

REPRINT:
AMERICAN INDIAN LAW AND THE
SPIRIT WORLD

Rennard Strickland

As this special dedication issue dives into the testimonials in honor of Professor Strickland, the incoming Board has decided to include a work by Professor Strickland, to share his passion with you, the reader, in his own words.

This article, written by Professor Rennard Strickland, was first published in the American Indian Law Review's (AILR) very first publication (1-1) in 1973. This article has been reproduced as a "hello" from the beginning of AILR and a "goodbye" to Professor Strickland.

Best wishes,
Samantha A. Tamura, Editor-in-Chief of AILR

REPRINT: AMERICAN INDIAN LAW AND THE SPIRIT WORLD*

*Rennard Strickland***

Lieutenant Henry Timberlake, a British Officer assigned to the American Indian country in the mid-eighteenth century, wrote that [Indian] “government, if I may call it government . . . has neither laws nor power to support it” An early traveler, William Fyffe, reported that Indian “government is not supported by laws and punishments as among us.” Similarly, Captain Raymond Demere, commander of Fort Loudon, wrote to Charles Town in 1757 that “[T]here is no law or subjection amongst them.”¹

Timberlake and his contemporaries were limited by the short-sightedness which afflicted most early observers of the traditional American Indian legal systems. Englishmen were looking for native versions of British courts and, when they saw no red chief justices or Indian barristers, concluded, in a supreme gesture of ethnocentrism, that the American Indians had no system of law. In truth, the American Indian conception of law was simply different from the more traditional Western idea of law.

This essay examines the traditional legal system of one of the North American Indian tribes, the Cherokees. The aim is to picture traditional jurisprudence as it existed before substantial modification through the introduction of alien economic and social concepts. American Indian legal studies are not new. When Llewellyn and Hoebel merged the strengths of scientific anthropology and American legal realism in *The Cheyenne Way*, their classic study of jurisprudence on the American plains, North American Indian culture fully emerged as a laboratory for the study of legal institutions. John Phillip Reid recently focused upon the Cherokee law

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1. H. TIMBERLAKE, THE MEMOIRS OF LIEUT. HENRY TIMBERLAKE (Samuel Cole Williams ed.), 93. William Fyffe, Letter to Brother John, Feb. 1, 1761, Thomas Gilcrease Institute, Tulsa, Oklahoma. Captain Raymond Demere, Letter to Charles Town 1757, Cherokee Documents Collection, Indian Heritage Association, Muskogee, Oklahoma. Students interested in specific legal institutions of the traditional Cherokees should read John Phillip Reid’s excellent study of early tribal law.

ways in *A Law of Blood: the Primitive Law of the Cherokee Nation*, his major study of primitive jurisprudence.² This study, by contrast with the Reid work, focuses upon the Indian conception of law as a part of the tribal spirit world.

The Cherokees were an Iroquoian people whom ethnologists classify as Southern Woodland Indians.³ At the time of the white arrival their home was in the Appalachian Mountain highlands where they lived in scattered villages. The Cherokees were hunters, fishers, farmers, and warriors. They were a settled people whose lifestyle contrasted sharply with the stereotype nomadic buffalo hunters of the plains.

To the Cherokee, law was the earthly representation of a divine order. The Cherokee did not think of law as a set of civil or secular rules limiting or requiring actions on their part. Public consensus and harmony rather than confrontation and dispute, as essential elements of the Cherokee worldview, are reflected in the ancient concepts of the law.

The ongoing social process could not, in the Cherokee way, be manipulated by law to achieve policy goals. There was no question of man being able to create law. To the Cherokee, the norms of behavior were a sovereign command from the spirit world. Man might apply the divinely ordained rules but no earthly authority was empowered to formulate rules of tribal conduct.

The Cherokee law was centered in the priestly complex of the native tribal religion. The recitation of the law was a high religious ceremony. Among the ancient Cherokees there was an office of tribal orator, a priest who was sometimes called the "beloved man." The orator's duties included, among others, the delivery of the laws of the Cherokees at the annual busk of first-fruit celebration. Dressed in the orator's costume and wearing the wings of a raven in his hair, the law-giver must have been an impressive and important figure. John Haywood in his *Natural and Aboriginal History of Tennessee* reports observations of the recitation of the law:

The great beloved men or high priest addresses the warriors and women giving all the particular and positive injunctions, and negative precepts they yet retain of the ancient law. He uses very

2. J. REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* (1970). The major point of distinction between our interpretations of early law centers around the role of the religious complex in the Cherokee legal system.

3. For general history of the Cherokees see H. MALONE, *CHEROKEES OF THE OLD SOUTH* (1956); M. L. STARKEY, *THE CHEROKEE NATION* (1946); E. B. PIERCE and RENNARD STRICKLAND, *THE CHEROKEE PEOPLE* (1973); E. STARR, *STARR'S HISTORY OF THE CHEROKEES* (J. Gregory and R. Strickland eds., 1968); T. WILKINS, *CHEROKEE TRAGEDY* (1970); G. S. WOODWARD, *THE CHEROKEES* (1963).

sharp language to the women. He then addresses the whole multitude. He enumerates the crimes they have committed, great and small, and bids them look at the holy fire, which has forgiven them. He presses on his audience by the great motives of temporal good, and the fear of temporal evil, the necessity of a careful observance of the ancient laws⁴

When the orator spoke the law, he was reading the meaning of history and tradition contained in the tribal wampum. He held the ancient and sacred wampum belts in his hand. At the earliest period the laws were interpreted from divining crystals whose surface might picture the events of the forthcoming year. In later times wampum beads of varying shades were strung together to symbolize events and customs of the Cherokees. Even today, the Kee-too-wah Cherokees are said to continue to read their ancient laws from many of the same belts used by the beloved men in Haywood's time.

The law was read but once a year. The law was simple and the people knew the law. The reading was more symbolic than informative, but no doubt served as a reminder that the Cherokees were a people governed by the laws of the spirits. Each year, among the Cherokees, there was a "great festival of the expiation of sins," at which time all crimes except murder were forgiven after the expiration of a year. The Cherokees felt that "the heart cannot be weighed down with all the sorrows of past years" and thus the new year feast was a time of absolution at which "the divine fire is appeased for past crimes."

The fire itself and the smoke of the fire were agents and acted to grant the pardon. No Cherokee who retained a grudge or notion of revenge could participate in the renewal festival which was a time of "joy and gladness," when the fire had "sanctified their weighty harvest." At this feast the Cherokees "rejoice exceedingly at this appearance of the holy fire, and it is supposed to atone for all their past crimes, except murder."⁵ As Haywood explains:

4. J. HAYWOOD, *THE NATURAL AND ABORIGINAL HISTORY OF TENNESSEE* 243 (1972) [cited hereafter as Haywood].

5. John Howard Payne Papers, 6987, 350; 6985, 19, 55-60. The history of the Cherokee feasts wampum is traced in Robert K. Thomas, "The Origin and Development of the Redbird Smith Movement" (MA. thesis, University of Arizona, 1953), 119-35. The wampum belts are shown in a picture of the Keetoowah Council of 1916 in STARR'S *HISTORY OF THE CHEROKEES*, 487, Letter, William Fyffe to Brother John. For contemporary Cherokee practices see Benny Smith, "The Keetoowah Society of the Cherokee Indians" (M.A. thesis, Northwestern State College, 1967), and Nancy Beverage, "The Keetoowah Society" (Seminar paper, University of Tulsa, 1969).

Here it is that all injuries are forgiven, which have been done to one another. Vengeance and cruelty are forgotten in the sacrifice made to friendship. No one who has been guilty of unpardonable offences, can partake of this feast; and all who partake of it must be forgiven, no matter what may be the nature of the offence. This feast consigns to oblivion and extinguishes all vengeance, and forever banishes from the mind all sentiments of displeasure which before separated them from a close and friendly intercourse with each other.⁶

In order to clarify the ancient Cherokee law ways, this writer is following the methods outlined by Professor E. Adamson Hoebel in his classic *The Law of Primitive Man: A Study of Comparative Legal Dynamics*. As Hoebel explains, “[I]n the study of a social system and its law by the specialist it is his job to abstract postulates” which reflect the “broadly generalized propositions held by the members of a society as to the nature of things”⁷

To avoid the pitfalls which Timberlake faced one must view law as an ongoing process in a specific social context. Therefore, we must attempt to formulate the basic social postulates upon which the system rests. We should strive to find “the key basic concepts of . . . culture, without which the living law . . . of that culture is not understood”⁸ We are thus looking for the general propositions held by the Cherokee Indians “as to the nature of things and as to what is qualitatively desirable and undesirable.”⁹

Using Hoebel’s basic methodology, the following social postulates of the civilization of the eighteenth-century Cherokee have been drawn from

6. HAYWOOD, 246; John Howard Payne Papers. GREGORY AND STRICKLAND, CHEROKEE SPIRIT TALES, 26 (1969). The work of David H. Corkran is especially important in interpreting the ancient ceremonies. Corkran, “Cherokee Prehistory,” *North Carolina Historical Review*, 34 (1957), 455-66; Corkran, “Cherokee Sun and Fire Observances,” *Southern Indian Studies*, 7 (1955), 33-38; Corkran, “The Sacred Fire of the Cherokees,” *Southern Indian Studies*, 5 (1953), 21-26.

7. E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY OF COMPARATIVE LEGAL DYNAMICS*, 13 (1954). Hoebel acknowledges the “influence of Pound’s sociology of law” and of Julius Stone’s *THE PROVINCE AND FUNCTION OF LAW*.

8. F.S.C. Northrop, *Jurisprudence in the Law School Curriculum*, *JOURNAL OF LEGAL EDUCATION*, 1 (1949), 489.

9. HOEBEL, *LAW OF PRIMITIVE MAN*, 13. Perhaps the clearest summary of this approach is found in Otis Lee, *Social Values and the Philosophy of Law*, *VIRGINIA L. REV.*, 32 (1946), 811-12.

contemporary accounts.¹⁰ These are the constructs commonly accepted by the traditional Cherokee.

Postulates of Traditional Cherokee Society

I. The fire is central to life. Fire and smoke are agents of Being. Spirit Beings created the world. These Beings, who possess emotional intelligence similar to man, control the destiny of man who, in important aspects of life, is subordinate to the souls of the Spirit Beings. Man's social order is patterned after the system of the creating Spirits. Divine Spirit retribution is always a grave danger. Displeasure may or may not be vented immediately. The spirits allow both supernatural and secular aspects in their divinely ordained world.

II. The matrilineal clan is the primary social unit whose purity of blood must be safeguarded at all times.

III. War and Peace are separate activities which require two distinct political organizations, as well as dual obligations for all men and women.

IV. Priests, as leaders of the Peace organization, have been given secrets which will guard the welfare of the tribe.

V. Popular consensus is essential to effective tribal action. Leadership depends upon popular support which may be withheld to prevent action. Withdrawal of factions may provide the solution when agreement by consensus is impossible. Social harmony is an element of great value.

VI. Society is divided into separate classes and ranks which were created by the Spirits. There is no significant stigma and only limited privilege attached to class membership. All classes, both men and women, are of great value socially and have important and useful roles in Cherokee society.

VII. All natural resources are free or common goods. Food supplies and wealth items are privately owned but are to be shared. Property is to be

10. The following manuscript sources were consulted in preparing these postulates and the tables: George Chicken, "Journal of the Commissioner of Indian Affairs on Journey to the Cherokees and His Proceedings There, 1725," Thomas Gilcrease Institute, Tulsa, Oklahoma; William Fyffe, Letter to Brother John, Feb. 1, 1761, Thomas Gilcrease Institute, Tulsa, Oklahoma; Alexander Longe, "A Small Postscript to the Ways and Manners of Indians called the Cherokees," Papers of the Society for the Propagation of the Gospel, Library of Congress, Division of Manuscripts, Washington, D. C., John Howard Payne Papers, "Traditions of the Cherokees, Buttrick Manuscript Notes on Cherokee Customs and Antiquities, "Notes on Cherokee History," Letters to John Howard Payne from Selected Cherokee informants, all in Ayer Collection, Newberry Library, Chicago, Illinois. Papers, American Board of Foreign Missions, Harvard Library, Boston.

used but not accumulated, as wealth is not a desired social goal. All people are to be honored regardless of physical and personal limitations.

VIII. Marriage is a temporary state and may be dissolved at will by either party. While marriage exists, sexual fidelity is expected.

IX. There is a supernatural world to which the ghosts of all men desire to go. Actions on earth, either one's own or those of a clan brother, may prevent passage into the afterworld of Nightland. Duties of blood and oaths are, therefore, to be highly regarded.

Legal norms existed on four levels among the ancient Cherokees. This analysis, following recent anthropological scholarship, accepts a social norm as legal "if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."¹¹ The first of these were the norms governing relationships between man and the supernatural—the Spirit Beings. Second were the norms prescribing conduct of the individual Indian toward specific public order issues relating to the entire village or tribe. Next were the norms concerning clan rights and duties. Finally, there were a limited number of norms on individual or personal questions.¹²

The Cherokees distinguished between norms regulating public conduct and those designed to assist in preventing or curing diseases. According to ancient tradition, tribal knowledge of these two types of regulations came

11. HOEBEL, *LAW OF PRIMITIVE MAN*, 28. For a vigorous dissent see K. CARLSTON, *SOCIAL THEORY AND AFRICAN TRIBAL ORGANIZATION: THE DEVELOPMENT OF SOCIO-LEGAL THEORY*, in which he argues at page 3 that "to limit law to Hoebel's conception of a social norm supported by the regularized application of force by an agent socially authorized so to act or to adopt the notion of much modern jurisprudence, stemming from Austin, that law is a command supported by the coercive power of the state, is to life a concept from our culture which is simply inappropriate for the study of tribal societies." Carlston concludes (page 62) "If a definition of law . . . must be had, it can be said simply to consist of those valued norms violation of which subjects their violators to a sanctioning process, together with those procedures which determine that violation of such norms have occurred in situation of interpersonal conflict." The most complete discussion of the literature of anthropology on law is found in L. Nader, *The Anthropological Study of Law*, *AMERICAN ANTHROPOLOGIST*, 47 (1965), 3. For the difficulty in working with custom and law through application of "the theories and work of Western jurists," consider Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in Laura Nader (ed.), *LAW IN CULTURE AND SOCIETY*, 349-73.

12. See Tables 1-4 [at pp. 265-69 of this reprint]. These should not be confused with Gearing's "structural poses." F. O. Gearing, "Cherokee Political Organizations, 1730-1775," (Ph.D. dissertation, University of Chicago, 1956); GEARING, *PRIESTS AND WARRIORS: SOCIAL STRUCTURES FOR CHEROKEE POLITICS IN THE 18TH CENTURY*; and *Structural Poses of the Eighteenth Century Cherokee Village*, *AMERICAN ANTHROPOLOGIST*, 60 (1958), 1148-57.

from separate prophets at different times in Cherokee history. Functions are also distinguished in the tribal mythology on the origin of death and the introduction of disease. And yet, there is a connection in that violation of either norm may result in punishment by disease or death inflicted from the Spirit World.¹³

Thus there were four types of deviations recognized by traditional Cherokee law. These were deviations which constituted an offense against the supernatural or Spirit Beings, against the entire community, against the clan, and against the individual Cherokee. There were four distinct authorities empowered to determine deviation from these norms. Supernatural norms involving, as they did, the relationship between man and the spirits were, in the Cherokee view, automatically detected. In fact, there was, according to report in the John Howard Payne Papers, "no hiding place where the Spirits did not see."¹⁴ Most public offenses were brought before a tribal group much like a court composed of the seven clans. Deviations which were offenses against the clan might be resolved by consensus of clan members or in accord with a priority-of-duty scale. Offenses against an individual involved little more than personal response. Divine judgment might be sought for deviations of any of the levels.

Again, the agent assigned the task of application of sanctions for any deviation was clearly delineated along one of the four lines. Divine retribution for violation of spirit norms might be immediate or prolonged, against either the individual or the entire village. Public punishment of an established nature followed conviction for a public offense. Clan violations were revenged by individual members of the offended clan as individual retribution was achieved by the person offended. Divine assistance might be sought for punishment of non-spiritual norm deviations.

Each Cherokee village had two distinct governmental structures, a White or Peace government and a Red or War government. The White government was supreme in all respects except the making of a war. During times of peace, the White government controlled all tribal affairs. Conversely, in times of war, the Red government was in control of all tribal affairs. The two governmental structures were never in operation at the same time. The White government was essentially a stable theocracy composed of the older and wiser men of the tribe who constituted a tribal gerontocracy. The Red organization was, on the other hand, quite flexible,

13. John Howard Payne Papers, 6985, 18-27. See, *Origin of Disease and Medicine*, J. Mooney, *Myths of the Cherokees*, ANNUAL REPORT SMITHSONIAN INSTITUTION, 250-52; F. M. Olbrechts, *THE SWIMMER MANUSCRIPT: CHEROKEE SACRED FORMULAS AND MEDICINAL PRESCRIPTIONS* (1932), 15-16, 18-39, 131-134; John Howard Payne Papers, 6985, 18-20, 27.

14. John Howard Payne Papers, 6985, 3-7.

responsive to changing conditions, and controlled by the younger warriors.¹⁵

The Seven Counselors Court was a White or Peace organization composed of selected officials from the White government. The officers operating the Peace society were (1) The chief of the tribe or high priest, (2) the chief's right-hand man, (3) seven prime counselors representing the seven clans, (4) the council of elders, (5) the chief speaker, (6) messengers, and (7) a number of officers for specialized ceremonial functions. Evidence indicates that all of the officers above the level of messengers sat at the White or Peace court. This organizational structure was repeated in each of the tribal villages of any size large enough to be represented by each of the clans.¹⁶

Deviation from established norms which offended community expectations were tried in the courts of the villages. A Cherokee trial was essentially a matter of oath saying. The accused was brought before the assembled officers. The offenses against him were presented by a court prosecutor who was generally the chief's right-hand man. The court was free to question in any manner desired. No attorney was allowed to represent the individual on trial. There were no juries and the counselors and court did not act in that capacity but, rather, placed the accused upon a sacred oath which required him to state his own innocence or guilt. Violation of the oath would prevent the ghost from passing to the Nightland and, therefore, the punishment for the offense with which the accused was charged would, in the view of the traditional Cherokee, be less grave than having one's ghost remain forever wandering as a result of violation of the oath. The oath-taking process was described by James Adair.

The Cherokee [*sic*] method of adjuring a witness to declare the truth On small affairs, the judge, who is an elderly chieftain asks the witness, Cheekohga "Do you lie?" To which he answers, Ansa Kai-e-koh-qa, "I do not lie." But when the judge will search into something of material consequence, and adjures the witness to speak the naked truth, concerning the point in question, he says "O E A (sko?)" "What you have now said is it

15. See, generally, the John Howard Payne Papers for the most complete primary data. W. H. GILBERT, THE EASTERN CHEROKEES, 313-372; GEARING, PRIESTS AND WARRIORS, 13-75; W. S. Willis, "Colonial Conflict and the Cherokee Indians," (Ph.D. dissertation, Columbia University, 1955), 219-77.

16. GEARING, PRIESTS AND WARRIORS, 37-47; GILBERT, EASTERN CHEROKEES, 323; "Wolf King's Answer to a Joint Talk," April 29, 1766, Oklahoma Historical Society, Indian Archives, Bartram, 297-298.

true, by this strong emblem of the beloved name of the great self-existent God?" To which the witness replies, O E A, "It is true, by this strong painting symbol of YO HE WAH." When the true knowledge of the affair in dispute, seems to be of very great importance, the judge swears the witness thus: O E A - YAH (sko?) This most sacred adjuration imports, "Have you now told me the real truth by the living type of the great awful name of God, which describes his necessary existence, without beginning or end, and by his self-existent literal name in which I adjure you." The witness answers, O E A = YAH I have told you the naked truth, which I most solemnly swear, by this strong religious picture of the adorable, great, self-existent name which we are not to profane; and I likewise attest it, by his other beloved, unspeakable, sacred, essential name.¹⁷

The Red organization was composed of the following officers: (1) Great Red War Chief, (2) Great War Chief's Second, (3) Seven War Counselors to order war, (4) Beloved, Pretty, or War Women, (5) Chief War Speaker, and (6) messengers, ceremonial officers, and war scouts or titled men. The Chief, Second Chief, and War Counselors served as the military or Red court. The War Women served in a similar capacity to judge the fate of captives and other prisoners of the war.¹⁸

Clan investigation was never formalized into an actual court procedure but represented an investigation by clan members most immediately concerned with deviations. It was a corporate reaction but never institutionalized into a court procedure as in community sanction enforcement. The offended members of the clan reacted, often immediately, as in the case of the individual who might seek revenge or retaliation for the offenses against his person.¹⁹

Women constituted a special class within the operation of Cherokee law. They might serve as a court designed to punish offenses which were affronts to them and the tribe growing from the regulations of women. The law-giver recited a "female lecture" when tribal laws were given and was reported to be "sharp and prolix" as "he urges them with much earnestness

17. J. ADAIR, *THE HISTORY OF THE AMERICAN INDIAN* (1775).

18. HAYWOOD, 260; "Journal of Antoine Bonnefoy," in S. C. Williams, ed., *EARLY TRAVELS IN THE TENNESSEE COUNTRY, 1750-1800*, 149-50; N. KNOWLES, *THE TORTURE OF CAPTIVES BY INDIANS OF EASTERN NORTH AMERICA*, 151; Adair called the Cherokees "a petticoat government." ADAIR, 145.

19. Statement of A-Kee-la-nec-ga shows survival of this feeling. *CHEROKEE MESSENGER*, December 1844, 29. John Howard Payne Papers, 6987, 524.

to an honest observance of the marriage-law." To violate the rules of female cleanliness was "at the risque of their lives." Women were themselves granted the right to enforce these regulations, especially those relating to the obligations of widowhood and adultery.²⁰

It was apparently possible for an individual to seek some form of supernatural adjudication from the spirit world without the use of the priest as an intermediary. The process in the case of adultery is explained in considerable detail in the Buttrick papers. A Cherokee would take "two white beads, and blackened one of them." The white bead became the symbol of innocence and the black of guilt. "The white bead . . . was then placed between the thumb and finger of his right hand [and] the black bead between the thumb and finger of his left hand." The inquirer would ask certain questions in ritualistic form and request to know if a certain member of a certain clan were guilty. Finally, "if the black bead vacillated between his left thumb and finger, at the mention of any particular clan, he was certain of his wife's guilt, and watched till he personally detected with whom."²¹

The most completely documented study of Cherokee norm deviations center around the clan blood regulation of homicide. The clan was, without doubt, the major institution exercising legal powers. The survival of these important sources of information on murder regulation is possible for two reasons. Control of murder was, no doubt, an ancient and major public order question among the Cherokees and had become fully institutionalized. A second factor accounting for our complete detailed knowledge of regulation of murder was the fascination which this crime held for travelers who noted the cases with considerable detail. The following statements represent the general Cherokee attitudes toward control of murder.²²

- I. Homicide is an offense against the blood of the clan.
- II. The ghost of the murdered clansman cannot pass from the earth until the blood has been revenged.
- III. Revenge for the murder rests with members of the clan of the victim.
- IV. Blood revenge requires the death of a member of the clan of the murderer.
- V. Clans are corporate units for revenge purposes, all being brothers.

20. TIMBERLAKE, 93; ADAIR, 107, 123-24, 186-87, 190; HAYWOOD, 243, 260; John Howard Payne Papers, 6987, 401.

21. John Howard Payne Papers; OLBRECHTS, THE SWIMMER MANUSCRIPT, 132.

22. REID, LAW OF BLOOD, 73-112; Letter, I. P. Evans to John Howard Payne, Payne Papers, 6986, 4-5.

VI. It is desirable to revenge the murderer himself, but if he is not available then members of the clan, especially those closest to the murderer, may be revenged.

VII. Revenge is a duty and befalls the oldest male relative of the victim's generation. The duty generally falls to his oldest brother. To fail to revenge is to be held up to public ridicule.

VIII. There are no degrees of murder. The necessity of revenge to free the ghost is the same whether the death is accidental or deliberate.

IX. There is no need for a public trial, witnesses, or hearings. The clan member with the duty of revenge will determine guilt. If assistance is needed, he may call upon other members of his clan.

X. The members of the clan of the murderer might serve a self-policing or protecting purpose by executing the member of their own clan and thus eliminate the risk that innocent clansmen might be made to suffer the blood revenge.

XI. An individual who had innocently (or by accident) taken the life of another might flee to one of four "free cities" or "sacred cities of refuge" where the accidental murderer would be safe. A priest might offer the same protection on sacred ground in any town.

XII. Compensation was occasionally possible but only with the replacement of a member of the clan through capture of a prisoner or delivery of the scalp of an enemy in blood revenge. No fixed monetary compensation appears to have existed in the primitive system.

XIII. Execution in blood revenge could be by any means selected by the clansmen designated to make the revenge.

XIV. The clans were serving as public executioner but often increased the chances of public disorder with the danger of blood feud. However, generally the sanction was so strongly supported that the clan which suffered the blood revenge considered the execution justified.

One of the most serious blood regulation threats to the Cherokee community stemmed from the presence of a witch who could cause sickness and death.²³ The Reverend Cephas Washburn noted that "it should be considered not only lawful, but even a duty [for a Cherokee] to put to

23. J. STUART, *A SKETCH OF CHEROKEE AND CHOCTAW INDIANS*, 46; OLBRECHTS, *THE SWIMMER MANUSCRIPT*, 29-33; WASHBURN, *REMINISCENCES OF THE INDIANS*, 107-112 [cited hereafter as Washburn]; ADAIR, 36; HAYWOOD, 251. The Cherokees are said to have feared the "morning star [because] long ago a very wicked conjurer killed people by witchcraft . . . but on hearing of a resolution formed by the other Indians to kill him, he took all his shining instruments of witchcraft, and flew away . . . and appeared as a bright star. [T]hose Indians who wish to kill others [by] witchcraft pray to him." John Howard Payne Papers, 6987, 569.

death every one who could exercise this malignant power.”²⁴ Witchcraft was considered a capital crime—more dangerous than homicide. Some witch cases might be tried by the Seven Counselors court but generally there were no trials, no witnesses; the dangers were too great. All that was required to insure execution was “to accuse him and refer to some instance of painful disease or death.”²⁵

One of the most difficult tasks of law under a clan-revenge system is to prevent escalation of revenge into open clan warfare and blood feud. The process of buildup is easy to understand because the revenge killing is a private act with no public determination of fairness. In most instances, the consensus of support for the system was so great that the retaliation produced no additional revenge and, in fact, the revenge killing was occasionally executed by the clan of the murderer itself.²⁶ However, there is record of “one instance [in which] a man was killed as a witch who had several brothers. These avenged his death by killing the witchkiller. His relatives avenged his death, and so it went on till seven individuals were killed.”²⁷

Protection of blood lines and the difficulty of freeing the ghost of the deceased were probably the major reasons for the stigma attached to suicide. Since the deceased was responsible for his own death, the ghost could not be set free by the clan brothers since they could only accomplish this by taking the life of the murderer. Cherokees would, however, if they felt sufficiently disgraced, choose death by suicide. There are recorded cases of priests disfigured by smallpox who “cut their throats, stabbed themselves with knives, . . . with sharp-pointed canes; many threw themselves with sudden madness into the fire”²⁸

The clan-blood relationship explains why there was so little social emphasis attached to male sex practice in the matrilineal structure of the society. Clan membership, inheritance, and social status depended upon the mother and her family. Sexual activity constituted little threat to society unless there was a violation of clan intermarriage restrictions. As Chief Blanket explained, “[E]very mother knows who are her children, but fathers have not such knowledge. My wife was a singing bird [and] had four [children] while she lived with me, and she said I was their father.”²⁹

24. WASHBURN, 108. Nustawi reported that “witches were always killed.” John Howard Payne Papers, 6987, 527.

25. WASHBURN, 108; E. STARR, *CHEROKEES “WEST,”* 1794 to 1839, 53.

26. *Cherokee Phoenix*, Feb. 18, 1829.

27. WASHBURN, 111; STARR, *CHEROKEES “WEST,”* 56.

28. ADAIR, 233-34.

29. WASHBURN, 167-68; STARR, *CHEROKEES “WEST,”* 94-95.

Public punishment was rare and inflicted by officers chosen for the purpose. Tribal humiliation was common and administered by the entire tribe. An effort was made to select individuals related to the offense in case of assaults, arson, witchcraft. If the punishment involved death, a member of each clan constituted the execution group to prevent the danger of revenge. Apparently there was no institutionalized post of public executioner. In the case of putting to death an acknowledged witch, “[T]hese executions were accomplished by a company designated by the headmen of some village, within whose jurisdiction the witch resided.”³⁰ Priests might provide the more common punishments such as scratching the legs of young warriors who violated prescribed codes of military conduct. Scratching of the young was often the duty of a mother’s brother.

The temptation to abuse individual or clan punishments was great. There are recorded instances of abuses of punishment of witches. Any enemy found it simple to suggest that failure of crops or unexplained deaths were the result of witchcraft by an old enemy or bitter rival. The case of Whirlwind, in which he inspired a young orphan to kill the elderly chief who had befriended him, is typical.³¹

The Journal of Dwight Mission provides an excellent example of abuse of the traditional powers regulating death by witchcraft. “A man,” the report notes, was “murdered in a most shocking manner by his nephew.”

The mother of the nephew died some months since of a very singular disease, and several other relatives were affected in the same way, all efforts to effect a cure proved entirely unavailing. A man, who had inimical feelings towards the uncle, told the young man that his mother & other relatives were bewitched by the uncle, & that if he was killed the surviving relatives would recover. Accordingly the nephew called upon his uncle & as they were walking together, the young man discharged his rifle & shot his uncle through the body. He then shot again as soon as possible. Stabbed him in many places, & finally fractured his skull by beating him with a large stone. Notwithstanding all these wounds, the old man survived several hours & intreated, but in vain, to be informed for what he was put to death. This is the second instance of murder committed within a few days by

30. WASHBURN, 108; STARR, CHEROKEES “WEST,” 53-54.

31. WASHBURN, 109-11; STARR, CHEROKEES “WEST,” 54-56.

this benighted people. Surely the dark places of the earth are full of the habitations of cruelty.³²

Spirit or supernatural punishments might be invoked in response to violations of the norms of society. The spirit world was often called upon to atone for deviations affecting the community, the clan, and the individual. These divine punishments were not, however, automatic and had to be requested by the offended Cherokee. Most often, such assistance would be sought when supernatural forces were needed to determine guilt for the offense. Divining crystals were regularly used to determine the location of stolen property and the name of the thief. The clearest instances of this practice are found in individual retaliation against an adulteress by her husband. In this instance:

When the priest was consulted on such occasions, he would set his crystal and pray for information. In the event of innocence, it never changed; but in that of guilty, two persons would be discovered in it. The priest would next take some flies which he had previously killed for the purpose. He then solemnly pronounced evil which would befall the woman, if guilty. He declared that if, on opening his hand, one of the flies came to life again, it would fly to her in the instant, and with bitter tortures, in seven days she would feel it gnawing into her heart, and die. Accordingly, the woman invariably died on the seventh day; but whether the fly received any assistance from the husband or the priest is not reported.³³

There was, among certain early traders, a belief that “the Cherokee are an exception, in having no laws against adultery.”³⁴ Adair, for example, blamed this on “petticoat government,” which gave “women full liberty to plant their brows with horns as often as they pleased without fear of punishment.”³⁵ Adair failed to comprehend that with divorce as easy as “splitting the blanket,” adultery was considered a direct affront to the warrior’s ego. Punishment might be death, but was not invoked often since the option to enforce rested with the offended husband. Adair himself records one of the most unusual punishments for adultery.

32. Journal of Dwight Mission, Papers, American Board of Foreign Missions, Harvard Library, Boston.

33. Journals, John Howard Payne Papers.

34. ADAIR, 145-46; Letter, William Fyffe to Brother John. Interestingly, the Cherokees never enacted a law against adultery. *In re Mayfield*, 141 U.S. 107 (1890).

35. ADAIR, 145.

Once in my time a number of warriors, belonging to the family of the husband of the adulteress, revenged the injury committed by her, in her own way; for they said, as she loved a great many men, instead of a husband, justice told them to gratify her longing desire—wherefore, by the information of their spies, they followed her into the woods a little way from the town, (as decency required) and then stretched her on the ground, with her hands tied to a stake, and her feet also extended, where upwards of fifty of them lay with her, having a blanket for covering.³⁶

There was a great pride involved in acceptance of justified punishment. The Cherokee was resentful of one who did not accept his punishment. The practice of scratching the young was more often a ritual related to powers rather than punishment. War leaders are said to have scratched harder and deeper if warriors flinched when being scratched as punishment for violation of battle order. The case of Crane-Eater illustrates the extreme personal pain which a Cherokee was willing to endure to accept the sanctioned justice. The instance is reported by an early Indian informant.

Some few years ago, a man in his village by the name of Crane-Eater had stolen a horse. He was tried and found guilty, and was sentenced to receive a hundred lashes on his bare back. When tied to the tree for the purpose of receiving the penalty of the law before the first blow was struck, he fainted from mere terror of the dreadful punishment. . . . At this juncture, a brother of Crane-Eater's came forward and thus addressed the executioner of the law. "This person," said he, "is my brother. I am ashamed of him. He thought he was a man, and he dared to steal a horse; but now when called to meet the consequences of his act, he finds he is a woman. I pity him. Untie him and let him go. I will take his place. I am a man, and though I have stolen no horse, I can bear the punishment which is due him." And, added Blanket, so they untied Crane-Eater and whipped his brother.³⁷

Violation of established order might result in punishment of the entire tribe. It was believed by the Cherokees that the severe smallpox epidemic of 1738, which is said to have reduced population by one-half, was 'brought on by their unlawful copulation in the night dews'³⁸ The violation of the divine spirit order and not the wet grass was considered the cause. The

36. ADAIR, 146.

37. WASHBURN, 175; STARR, CHEROKEES "WEST," 100.

38. ADAIR, 232.

dangers of women violating “their lunar retreats” illustrate individual violations being vested upon the entire tribe.³⁹ Adair notes that “should they be known to violate that ancient law, they must answer for every misfortune that befalls any of the people, as a certain effect of the divine fire”⁴⁰

Within this universe of divinely ordered laws the Cherokees faced the question introduced by the arrival of the white man, the question of adopting laws to new or changing circumstances. Adaptation was begun with a form of supernatural fiction found among many primitive people and probably used by the ancient Cherokee. This procedure is recorded by an early traveler in the Cherokee country.

The principal chief pretends that he has been inspired that a spirit has come to him and delivered a bit of wampum, whispering in his ear, and again returned to his invisible abodes. The fiction is not discountenanced, because the good of the nation requires secrecy and the chief is responsible only for the truth and importance of the subject, which a supernatural communication often gives to the most trivial affair.⁴¹

The Cherokee experience demonstrates that law is more—much more—than powdered wigs, black robes, leather-bound statutes, silver stars, and blinded ladies with balanced scales. Law is also a Cherokee priest listening to the spirit world while holding the sacred wampums in hand and the Cheyenne soldier society warrior draped in the skin of a wolf. In fact, a command from the spirit world can have greater force as law than the most elaborate code devised by the most learned of men. For law is organic. Law is part of a time and a place, the product of a specific time and an actual place. The Cherokee experience demonstrates that law cannot be separated from the environment in which it matured. Just as we cannot transplant law into another time or another place, so we cannot judge the laws of a people by the standards of the people of another time and another place. To do so does violence to the very nature of the concept of law as a living institution. Law itself is dynamic, a vital force, organic in all respects. Thus, law was to the traditional Cherokee a part of his larger worldview, a command from his spirit world. And it is as such that we must view the law of the early Cherokees. For law can no more be projected into another time than law can be isolated from the cultural milieu of its own time.

39. John Howard Payne Papers.

40. ADAIR, 124.

41. HAYWOOD, 258.

Table 1
SPIRIT DEVIATIONS

Deviation	Authority Expected to Determine Deviation	Agent Enforcing Sanction for Deviation	Sanction
(1) Unauthorized person learning religious secrets.	(1) Either spirits or White priest who calls spirits.	(1) Demons sent from spirit world.	(1) Death before next day.
(2) Theft of sacred religious relics.	(2) Spirits or White priest who calls spirits.	(2) Spirits themselves.	(2) Immediate death.
(3) Assault on priest, i.e., touching his beard. Assault or entering sacred religious areas.	(3) Spirits or White priest who calls spirits.	(3) Spirits themselves.	(3) Death but uncertain date or manner.
(4) Widespread deviation from general norms of conduct so frequent as to offend spirits, i.e., adultery.	(4) Priest must call upon spirits.	(4) Spirits through agents of disease.	(4) Sickness, suffering, smallpox, plague.
(5) Women's tabus.	(5) Spirits, White priests, or other women.	(5) Spirits themselves; agents of disease; demons sent from spirit world.	(5) Death, sickness. Entire village will suffer.
(6) Failure to follow rituals such as bathings, singing	(6) Spirits or White priest who calls spirits.	(6) Agents of spirits.	(6) Sickness. Bad luck. Entire village may suffer.

Table 2
COMMUNITY DEVIATION

Deviation	Authority Expected to Determine Deviation	Agent Enforcing Sanction for Deviation	Sanction
(1) Arson—frequent chronic burning of individual or public property.	(1) Council of Seven Clans (White Courts).	(1) Appointed by Seven Clans Council. Select group which should be composed of individuals whose property was burned if possible.	(1) Death (throwing from cliff or high place).
(2) Assault—frequent and aggressive attacks upon the person of others.	(2) Council of Seven Clans (White Courts).	(2) Group appointed by Council. Should be those assaulted if possible.	(2) Whipping or infliction of similar assault.
(3) Food and Field regulations. Refusal to work. Contribute share of work and crops.	(3) Council of Seven Clans (White Courts).	(3) Select Group or elder members of individuals clan.	(3) Whipping, insult, possible expulsion (outlawry).
(4) Hunting Regulations.	(4) Council of Seven Clans.	(4) Select group or elder clan members.	(4) Whipping, insult, and possible outlawry. Scratching legs.
(5) Misrepresentation. Wearing fraudulent insignia, using wrong war name, etc.	(5) Either Council of Seven Clans for Peace Offense or Military Court of Red Organization for war offense.	(5) Public Executioner.	(5) Whipping, name calling, public disgrace.

Table 2 (Continued)

COMMUNITY DEVIATION

Authority Expected to Agent Enforcing Sanction Determine Deviation for Deviation	Sanction
(6) Treason—deliberate violation of community interest which benefits recognized enemy of group.	(6) Death.
(7) War Regulations, order of fire, command, restrictions on attack.	(7) Place violator in battle position where certain to be killed. Death by tribal executioner. Scratching legs.
(8) Women's tabus, separation, childbirth, etc.	(8) Stoning, mutilating, whipping, death.
(9) Widower or Widow, remarriage or mourning requirements.	(9) Death, stoning, mutilation, whipping.
(10) Witchcraft (see also individual).	(10) Death.

Table 3

CLAN DEVIATION

Deviation	Authority Expected to Determine Deviation	Agent Enforcing Sanction for Deviation	Sanction
(1) Intermarriage within the clan.	(1) Clan members, especially immediate family of violators.	(1) Clan members selected by family.	(1) Death for the couple.
(2) Homicide.	(2) Clan members of immediate family of deceased.	(2) Oldest male relative (generally brother) of the deceased clansman. But a member of murderer's clan might execute punishment.	(2) Death for the murderer or a member of his clan.
(3) Incest.	(3) Informal clan consensus.	(3) Clan representative.	(3) Death.
(4) Infanticide a. Mother b. Father	(4) a. No stigma for mother. b. Informal Clan decision.	(4) a. No penalty or enforcement. b. Wife's relatives as clan revenge.	(4) a. None. b. Death.
(5) Sex crimes—bigamy, prostitution, incest. Only to extent violate clan blood customs. See (1) Intermarriage within clan.			
(6) Suicide.	(6) Clan offense, but death prevents earthly retribution so punishment left to spirits.	(6) Spirits. Clan should cleanse blood but cannot punish the suicide.	(6) Ghost must always remain in this land. Cannot pass to Nightland.
(7) Theft from dead or graves of dead.	(7) Members of clan of the deceased.	(7) Bone bearer assisted by clan.	(7) Death.

Table 4
INDIVIDUAL DEVIATION

Deviation	Authority Expected to Determine Deviation	Agent Enforcing Sanction for Deviation	Sanction
(1) Arson (see also community).	(1) Individual immediately injured.	(1) Injured individual.	(1) Death (?)
(2) Adultery (see also spirit).	(2) Husband. (2) Or Husband might ask divine assistance to locate guilty.	(2) Injured husband. (2) Divine intervention.	(2) Punish wife with whipping, mutilation, death. (2) Death by divine intervention.
(3) Assault (see also spirit).	(3) Injured individual.	(3) Injured individual.	(3) Return in kind, related to nature of assault.
(4) Rape.	(4) Husband of rape victim. The victim apparently had no authority.	(4) Husband.	(4) Death.
(5) Theft (see also spirit, clan).	(5) Individual from whom item was stolen. (5) Divine assistance from priest to locate thief.	(5) Individual injured. (5) No divine recovery of goods.	(5) Recovery of goods in question and public humiliation of thief.
(6) Witchcraft.	(6) Threat is so great that any individual can determine. No community standards	(6) Any person who feels in danger from witch.	(6) Death to the witch.