

Law with a Vengeance

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WHEN THE EDITOR of the *Green Bag* asked me for some ruminations to introduce this issue of his newly resuscitated law review lite, he doubtless reckoned that he could not locate a more appropriate prospect for the honor than a provincial magistrate *cum* local antiquary like me. I believe that his instinct in this instance was a good one: As odd as it might seem, I have recently been engaged in work that both frees me from the barbarous acronyms of the bureaucratic-liberal state and satisfies my need to ransack old books and unearth unplundered archival materials. And while that work centers on a small and remote part of the country, it provides support for William Blake's suggestion that one can look inside a grain of sand and sometimes find the world.

Before I fell from grace some twelve years ago and became a government worker, I had taught English legal history at a number of American law schools and had published books and articles on the law of the Middle Ages. So when I returned to my native

Arkansas almost two decades ago, I suppose that it was only natural that I turned my attention to studying the nature and extent of early European colonial efforts here. I even made a considerable sacrifice for scholarship and travelled to archives and libraries in France and Spain to search out relevant matter. Arkansas having been part of colonial Louisiana, there was not much in English archives of direct interest. (Here's a trick question: Who was the last king to claim sway over Arkansas? George III of England? Wrong! Carlos IV of Spain!)

Over the years, these and other forays have yielded about seven thousand pages of letters and reports written to and from Arkansas in the eighteenth century, in addition to numerous censuses, inventories, and other documents from the same place and time. Many of these papers deal with legal matters, and some of them even touch on the very interesting ethnohistorical question of the extent to which, if any, the French and the Spanish governments sought to incorporate the Indi-

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ans of Louisiana into their legal systems.

It turns out that whatever the original European ambitions may have been, there were virtually no instances of a successful application of French or Spanish legal norms to indigenous peoples during Louisiana's colonial epoch. In Arkansas, the local commandant (head of both the civil and military government) was even forced to endure assaults on his own person by Quapaws (an allied Indian tribe), because it proved impossible to punish the culprits under his own law. The Indians, in other words, stoutly and sometimes successfully resisted what we have learned to call cultural imperialism in any form.

This discovery is interesting enough in itself, for it is entirely at odds with much current literature that posits virtually unremitting conflict between colonizing Europeans and Indian people on a genocidal scale. Even the rotund, smiley-faced Franciscan friar has of late been transformed into a conscious agent of a racist imperialism, who, greatly bigoted to his religion, mercilessly imposed himself and his mores on a defenseless native population. But here again, Louisiana proves to have been different: French missionaries, underfinanced and never numerous, had virtually no success in converting the Quapaws, and the Spanish (contrary to their practice in Texas, New Mexico, and California) did not even bother to send religious to minister to Louisiana Indians.

What is perhaps most interesting about the situation in colonial Arkansas, however, at least to a lawyer, is the extent to which the Quapaws tried to apply their own law to Europeans in the Arkansas country. During the course of the eighteenth century, Quapaws not infrequently attempted to retaliate against Frenchmen or Spaniards who had wronged them in some way. In one such incident, a Quapaw was sure that a Spaniard had stolen his horse, in another a soldier had beaten a Quapaw, and, in a third, a sentry had fired on,

but missed, a Quapaw who had refused to identify himself. In all of these instances, the Quapaws had attempted to kill the perpetrator or some other European in retaliation.

A modern reader might well want to wonder whether the Quapaws could reasonably be said to be acting according to law in reacting in this way. Although some commentators claim that the Indian legal principle requiring a retaliatory killing in response to a homicide was bottomed on a desire to appease the soul of the departed, it must be obvious that in the cases just described vengeance cannot be justified on that basis because no one has died. Indeed, it appears that the Quapaws viewed killing as the proper response to any serious wrong, at least if the wrong were committed by someone outside their tribe.

One certainly cannot say, in any event, that these cases do not reveal a discernible rule. The rule is, Mess with me and I'll kill you, at least if you are a foreigner. This is not just law, it is, well, law with a vengeance. Efficiency, moreover, is served because information costs associated with determining what the law is are zero, a fact useful to both perpetrator and victim: There is no need to fumble through complicated finding aids here to discover the applicable rule. Indeed, this easy and accessible principle of Quapaw law even has a leg up on Newton, to whom nature had revealed only a rule of proportionate response, that is, a requirement of an equal reaction to every action.

Still, one is left with the uneasy feeling that blind adherence to a retaliatory urge ought not to qualify as law. It is certainly *a* law in the sense that it involves an unflinchingly consistent response to the commission of a perceived wrong. But is it Law? While cultural relativism is all the rage these days, especially in our universities, human rights activists are much in evidence there as well, at least in the law schools, so right and wrong aren't entirely out of fashion.

Still, the tug of a vulgar ecumenism is sufficiently strong that people protesting the treatment of women in China, for instance, find it necessary to deny that they are practicing cultural imperialism. Of course, that is exactly what they are doing, and rightly so, because, speak it softly, some cultural practices are wrong. The fact that these practices are institutionalized in a culture, far from somehow providing them with an immunity from criticism, only exacerbates their wrongful character. Were the Freedom Riders of the sixties cultural imperialists who should have busied themselves elsewhere? Should Hillary Clinton have stayed at home instead of criticizing certain practices in Africa that degraded women? Surely the answer to these questions is No. It is hard to believe, moreover, that even many academic anthropologists would think otherwise.

That being the case, one is left to ponder what work the idea of cultural imperialism actually has to do. If all this notion means is that one should not interfere with others unless those others are committing wrongs, then it seems that it embodies an unexceptionable principle: It reduces itself to the simple libertarian premise that one should mind one's own business. But if the phrase means that one should never make a "value judgment" of another's behavior, then there is an end to objective morality and to law itself.

It is true that the ability to transcend one's own culture is the mark of an educated person. Perhaps the best thing that can be said about comparative law, for instance, is that it helps one see that there are ways of constructing a

reasonable and moral world other than those that the common-law tradition has chosen. That is the way to wisdom. One fruitful way of teaching legal history, moreover, is to approach the subject as a kind of comparative law in time.

But having the proper respect for other ways of doing things ought not to be confused with moral nihilism. A recent book offered the view (I am not kidding) that it was "Eurocentric" to criticize the Comanches for torturing prisoners. The author of that book had completely abandoned his moral compass. If we can learn some important things from Indians, as we certainly can, then I see no reason why they cannot learn some things from us.

I know what I am talking about, because many centuries ago my ancestors lived in a tribe on an island with rocky coasts that the inhabitants vigilantly guarded against unwanted visitors. One day, strangers came from the West bearing crosses.

Firm in the conviction that theirs was the only true way, the newcomers somehow convinced the rude, xenophobic, and water-bound islanders that it was not dishonorable to accept money by way of compensation for wrongs, instead of taking revenge, despite my ancestors' protest that this amounted to selling one's honor. Eventually, these cultural imperialists contributed to the creation of a rudimentary schedule of compensation, a kind of tariff, that seems to have led to the development of a full-blown system of criminal and tort law.

My tribe?

The Anglo-Saxons. 