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OF CONTRACT, CULTURE, AND THE CODE: JUDGE EASTERBROOK AND THE CHEYENNE INDIANS

John M. Conley[1]

When I first read Judge Easterbrook's opinion in *Hill v. Gateway 2000, Inc.*,[2] I was drawn immediately to his breezy remark, "Where's the sense in that?"[3] (This rhetorical question was posed with respect to the contention that the Seventh Circuit's earlier holding in *ProCD, Inc. v. Zeidenberg*[4] should be limited to software.) When I scanned down the page I saw an equally striking reference to "competent adults" who are bound by approve-or-return documents.[5]

What struck me about both phrases was the cultural assumptions they embody. Sense and competency are neither idiosyncratic nor universal. They are instead cultural constructs, dependent on shared understandings about how the world works. *Hill v. Gateway* is thus a cultural decision, built upon - or perhaps imposing - shared understandings of what constitutes reasonable knowledge in the twenty-first century commercial world.

Judge Easterbrook's interjection, however inadvertently, of cultural concerns into the *Gateway 2000* decision led me to begin pondering the larger issue of the relevance of anthropology to contract law. Several themes immediately came to mind.

STATUS AND CONTRACT

As it happens, contract law was one of the very first issues to emerge in the anthropological study of law. It can be plausibly argued that the first book that is recognizable as anthropology was Henry James Sumner Maine's *Ancient Law*,

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[2] 105 F.3d 1147 (7th Cir. 1997).
[3] *Id.* at 1149.
[4] 86 F.3d 1447 (7th Cir. 1996).
[5] *Gateway 2000*, 105 F.3d at 1149.

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which appeared in 1861.[6] *Ancient Law* was a grandiose effort to impose the emerging evolutionary model (Darwin's *Origin of Species*[7] had appeared two years earlier, and evolution had been in the air for more than a generation) on the study of law. Maine endeavored to trace legal evolution from the earliest and most 'primitive' societies up to his own Victoria England.

Although *Ancient Law* is largely forgotten, one of Maine's ideas enjoys continuing vitality: the fundamental distinction between those societies where legal rights and responsibilities are dependent upon a person's *status* and those where rights and responsibilities are a matter of *contract*. In the former sort of society, kinship tends to determine one's social and legal fate; in the latter category, which is largely coterminous with Western industrial society, people are presumed to be autonomous individuals with the capacity to move in and out of voluntary relationships with strangers.

Even in contemporary America, however, the distinction is far from clear. Although we give nominal fealty to the ideal of the autonomous individual, a quick glance at a law school course catalog reveals numerous instances in which we predicate rights and responsibilities solely or primarily on status. See, for example, such subjects as the law of children, landlord/tenant law, and, most relevant to these proceedings, consumer law. Moreover, a lengthy ethnographic study of small claims courts that I conducted with an anthropologist colleague revealed that large numbers of competent lay adults in this society do not appreciate our official contract orientation.[8] They go into court believing in entitlements premised on their general social rectitude, and are surprised and aggrieved when the law brings them up short with such 'technicalities' as leases and contracts. In the same vein, Robert Ellickson's *Order Without Law*[9] depicts a community of affluent Americans (northern California cattle

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[6] HENRY JAMES SUMNER MAINE, ANCIENT LAW (1861).
[7] CHARLES DARWIN, ORIGIN OF SPECIES (1859).
[8] *See* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990).
[9] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

ranchers) who regulate themselves according to their status as neighbors, largely ignoring variable and changing legal rules. Against this background, one can envision the Hills being dragged by Judge Easterbrook across the status-contract boundary, kicking and screaming.

LEGAL ANTHROPOLOGY AND MODERN CONTRACT LAW

Indiana University law professor David Ray Papke has made a persuasive case that the legal system of the Cheyenne Indians had a direct influence on the American Uniform Commerical Code ("UCC").[10] Few lawyers are aware that before beginning his work as principal draftsman of the UCC, Karl Llewellyn co-authored, with the anthropologist E.A. Hoebel, the classic legal ethnography *The Cheyenne Way*.[11] By interviewing elderly Cheyennes in the 1930s, Llewellyn and Hoebel attempted to reconstruct the 'law-ways' of the Cheyenne tribe as it roamed the Great Plains hunting buffalo and waging war on neighboring tribes in the mid-to-late nineteenth century. Although the Cheyenne had no written code or even unwritten legal maxims, Llewellyn and Hoebel discovered that they applied a consistent yet highly flexible set of principles and procedures to the resolution of complex disputes in such diverse areas as homicide, domestic relations, and property rights.

According to Papke, the Cheyenne experience strongly influenced Llewellyn in a number of ways, both procedural and substantive. On a general level, the UCC project and its product were suffused with Llewellyn's ethnographic sensibility.[12] As early as 1930, he had criticized existing commercial law for its "academic abstraction and remoteness from life."[13] To remedy

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[10] David Ray Papke, *How the Cheyenne Indians Wrote Article Two of the Uniform Commercial Code*, 47 BUFF. L. REV. 1457 (1999).
[11] KARL LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY (1941).
[12] *See* Papke, *supra* note 10, at 1459-67.
[13] KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES ix (1930).

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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.[14]

Llewellyn characterized this process as "use-testing."[15] 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 a language "*which really fits the need.*"[16]

Llewellyn's drafting process was novel in the legal world. Before and since, the principal players in the process 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 Cheyennes. And the result is very much like the practical, easily understood, and readily adaptable Cheyenne law-ways that they discovered. Like the Cheyenne law-ways, Llewellyn's UCC would emerge from and be consistent with its cultural context, rather than being imposed from on high.

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[14] Karl N. Llewellyn, *A Simple Case on Behalf of the Code* (Statement to the New York Law Revision Commission) (1954), reprinted in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 530 (1973).

[15] TWINING, *supra* note 14, at 531.

[16] TWINING, *supra* note 14, at 538 (italics in original; Llewellyn was much-given to italics).

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A number of substantive correspondences are also evident. The structure of the UCC, for example, was unusual for its time. It consists of nine major sections, or Articles. Article One sets out a number of definitions that will apply code-wide; the other eight Articles deal with specific areas of law - Article Two on sales; Article Nine on secured transactions, etc. Many of the key terms defined in Article One are highly amorphous concepts that become meaningful only in specific applications: things like agreement,[17] good faith,[18] course of dealing and usage of the trade,[19] and "seasonable" action,[20] for example. Moreover, their meaning is to be determined in most cases by the cultural norms of the marketplace. The result is that legal outcomes across a broad range of commercial transactions depend upon a relatively few culturally defined principles, and these principles are themselves flexible in the extreme. This is thoroughly reminiscent of Llewellyn's and Hoebel's view of the adaptive genius of Cheyenne law.

On a more specific level, Papke has traced several possible Cheyenne influences on Article Two. Papke's first example concerns the formation of a sales contract.[21] In classic contract law, 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 Two, by contrast, a binding contract can be formed in any manner that the marketplace deems reasonable.[22] As long as competent members of the relevant trade or business community would look at the circumstances and infer the existence of a

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[17] UCC § 1-201(3) (1993).
[18] UCC § 1-201(19) (1993).
[19] UCC § 1-205 (1993).
[20] UCC § 1-204(3) (1993).
[21] *See* Papke, *supra* note 10, at 1472-73.
[22] *See* UCC §§ 1-204, 1-206, 1-207 (1993).

contract, the law must do the same. If party A acted like it 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 them.[23] 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;[24] in both instances the answer is always, "It depends."

Papke's second example is the modification of contracts.[25] Under pre-UCC law, modifying a contract was a process that required several formalities. The UCC throws them out, and allows "all necessary and desirable modification of sales contracts without regard to the technicalities, which at present hamper such adjustments."[26] Once again, this was the sort of pragmatic, seat-of-the-pants approach with which the Cheyennes were comfortable, but Anglo-American lawyers typically are not.

A third example involves the pervasive concept of "usage of trade,"[27] which is often decisive in the interpretation and enforcement of ambiguous or incomplete sales contracts. It is defined in section 1-205(1) of the Code 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."[28] As Papke observes, this definition is purely operational. The Code 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,

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[23] *See* UCC § 1-206(1) (1993).
[24] *See* LLEWELLYN & HOEBEL, *supra* note 11, at 169-71.
[25] *See* Papke, *supra* note 10, at 1473-74.
[26] UCC § 1-209, Official Comment 1 (1993).
[27] *See* Papke, *supra* note 10, at 1477-79.
[28] UCC § 1-205(1).

which was one of the principal virtues that Llewellyn and Hoebel saw in the Cheyenne law-ways.

By incorporating into the Code concepts like usage of trade, Llewellyn also set in motion a particular form of legal evolution.[29] In many contexts, rapid changes in the commercial environment have quickly rendered a body of law inadequate or obsolete. In copyright law, for example, judges and lawyers are now struggling to figure out how to treat computerized databases, which were barely envisioned in 1976 when the current law was drafted.[30] 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 and without the need for formal intervention. 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 would be difficult to imagine the UCC emerging in the form it did had its guiding genius been a lawyer of more conventional experience.

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[29] *See* Papke, *supra* note 10, at 1479-81.

[30] *See* Mary Maureen Brown, Robert M. Bryan & John M. Conley, *Database Protection in a Digital World*, 6 RICH. J. L. & TECH. 1 (1999), *available at* http://www.richmond.edu/jolt/v6i1/conley.html.

THE PROPRIETY OF THE CHEYENNE INFLUENCE

Even if persuaded of the reality of the Cheyenne influence on Llewellyn's drafting of the UCC, one may question whether an "anthropological" society like the Cheyenne was an appropriate testing ground for concepts to be used in a complex industrial society like ours. Llewellyn had been impressed by the sense of shared values that suffused Cheyenne society. In "the case of hitch or trouble,"[31] a consensus emerged based on subtle but universally understood norms. This enabled members of the society to arrive at broadly accepted resolutions of disputes without resort to the kinds of explicit and often complex rules that are the hallmark of the Western legal method. His hope was clearly that the shared values of the American marketplace would be the basis of a similar process of consensus building.

The point that Llewellyn may have ignored, however, was the fundamental difference between Cheyenne society and his own. The nineteenth-century Cheyenne society that he and Hoebel reconstructed was a small, face-to-face community in which everyone knew everyone else. Beyond distinctions based on age and gender, role differentiation was limited. There were chiefs whose authority was based primarily on personal stature and persuasive ability, but otherwise, questions such as, "What are you?" and, "What do you do?" were meaningless. Whereas I might answer such questions with, "I'm a politically schizophrenic Irish Catholic law professor," a Cheyenne would have said simply, "I'm a Cheyenne."

Moreover, anthropologists are now questioning whether the sense of shared values that Llewellyn and Hoebel thought they saw among the Cheyenne has ever been a reality in any society. On the contrary, anthropologists are now much concerned with diversity, defiance, and resistance even among the smallest and simplest cultures. If Llewellyn and Hoebel's attribution of strongly shared values to the Cheyenne is suspect, then what about Llewellyn's similar implicit assumption about the American marketplace of the 1940s? And if that is questionable,

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[31] LLEWELLYN & HOEBEL, *supra* note 11, at 21.

what would we say about shared values in the electronic marketplace of the new millennium?

MEETING OF THE MINDS

The meeting of the minds, classical contract law's core concept, is both fascinating and problematic to anthropologists. 'Minds' are themselves cultural constructs. The idea that these cultural constructs can 'meet' assumes a number of things, including sufficient shared knowledge to permit communication, shared communication norms (compare the contrasting norms of literacy and orality in the *Gateway 2000* case[32]), a mutually consistent sense of the other (that is, each party must assume, "he/she thinks like me"), and a shared understanding of the cultural meeting place (that is, the substantive norms of reasonable conduct).

The sociologist Erving Goffman has sensitized social scientists to the dangers of making such assumptions. In *The Presentation of Self in Everyday Life*[33] and other works, he demonstrates the cognitive and cultural complexity of even such mundane social tasks as greetings and simple requests. Sociologists and anthropologists apply the term *ethnomethodology* to the study of the patterns of shared knowledge and understandings that enable members of a society to navigate their way through day-to-day social interactions. One branch of ethnomethodology, called *conversation analysis*, is devoted entirely to the problem of how people manage the intricacies of natural conversation; its specific interests include turn-taking, topic management, and the issues raised by overlapping speech. Ethnomethodologists make pointed use of the verb "do" - as in "doing stories" or "doing accusations" - to emphasize that even the most ordinary social tasks require tremendous cultural competence. Is it not even more difficult to "do contracts?"

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[32] "If the staff at the other end of the phone . . . had to read the four-page statement of terms . . . . Writing provides benefits for both sides of commercial transactions." *See Gateway 2000*, 105 F.3d at 1149.

[33] ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

Thus, followers of Goffman, attuned as they are to the hidden complexity of the ostensibly simple, are not surprised that our society needs a law of contract, nor that it is voluminous, nor that failures of shared understanding - or "contract cases," as we lawyers call them - consume an entire first-year law school course.

CONCLUSION: CULTURAL RELATIVISM AND CONTRACTS

The connection between law and anthropology may be of historical or abstract intellectual interest, but does it have any practical relevance to contemporary contract law? The *Gateway 2000* case suggests that it does. Much of what I have been discussing comes under the heading of *cultural relativism*: the general idea that one's perception of facts, values, and other things depends on (or, as academics are now given to saying, is 'contingent' on) one's cultural perspective. Cultural relativism has made significant inroads into criminal and tort law in the form of the so-called cultural defense. In numerous widely-reported cases, parties have tried to justify or mitigate their behavior by explaining it in terms of their particular cultural understandings.[34]

The Hills' position might also be characterized as a cultural defense. Gateway argued that the rule-based, document-driven norms of business culture should control its dealings with its customers. It treated its understandings as commonsensical, universal, self-evident. So did Judge Easterbrook, as evidenced by his references to sense and competence. In arguing for a more context-based approach, and in denying the absolute primacy of the written word, the Hills were, in the posture of a cultural minority, claiming exemption from majority norms. But

[34] *See, e.g.*, Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991) (in civil action for rape, plaintiffs permitted to offer expert testimony about submissiveness of Hmong (Laotian) women to explain failure to report rapes); People v. Wu, 286 Cal. Rptr. 868 (Cal. App. 1991) (Chinese immigrant accused of murdering her son allowed to introduce evidence of Chinese cultural notions of shame).

Judge Easterbrook saw no place for cultural relativism in the market – "Where's the sense in that?"[35]

At one level, Judge Easterbrook's opinion looks like the embodiment of Llewellyn's vision for the UCC: the law enforcing the shared cultural norms of the marketplace. As anthropologists now understand, though, it is problematic to attribute a shared set of norms and understandings to 'the' Cheyenne, let alone to 'the' modern American marketplace. Moreover, even if Llewellyn's vision was in fact a delusion, at least he pursued it in traditional ethnographic style, seeking to discover from the bottom up rather than impose from the top down. Judge Easterbrook's choice of norms, by contrast, is devoid of ethnographic sensibility; it is openly, even triumphantly, top-down.

It is not the place of anthropology to criticize Judge Easterbrook's choice of norms. What anthropology can do is remind us that it was a choice. A society like ours is full of norms, some complementary and some conflicting. None is inherently imbued with 'sense,' nor is any shared by all 'competent adults.' Instead, all are contingent on the holder's cultural perspective. When lawmakers must decide what norms to elevate to the status of law, as they often must, it is disingenuous to claim empirical privilege for the choice. 'Sense,' in other words, is a value, not a fact. While the law cannot avoid choices among competing cultural norms, it can and should acknowledge such choices for what they are.

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[35] *Gateway 2000*, 105 F.3d at 1149.

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