of the trouble case.

Ironically, Llewellyn and Hoebel were not—at least in hindsight—especially effective practitioners of their own method. Their use of evidence sometimes seems suspiciously selective, their reasoning is often convoluted, their biases are occasionally transparent, and their enthusiastic conclusions do not always square with the facts they presented. In addition, as the admirably concise Malinowski was the first to point out, the book's style is too often bombastic, pompous, and otherwise impenetrable. Contemporary scholars may look at these flaws and strike *The Cheyenne Way* from their

personal canons as a "bad" book no longer worthy of study. The flaws are quite real. Some of them may be attributable to the shortcomings of the material that Llewellyn and Hoebel had to work with, some to their inability to put aside their preconceptions, and some (especially the stylistic ones) to Llewellyn's considerable ego. In significant part, however, the now-apparent weaknesses of their analyses are due to the changing state of anthropological theory. They tried to answer the questions that people of their era were interested in. The fact that those questions now look much less interesting in no way detracts from their methodological contributions.

Llewellyn, of course, remains a major figure in the law. He is remembered as a founding force in legal realism. The fundamental arguments of realism—that law is made, not discovered, and that its making is influenced by such forces as politics, economics, and psychology—in turn prepared the way for such postmodern jurisprudential movements as critical legal studies, critical race theory, and feminist jurisprudence. His role in drafting the UCC is also generally known, and many recognize the connection between his realist beliefs and the structure and method of the Code.

But *The Cheyenne Way* is all but forgotten by lawyers. It received modest attention in the legal literature at the time of its publication, some of it quite negative. (To be fair, people had other things on their minds in the fall of 1941). The famous realist judge Jerome Frank is said to have "announced that Llewellyn would have better spent his time studying the law-ways of Tammany Hall braves than the Cheyenne Indians" (Kalman 1986, 18).

The *Yale Law Journal*, the house organ of realism and the infant field of law and social science, carried a brief review in 1942 (Ayres 1942). (Two years earlier, *Yale* had run a lengthy article by Llewellyn [1940] called "The Normative, the Legal, and the Law-Jobs," which reflected the mutual influences of his legal philosophy and his ethnographic experiences.) The reviewer, the University of Texas economist C. E. Ayres, anticipated the book's fate. He effectively dismissed the Cheyenne material in his first paragraph: "Lawyers, I should suppose, would have only an amused interest in Two Twists v. Red Robe, or People v. Cries Yia Eya" (Ayres 1942, 881). While Llewellyn and Hoebel emerged from their ethnographic work "with the highest respect for Cheyenne legal genius," they had not, in Ayres's judgment (1942, 881), made a case that would be persuasive to others. What would endure, he correctly predicted, was their "method-principle" (Ayres 1942, 883).

After Ayres's review, *The Cheyenne Way* virtually disappeared from the legal literature. A significant 1951 article entitled "On the Legal Method of the Uniform Commercial Code" (Franklin 1951) does not mention it. A LEXIS/NEXIS search for the book's title in the post-1942 law review literature turned up 144 citations, but most are passing references appearing

in symposia and specialized journals dealing either with Llewellyn or with Native American issues. Until Papke's (1999) recent effort to explore its influence on Article 2 of the UCC, *The Cheyenne Way*'s connection to the Code had been largely unnoticed. But like the legal norms that are its subject, *The Cheyenne Way* has been influential even if that influence has not been consciously recognized. Ayres was exactly right to focus on its method rather than its content in 1942. Llewellyn and Hoebel's method, with many refinements, remains the core method of legal anthropology. Llewellyn brought the same method to the study of the commercial marketplace, and the result was one the most successful and adaptable statutes in Anglo-American legal history. We are led to the conclusion that *The Cheyenne Way* succeeded in spite of itself.

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