A THEORY OF PRIMITIVE SOCIETY, WITH SPECIAL REFERENCE TO LAW

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INTRODUCTION

THIS paper uses economic theory to explain some of the characteristic social, including legal, institutions of primitive and archaic societies. The literary remains of a number of early civilizations contain detailed descriptions of the preliterate societies out of which modern Western civilization evolved. (The poems of Homer, the Old Testament, and the Norse Sagas are examples of such literary records.) We may call these "archaic" societies. In the nineteenth century anthropologists and colonial administrators began compiling detailed descriptions of primitive societies—African, North American Indian, Polynesian, and many others. The strong similarity of the social, including legal, institutions of primitive and archaic societies justifies discussing them together. For want of a better term, and with no pejorative intent, I shall refer to both types as "primitive." My working definition of primitive is not poor, by modern standards, but preliterate (thus I exclude, for example, the Roman Empire). Because most preliterate societies lack either a complex economy or an effective government, and most literate societies have both, literacy is a good criterion for distinguishing primitive from more advanced societies. Why this should be so will be considered later.

The applicability of the economic model of human behavior to primitive man has been debated extensively by anthropologists, with occasional joinder in the debate by economists such as Frank Knight.[1] One group of an-

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[1] For the flavor of the debate see the essays in the first half of Economic Anthropology (Edward E. LeClair, Jr. & Harold K. Schneider eds. 1968); and for a brief summary Harold K. Schneider, Economic Man 2-17 (1974). Knight's contribution is Anthropology and Economics, 49 J. Pol. Econ. 247 (1941), reprinted in Melville J. Herskovits, Economic Anthropology 508 (rev. ed. 1952).

thropologists, the "formalists," have argued that the economic model is fully applicable to primitive man, and have sought to prove this by studying the explicit markets which are sometimes found in primitive societies. The other group, the "substantivists," argue that the conventional economic categories are largely inapplicable to primitive society—that what appear to be counterparts to Western markets have mainly a different, and noneconomic, function in primitive society.

It is a sterile debate. The contending groups share an excessively narrow view of what is economic. The formalists equate the domain of economics with the explicit market and hence focus on what is, after all, not the most distinctive feature of primitive society. (However, their work is useful in demonstrating, though in a rather restricted sphere, that primitive man is capable of rational maximizing behavior.) The substantivists make the same equation as the formalists and hence conclude that the distinguishing features of such societies—such as the greater emphasis placed on reciprocal gift exchange than on strictly contractual market exchanges—lie outside the range of economic understanding.[2] Yet, despite their hostility to economic theory, the substantivists have contributed to the literature not only a wealth of valuable detail regarding the distinctive institutions of primitive society but also valuable, if unsystematic, insights into the economic function of those institutions.[3] Some of the writings of economic historians on archaic

[2] Thus George Dalton, a leading substantivist, has written: "Primitive economy is different from market industrialism not in degree but in kind. The absence of machine technology, pervasive market organization, and all-purpose money, plus the fact that economic transactions cannot be understood apart from social obligation, create, as it were, a non-Euclidean universe to which Western economic theory cannot be fruitfully applied. The attempt to translate primitive economic processes into functional equivalents of our own inevitably obscures just those features of primitive economy which distinguish it from our own." Economic Theory and Primitive Society, 63 Am. Anthropologist 1, 20 (1961). To similar effect see, e.g., Karl Polanyi, The Great Transformation, ch. 4 (1944); Karl Polanyi, The Livelihood of Man (Harry W. Pearson ed. 1977). The grandparent of this point of view seems to be Max Weber.

[3] An outstanding example of substantivist writing is Marshall Sahlins, Stone Age Economics (1972), especially chs. 1, 2, and 5. Melville J. Herskovits, Economic Anthropology (rev. ed. 1952), is the largest compendium of substantivist description of primitive economies. A good anthology in which the substantivist viewpoint is dominant is Tribal and Peasant Economies (George Dalton ed. 1967). Some more eclectic works of economic anthropology are Manning Nash, Primitive and Peasant Economic Systems 1-57 (1966); Markets in Africa (Paul Bohannan & George Dalton eds. 1962); Themes in Economic Anthropology (Raymond Firth ed. 1967); LeClair & Schneider, *supra* note 1. A recent review of the economic anthropology literature is George Dalton, Economic Anthropology, 20 Am. Behavioral Scientist 635 (1977). An important recent addition to economic anthropology should be mentioned: Frederic L. Pryor, The Origins of the Economy (1977). The main content of the book is a series of statistical tests of various hypotheses concerning primitive economic behavior. I discuss Pryor's book in Anthropology and Economics, J. Pol. Econ. (forthcoming).

Herskovits generously reprints Frank Knight's scathing review of a previous edition of Herskovits's book, in which Knight stated: "The first essential weakness of Professor Herskovits' opus is that it explicitly sets out to make anthropological data 'intelligible to econo-

economies, such as that depicted in the Homeric poems, resemble (in character, not quantity) the work of the substantivists in combining excellent description with a denial of the applicability of the economic model.[4]

With economists devoting increasing attention to the study of nonmarket activities and institutions—including the family, information, and the law[5]—the foundation is now in place for the thoroughgoing and unapologetic application of economic theory to the full range of primitive social institutions. Such application has, indeed, begun. Clifford Geertz's recent article applying the economics of information to trading in bazaars shows how the pervasive ignorance regarding qualities of goods and reliability of traders is mitigated by "clientalization" (the pairing off of buyers and sellers in repetitive transactions) and also by each buyer's bargaining intensively with one seller in lieu of shopping among many.[6] Geertz's emphasis on the costs of information in primitive society and on the social responses to those costs is, I shall argue in this paper, extremely fruitful for a general understanding of the institutions of primitive society.[7] Among other recent work, Gary Becker and his student Amyra Grossbard have discussed the marital arrangements of primitive society, including polygamy and brideprice, from

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mists' in the absence of any clear grasp on his part of *any* of the principles in which economists are interested and with which they deal. . . ." Herskovits, *supra* note 1, at 510. For other sharp criticism of substantivism see, e.g., Scott Cook, The Obsolete "Anti-Market" Mentality: A Critique of the Substantivist Approach to Economic Anthropology, 68 Am. Anthropologist 323 (1966).

[4] See especially M. I. Finley, The World of Odysseus (2d rev. ed. 1978), the standard (and best) discussion of the society and economy described by Homer. Other economic historians reject a Polanyi-esque view of the ancient economy. See, e.g., Chester G. Starr, The Economic and Social Growth of Early Greece, 800-500 B.C. (1977). See generally, S. Todd Lowry, Recent Literature on Ancient Greek Economic Thought, 17 J. Econ. Lit. 65 (1979).

[5] See, e.g., Gary S. Becker, The Economic Approach to Human Behavior (1976); J. Hirshleifer, Where Are We in the Theory of Information?, 63 Am. Econ. Rev. 31 (Papers & Proceedings, May 1973); Richard A. Posner, Economic Analysis of Law (2d ed. 1977). Lack of familiarity with these new branches of applied economics is the reason why Schneider's book, see note 1 *supra*, fails to deliver on its promise of applying economic theory to the entire range of primitive behavior.

[6] See Clifford Geertz, The Bazaar Economy: Information and Search in Peasant Marketing, 68 Am. Econ. Rev. 28 (Papers & Proceedings, May 1978). Geertz anticipated his own analysis by many years. See his Social Change and Economic Modernization in Two Indonesian Towns: A Case in Point, in On the Theory of Social Change 385 (Everett E. Hagen ed. 1962). The bazaar is not, of course, an institution limited to primitive society, although it is a characteristic market form in such a society. See, e.g., Markets in Africa, *supra* note 3, *passim*. This illustrates the important point, which I do not attempt to pursue in this paper, that the study of primitive society may cast light on the institutions of more advanced societies—"peasant societies," for example, which appear to have many features in common with primitive societies. See generally Peasant Society (Jack M. Potter, Mary N. Diaz, & George M. Foster eds. 1967).

[7] I am indebted to Gary Becker for having directed my attention to Geertz's paper and for having emphasized in conversation the importance of information costs to an understanding of primitive society. And see Gary S. Becker, Imperfect Information: Marriage, Divorce, and Kinship (Jan. 1979) (unpublished manuscript, Univ. of Chi., Dep't of Econ.).

an economic standpoint;[8] Harold Demsetz, Douglass North, and others have related the mixture of individual and communal property rights in primitive societies to the scarcity of the resources involved;[9] William Landes and I, and also David Friedman, have discussed several aspects of primitive law from an economic standpoint;[10] and (independently of Geertz) I have discussed several aspects of primitive society, including the prevalence of gifts and the formality and decorum of primitive speech and manners, from an information-cost standpoint.[11]

The original interest that sparked the present paper was in seeing whether and how far the theory that law is an instrument for maximizing social wealth or efficiency—a theory that has proved fruitful in studies of modern law—could be extended to primitive law. That question cannot be answered, however, without pushing the economic analysis of primitive society further than has been done to date. Accordingly, the first part of the paper sketches a general economic theory of primitive society. It argues that many of the distinctive institutions of primitive society, including gift-giving and reciprocal exchange, customary prices, polygamy and brideprices, the size of kinship groups, and the value placed on certain personality traits, such as generosity and touchiness, can be explained as adaptations to uncertainty or high information costs. Part I is ambitious in scope but far from complete—warfare, religion, and slavery are among the omitted topics.

[8] See Gary S. Becker, *supra* note 5, at 238-41; Gary S. Becker, Marriage: Monogamy, Polygamy, and Assortative Mating (Oct. 1978) (unpublished manuscript, Univ. of Chi., Dep't of Econ.); Amyra Grossbard, Toward a Marriage between Economics and Anthropology and a General Theory of Marriage, 68 Am. Econ. Rev. 33 (Papers & Proceedings, May 1978); An Economic Analysis of Polygyny: The Case of Maiduguri, 17 Current Anthropology 701 (1976); and The Economics of Polygamy (forthcoming in 2 Res. in Population Econ.).

[9] See Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347, 351-53 (Papers & Proceedings, May 1967); David E. Ault & Gilbert L. Rutman, the Development of Individual Rights to Property in Tribal Africa, 22 J. Law & Econ. 163 (1979); Vernon L. Smith, The Primitive Hunter Culture, Pleistocene Extinction, and the Rise of Agriculture, 83 J. Pol. Econ. 727 (1975); Douglass C. North & Robert Paul Thomas, The First Economic Revolution, 30 Econ. Hist. Rev. 229 (2d ser. 1977). And see North's interesting economic criticism of the substantivist view of the ancient economy. Douglass C. North, Markets and Other Allocation Systems in History: The Challenge of Karl Polanyi, 6 J. Euro. Econ. Hist. 703 (1979).

[10] See William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Legal Stud. 83, 106-08 (1978); William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 232, 242-45 (1979); David Friedman, Private Creation and Enforcement of Law: A Historical Case, *id.* at 399.

[11] See Richard A. Posner, The Homeric Version of the Minimal State, 90 Ethics 27 (1979); The Right of Privacy, 12 Ga. L. Rev. 393, 402 (1978); and Privacy, Secrecy and Reputation, 28 Buff. L. Rev. 1 (1979). See also Posner, Anthropology and Economics, *supra* note 3; Reuven Brenner, A Theory of Development, or Markets and Human Capital in Primitive Societies (mimeographed paper, N.Y.U., Dep't of Econ., Jan. 1980)—the latter a recent paper which builds in part on an earlier draft of the present paper; and Richard A. Posner, Retribution and Related Concepts of Punishment, 9 J. Legal Stud. 71 (1980).

Part II extends the analysis in Part I to the characteristic legal institutions of primitive society,[12] involving contracts, property, inheritance, marriage, and other legal concepts. Most of these areas are discussed quite briefly; however, one especially striking feature of primitive law, the merger of our modern categories of tort and crime in a system of private strict liability, is examined in some detail.

Because an effort to explain the behavior of primitive people in economic terms is likely to be misunderstood by noneconomists, I emphasize at the outset that I do not believe that primitive people consciously calculate costs and benefits of alternative courses of actions, any more than the modern consumer engages in conscious utility maximization when buying one good instead of another. The rationality of "economic man" is a matter of consequences, not states of mind.[13] I return to this theme briefly in the conclusion to the paper.

I. An Economic Model of Primitive Society

A. *Information Costs*

The fact that primitive people do not understand the laws of nature well (belief in magic and sorcery is almost universal among primitive peoples), have no system of writing and consequently no records,[14] and lack modern communications technology—with all that these lacks imply—suggests that the costs of obtaining information are higher in primitive than in advanced societies: that more inputs of time or other resources are required to obtain the same amount of information. This is trivially true of information concerning the many scientific and technical principles unknown to the primitive world, but it is also true of information concerning the probability that the other party to a contract will perform (there are no courts to coerce his performance) or that the quantity delivered in a sale is the quantity bargained for (there are no scales in primitive markets), the cause of a death (there are no police or autopsies, and the possibility that death was caused by

[12] The line between legal and other social institutions is often unclear in primitive society because many of the features which we conventionally use to distinguish law from custom, order, habit, rule, moral precept, and other regulatory devices which may or may not be "law" are absent. Since I am not interested in taxonomy, I will not worry about whether some of the social institutions discussed in Part I would be better classified as legal and discussed in Part II and vice versa. Certainly much of the discussion of family law in Part II could have been merged with the discussion of the family as a primitive social institution in Part I.

[13] Thus, animals have been found to be "rational maximizers." See, e.g., John H. Kagel *et al.*, Experimental Studies of Consumer Demand Behavior Using Laboratory Animals, 13 Econ. Inquiry 22 (1975).

[14] Like most generalizations about primitive society, this one is not universally valid. Some primitive societies developed ingenious systems of record-keeping not involving writing. See A. S. Diamond, Primitive Law, Past and Present 203 (1971).

witchcraft cannot be rejected out of hand), or the marginal product of a farm laborer's work.

To be sure, some sources of ignorance or uncertainty are more characteristic of modern than of primitive life. One is specialization of knowledge, which in the twentieth century has advanced to the point where each of us is an ignoramus regarding most areas of human knowledge. The other is the conditions of life and work in an urbanized society—whose anonymity, impersonality, and privacy result in our knowing less about neighbors, coworkers, and even friends and family members than we would in primitive societies. Both sources of ignorance, however, far from reflecting the high costs of information in modern society, are actually the product of low information costs, which have enabled the advancement of knowledge to the point where specialization in knowledge has become efficient, and have enabled social order to be maintained without continuous surveillance of the population.

The second point (surveillance) requires amplification. No matter what the ratio of territory to inhabitants is (and often it is very high), primitive people tend to live in crowded conditions where they are denied the preconditions of privacy—separate rooms, doors, opportunities for solitude or anonymity, a measure of occupational or recreational mobility.[15] The lack of privacy has a number of implications for primitive values and institutions. For example, it helps explain why crime rates in primitive societies are, as we shall see, apparently moderate despite the absence of either formal investigative machinery (public or private) or compensatingly heavy penalties. This very example suggests, however, that the absence of privacy in primitive societies may itself be an adaptive response to the high costs of information in a society that lacks (also, as we shall see, because the costs of information are so high) public or private investigatory institutions, any form of press, etc. One way of reducing information costs is to create living conditions in which everyone knows everything about everyone else. The denial of privacy in a primitive society serves to enlist the entire population as informers and policemen.[16]

[15] For evidence, see references in privacy articles cited in note 11 *supra*.

[16] Sahlins, *supra* note 3, at 204, remarks on the "publicity of primitive life" as a mechanism for preserving public order. With the growth of privacy, which reduces the effectiveness of surveillance as a method of social control, we find the emergence of another, and curiously related, mode of social control—conscience. The idea of conscience is historically associated with being watched, but with being watched by God rather than neighbors and other associates. The idea persists in the "impartial spectator" ethics of Adam Smith and others. See Adam Smith, The Theory of Moral Sentiments ([1759] 1959 ed.). The difference between a "guilt" and a "shame" culture (see E. R. Dodds, The Greeks and the Irrational 17 (1951)) is perhaps the difference between a culture in which people have a lot of privacy and one in which they have little or none.

While the denial of privacy increases the production of information in one respect, it reduces it in another that helps explain why the accretion of knowledge, and hence economic development, proceed very slowly in primitive societies. Some measure of privacy is necessary both to create the peace and quiet that sustained and effective mental activity (which might lead to an improved understanding of the world) requires and to enable people to appropriate, by concealing their ideas from other people, the social benefits of their discoveries and inventions. In the absence of either formal rights to intellectual property (such as patent laws create) or public subsidization, concealment is the only method of obtaining a reward for developing a new productive technique. The costs of defining and enforcing intellectual-property rights are high even in our society (and trade secrets remain, therefore, an important method of appropriating the benefits of innovation), and presumably even higher in primitive societies.[17] Public subsidization of inventors is ruled out by the rudimentary public finance in primitive societies, a factor itself traceable, as we shall see, to the high costs of information in such societies. That leaves secrecy—something the lack of privacy in a primitive society makes difficult to obtain.

The costs of information that result from the lack of a system of writing require special mention. Complicated mental activity is possible without literacy, including subtle analysis of character and prodigious feats of memorization, both illustrated by the circumstances in which the Homeric poems were composed and originally performed. But what is generally not possible without a system of writing is large-scale organization for production or governance. Bureaucracy is closely associated with record-keeping. This is as true of the Mycenaean palace state depicted in the Linear B tablets and the even earlier Egyptian and Sumerian kingdoms as of the modern state.[18] Among preliterate peoples government is generally weak[19] and sometimes nonexistent.[20] The absence of effective government, which I ten-

[17] To be sure, one often finds property rights to a song, a spell, a crest, or a name (see e.g., Diamond, *supra* note 14, at 188; Harold E. Driver, Indians of North America 268, 285 (2d rev. ed. 1969); Herskovits, *supra* note 3, at 390-91)—but, so far as I am aware, not to a productive idea or invention.

[18] The link between literacy and government is occasionally noted. See Diamond, *supra* note 14, at 39; Jack Goody, Introduction, in Literacy in Traditional Societies 1, 2 (Jack Goody ed. 1968); Jack Goody & Ian Watt, The Consequences of Literacy, in *id.* at 27, 36; Maurice Bloch, Astrology and Writing in Madagascar, in *id.* at 277, 286.

[19] An exception, but one that proves the rule, is the Ashanti Kingdom in eighteenth-century Africa, which developed a system of record-keeping that did not involve writing. See Herskovits, *supra* note 3, at 420.

[20] On government in primitive societies see, e.g., Driver, *supra* note 17, at ch. 17; Herskovits, *supra* note 3, at 399-405, 416-38; Lucy Mair, Primitive Government (1962); Max Gluckman, Politics, Law, and Ritual in Tribal Society (1965); African Political Systems (M. Fortes & E. E. Evans-Pritchard eds. 1940); Posner, The Homeric Version of the Minimal State,

tatively attribute to nonliteracy,[21] has, as we shall see, profound consequences for the structure of primitive social institutions.

B. *The Model: Assumptions, Implications, Evidence*

1. *Assumptions.* I shall propose a simple, nonformal model ("ideal type") of primitive society, deduced from the conditions of information in such societies. Economists (and Weberian sociologists) will not need to be reassured, but some anthropologists and lawyers may, that the purpose of such a model is not to deny the variety and complexity of primitive societies or to provide a realistic description of a particular society, but to explain those fundamental institutions and values that are common to most such societies. Weak government, ascription of rights and duties on the basis of family membership, gift-giving as a fundamental mode of exchange, strict liability for injuries, emphasis on generosity and honor as high ethical norms, collective guilt—these and other features of social organization recur with such frequency in accounts of primitive and archaic societies[22] as to suggest that a simple model of primitive society, which abstracts from many of the particular features of specific societies, may nonetheless explain much of the structure of primitive social institutions. Finally, although I view all of the threads in the model as derived from the assumed high information costs of primitive society, the model can equally well be viewed, and defended, as an inductive generalization from the descriptive anthropological literature on primitive societies, unrelated to any underlying premise concerning the conditions of information in such societies.

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supra note 11. I. Schapera, Government and Politics in Tribal Societies (1967), argues that previous writers exaggerated the weakness of primitive government, at least in African tribal society, but he gives examples of very weak governments in such societies. See *id.* at 38, 85-87, 88.

[21] The causation could, however, go the other way, as stressed in Brenner, *supra* note 11. Primitive societies lack large-scale institutions because they are illiterate, but lacking such institutions they have no need for the kind of record-keeping which requires literacy. For other communicative needs, even extremely subtle ones, an unwritten language may be quite adequate, as the Homeric poems attest.

[22] For archaic societies, the best general account of social institutions remains Henry Sumner Maine, Ancient Law (1861), though some of its conclusions are no longer accepted. On the current standing of Maine in light of the findings of modern anthropology see Robert Redfield, Maine's *Ancient Law* in the Light of Primitive Societies, 3 W. Pol. Q. 574 (1950), especially at pp. 585-87. Finley, *supra* note 4, is very good on the society depicted in the Homeric poems. On the Norse Sagas, see sources referenced in Friedman, *supra* note 10. The literature of modern social anthropology is of course vast. Some examples of this literature are Driver, *supra* note 17, on the North American Indian societies; Herskovits, *supra* note 3; Robert H. Lowie, Primitive Society (2d ed. 1947); Lucy Mair, African Societies (1974); Carleton S. Coon, The Hunting Peoples (1971); African Systems of Kinship and Marriage (A. R. Radcliffe-Brown & Darryll Forde eds. 1950); Elman R. Service, Primitive Social Organization (2d ed. 1971). There are innumerable highly readable studies of particular societies, such as E. E. Evans-Pritchard, The Nuer (1940); Bronislaw Malinowski, Crime and Custom in Savage Society (1926); Leopold Pospisil, Kapauku Papuans and Their Law (1958).

The specific assumptions of my model are as follows:

(1) There is no (effective) government. This exaggerates the anarchy of primitive life, but, for most primitive societies, not critically.[23] There may be a chief who is the leader in wartime but has no functions in peacetime and elders who exercise some intermittent authority, but generally there will be no courts, legislatures, police, prosecutors, tax collectors, or other familiar public officials. At the level of abstraction at which I am operating here, the difference between no government and slight government is too small to matter. As mentioned earlier, I attribute the lack of government to nonliteracy, although the possibility that the causation runs in the opposite direction cannot be excluded.

(2) The state of technical knowledge in the society is such that only a limited variety of consumption goods can be produced, where variety is measured both by the number of separate goods and by quality variations within a single good. Admittedly, however, lack of standardization may generate considerable random quality variation, and variety is to a considerable extent in the eye of the beholder.

(3) The goods produced in the society are assumed to be traded on only a limited basis for goods produced in other societies. Unlimited trade would allow for unlimited variety. In fact the costs of transportation, plus (other) transaction costs created by language differences, lack of currency, and lack of contract-enforcement mechanisms, make foreign trade generally a small, though often an important, part of the primitive economy.

(4) The consumption goods produced in the society are assumed not to be durable or storable but instead to be perishable goods that are consumed in the period in which they are produced. This is again an exaggeration. Yet food preservation is a serious problem, and food is the most important product of such societies.[24]

A fifth assumption is necessary to keep the society from adopting more productive techniques:

(5) The private gains from innovation—from reducing the costs of production (including transportation) or increasing the variety of goods

[23] For those primitive societies, and there are some, which have strong governments this assumption will not hold even as a reasonable approximation and we can expect the model to have less explanatory power—a caveat equally applicable, of course, to the other assumptions of the model.

[24] Sahlins, *supra* note 3, at 11-12, 31-32, explains the interrelationship, in a hunting economy, of lack of variety and lack of storability. Hunting bands must rove widely in search of game. Possessions, including preserved meat, would hamper their mobility, so one observes that the members do not have many possessions and do not preserve meat. Primitive cultivation societies are in a similar situation where, as is commonly the case, most of their energies are devoted to crop production and the crops cannot readily be stored or converted into storable food products. Herding societies produce the most durable consumption goods and, as we shall see, their institutions are somewhat different—and in the direction the model predicts.

produced—are assumed to be negligible, either because such gains cannot be appropriated (the privacy problem) or because scarcity of natural resources or other exogenous conditions make cost reduction or product improvement unattainable goals at any feasible scale of investment.

2. *The Insurance Principle and Its Implementing Institutions and Values.* The model described above (which, I emphasize, is designed to capture general tendencies and not to describe literally) implies the strong if somewhat misnamed "redistributive" ethic that has been noted in innumerable studies of primitive society.[25] One expects insurance—specifically, against hunger—to be a very important product in such a society. The conditions of production, in particular the difficulty of storing food, create considerable uncertainty with regard to the future adequacy of an individual's food supply and hence considerable variance in his expected wealth.[26] In these circumstances a transaction whereby A, who happens to produce a harvest that exceeds his consumption needs, gives part of his surplus to B in exchange for B's commitment to reciprocate should their roles some day be reversed will be attractive to both parties. Notice that the alternative of self-insurance is not open to A, because of the assumption that food is not storable.

The attractiveness to A of insurance is further enhanced by the assumed scarcity of alternative goods for which to exchange his surplus food. If the variety of consumption goods available in the society is limited, A will not be so "tempted" as he otherwise might be to exchange his food surplus for other consumption goods rather than to buy hunger insurance with it. To be sure, it may be possible to exchange one's extra food for production or capital goods, of which the most important are women (there is of course a consumption aspect as well). Women are another form of "crop insurance," as are children, which they also produce, because of kinship obligations to be discussed shortly. However, apart from other economic reasons that, as we shall see, limit the incidence of polygamy even in societies which permit it (as

[25] Redistribution as used in economic and ethical discourse implies an effort, through the state, to bring about more *ex post* economic equality than the free market would. Anthropologists generally assume that primitive societies are redistributive in approximately this sense (that is, in wanting to equalize *ex post* wealth beyond what the market would do or what would be efficient in strict economic terms), but tend to reserve the word "redistribution" for the allocation of a tribe's surplus agricultural production by the tribe's chief. See, e.g., Nash, *supra* note 3, at 32; Sahlins, *supra* note 3, at 209.

[26] For a good introduction to the economics of uncertainty, risk, and insurance see Kenneth J. Arrow, Essays in the Theory of Risk-Bearing, ch. 5 (1971). The idea that institutions other than explicit insurance contracts perform an insurance function is, of course, not a new one. See, e.g., Arrow, *supra*, ch. 8; Steven N. S. Cheung, The Theory of Share Tenancy, ch. 4 (1960); and McCloskey papers cited in note 42 *infra*. Nash, *supra* note 3, at 22, speaks of the "precariousness" of primitive life. For a succinct description of the hazards of primitive agriculture see M. Fortes, The Political System of the Allensi of the Northern Territory of the Gold Coast, in African Political Systems, *supra* note 20, at 239, 249.

most primitive societies do), there is the disparity in value between one good harvest or one good kill—limited and evanescent goods—and a highly durable and valuable good such as a woman. It is therefore difficult to accumulate the purchase price. One is led to predict that, other things being equal, polygamy will be more common in herding than in other primitive societies, because a herding society has a durable good to exchange for women.[27]

In short, without assuming that primitive people are any more risk averse or less individualistic than modern people, one can nonetheless give an economic explanation for the importance of insurance as a product demanded and supplied in primitive society. Indeed, primitive people might be less risk averse than modern people yet still desire more insurance, both because of their riskier circumstances and because of the dearth of alternative goods. However, we have yet to consider the institutional form in which the insurance will be provided. The first assumption of the model—the absence of a government—is important here. It rules out the possibility that the food surplus will be taxed away and redistributed by the state to the needy. Also, in combination with the underlying conditions of information in primitive society, which as we shall see are likely to retard the emergence of formal markets, the absence of an effective government impedes the emergence of a formal (private) insurance market in which food would be exchanged for an enforceable promise to reciprocate when and if necessary in the future. The problem is that there is no state to enforce promises.[28] Even without formal sanctions for breach of promise, most promises will still be honored simply because the promisor wants the promisee to deal with him in the future. But not all will be: an old man might renege on his promise to share his surplus if it was unlikely that he would live long enough to be

[27] Some evidence relevant to this prediction can be found in Pryor, *supra* note 3. Eliminating from his sample societies—not primitive in my sense—which he classifies as "economically oriented" or "politically oriented," and then comparing the incidence of polygamy in societies in which animal husbandry yields at least 10 per cent of all foods with societies in which it yields less than 10 per cent, yields the following results:

	Number of Societies	
Type of Society	Polygyny Common	Polygyny Not Common
Animal husbandry > 10%	13	7
Animal husbandry < 10%	9	11

Source: Calculated from Pryor, *supra* note 3, at 328 (variable 5), 333-34 (59, 61, 69), 336-39.

[28] To be sure, as we shall see in Part II, there is rudimentary contract law in primitive societies; but formal contracts of insurance are not within its scope. The "drafting" (if one can use the word with respect to a preliterate society) and administration of formal insurance contracts would involve heavy information costs in the setting of primitive society. But there is again a chicken-and-egg problem: formal insurance may not be found in primitive societies because of the adequacy of the alternative informal arrangements.

"punished" for his breach of contract by the refusal of anyone else to sell him hunger insurance in the future.[29]

Uncertainty as to whether sharing one's surplus food will be reciprocated can be expected to make people want to confine their sharing to (or at least concentrate it within) a group to which they belong whose members know and continually interact with one another and have broadly similar abilities, propensities, character, and prospects. The institution most likely to satisfy these requirements for a satisfactory informal "mutual insurance company" is the family. The family as we know it, however, is too small to constitute an adequate risk pool for insurance purposes. This may be one reason (another—the protection or law-enforcement function of kinship—is discussed in Part II) why primitive societies devote so many of their linguistic, legal, and informational resources to delineating kinship groups much larger than the modern family or, for that matter, the primitive household.[30] The primitive concern with careful definition and determination of the kinship group is based not on some idle genealogical curiosity but on the fact that in a primitive society the kind of legal and moral obligations which we moderns have to support our very close relatives (sometimes only our children) extend to all of the members of one's kinship group. I attribute this to a lack of alternative insurance mechanisms in primitive society.

The argument so far establishes only why people might want to limit their insurance arrangements to kinsmen—not why they should be *required* to enter into such arrangements with them. Recent work in the economics of information suggests an answer to this question. Consider modern life insurance. If we assume that the individual knows his personal life expectancy better than the insurance company, there will be a tendency for the better

[29] In fact, in at least one primitive society it is reported that the young are reluctant to share their food with the old because it is unlikely that the old will be there to reciprocate in the future. See Allan C. Holmberg, Nomads of the Long Bow 151-53 (1969).

[30] The most common system of kinship among primitive peoples is the patrilineal, wherein descent is traced through the male line. Thus, in a patrilineal system a man, his sons, their sons, and so on belong to the same descent group, while his daughters' sons will become members of the descent group of the men the daughters marry. But kinship ties often cross the line between different descent groups. For example, a woman upon marriage may remain a member of her father's descent group, entitled to seek assistance from him, albeit living with another descent group. See text at note 136 *infra*. The important point, however, is that the primitive kinship group is larger than the modern or primitive *household*, and where kinship ties cross descent groups may achieve a measure of geographical diversification. These characteristics of the kinship group are obviously related to its insurance functions, as are the rigid and demanding obligations among kin—for example, a brother's son might be entitled to take a cow from the brother without asking permission, let alone paying. See, e.g., I. Schapera, A Handbook of Tswana Law and Custom 219-21 (1938). For excellent introductions to the complexities of kinship definitions and structures in primitive society see A. R. Radcliffe-Brown, Introduction, in African Systems of Kinship and Marriage, *supra* note 22, at 1; Robin Fox, Kinship and Marriage (1967).

risks to withdraw from the insurance pool (they do not wish to pay premiums based on average life expectancies, which are lower than theirs) and the pool will shrink, conceivably to the vanishing point.[31] One solution to this problem is employee life insurance, whereby insurance is provided as a condition of employment and no one can withdraw from the insurance pool without giving up his job.[32] A similar problem and solution are found in primitive society. If a man knows better than anyone else how likely he is some day to need food from a kinsman, the better risks will tend to select themselves out of the insurance system. This problem would disappear if the customary insurance premium (for example, a nephew can demand one cow from his uncle during the nephew's lifetime) could be varied by a negotiation in which the parties could adequately communicate to each other any respects in which their prospects differed from the average. But if this alternative to selection out is assumed to be infeasible because of the high costs of information, then we have a reason to expect the obligations of sharing to be made compulsory within the kinship group. To be sure, this leaves open the possibility that the better risk will simply forswear his kinship membership. But this is a very costly step to take because of the protective functions of the kinship group discussed in Part II of this paper.

What determines how broadly the kinship group within which an obligation to share is recognized will be defined? On the one hand, the larger the group is, the smaller will be the covariance in the food production of the individual members and hence the more insurance will be provided. It is essential that the kinship group be larger than the household, since the covariance within the household is likely to be very high; and the more geographically scattered the kinship group is, the better that is from an insurance standpoint.[33] On the other hand, the smaller and geographically more concentrated the kinship group is, the less serious will be the "moral hazard" or incentives problem—the temptation of a man to work less and live off his kinsmen.[34] Presumably, then, there is some optimum size and dispersion of the kinship group depending on the particular circumstances of the society. The optimum size is presumably larger the more primitive the society is, because in a very primitive society the disincentive effects of insurance on both givers and takers are probably small. The less variety,

[31] See George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970).

[32] See Yoram Barzel, Some Fallacies in the Interpretation of Information Costs, 20 J. Law & Econ. 291, 303 (1977).

[33] On the insurance effects of geographical dispersal of production see also text at note 42 *infra*.

[34] Cf. S. F. Nadel, Dual Descent in the Nuba Hills, in African Systems of Kinship and Marriage, *supra* note 22, at 333, 358.

and storage possibilities, of consumption goods, the less the wealthy man gives up by producing a surplus that will be shared in part with his poor kinsmen. The effects on his incentives may be trivial indeed if, as is plausible, the precise amount of the surplus produced is beyond his control. And given the nonstorability of food and the uncertainty of the harvest, the poor kinsman who relaxed his own productive efforts in reliance on sharing in a wealthy kinsman's harvest would be acting recklessly.[35]

The obligation of sharing with kinsmen is not the only device by which primitive society, lacking formal insurance contracts or public substitutes therefor, provides hunger insurance for its members. Generosity—toward other members of one's village or band as well as toward kinsmen—is a more highly valued trait in primitive than in modern society and the reason appears to be that it is a substitute for formal insurance.[36] The fact that a man obtains prestige in primitive societies by giving away what he has rather than by keeping it (the potlatch of the Northwest Indians is only the most dramatic example of "buying" prestige by giving away one's goods on a seemingly extravagant scale[37]) has been thought evidence of the inapplicability of the economic model to primitive society. But since, in a society where consumption goods are limited in variety and durability, giving away one's surplus[38] may be the most useful thing to do with it, at least from society's standpoint, one is not surprised that it should earn the prestige that in a different kind of society is bestowed on a great inventor, scientist, captain of industry, or entertainer.[39]

[35] The optimal size of the group within which income is shared is discussed in another context in John Umbeck, A Theory of Contract Choice and the California Gold Rush, 20 J. Law & Econ. 421 (1978).

[36] Compare E. E. Evans-Pritchard, *supra* note 22, at 85: "This habit of share and share alike is easily understandable in a community where every one is likely to find himself in difficulties from time to time, for it is scarcity and not sufficiency that makes people generous, since everybody is thereby insured against hunger. He who is in need to-day receives help from him who may be in like need to-morrow."

[37] See Stuart Piddocke, The Potlatch System of the Southern Kwakiutl: A New Perspective, in LeClair & Schneider, *supra* note 1, at 283. There are also informational and political objectives of dissipating surpluses, discussed later in this paper, which in primitive societies that have the technological capacity to store food may interfere with storage of surpluses and thus with the provision of insurance against hunger. For an example see Siegfried F. Nadel, The Nuba 49-50 (1947).

[38] By "surplus" I mean simply production of food above normal consumption.

[39] The fact that in primitive as in modern society prestige is related to social productivity is (inadvertently) brought out in a passage quoted in Herskovits, *supra* note 3, at 121, to illustrate his contention that "the prestige drives that have been seen to afford so strong a motivation for labor in other groupings is at a minimum" in nomadic society. The quoted passage reads: "When the immediate needs for food have been supplied, a person is neither much criticized for doing nothing, nor much praised for occupying his time in constructive labor. . . . No prestige is gained by building a better house or a larger garden, both of which may have to be abandoned in the next move." But in these circumstances building a better house or a larger garden is *not*

If prestige is the carrot which encourages generosity, an extreme illustration of the stick is the occasional Eskimo practice of killing ungenerous rich people.[40] Such behavior in our society would be short-sighted: a productive individual, however selfish, produces consumer surplus for others to enjoy. But consumer surplus reflects the benefits of division of labor, specialization, and exchange of the resulting output, features largely absent from primitive society. The principal good exchanged in the simplest societies (such as that of the Eskimos) is insurance, and the rich man's refusal to share his surplus with others manifests his refusal to engage in this exchange. So he really is of little or no use to the rest of the society and killing him does not impose the social costs that it would in an advanced society.

The insurance perspective may also help to explain why some primitive societies do not allow interest to be charged on a loan. A "loan" in primitive society is often just the counterpart to the payment of an insurance claim in modern society—it is the insurer's fulfillment of his contractual undertaking and to allow interest would change the nature of the transaction. Also, custom may *require* a man to make a loan when requested.[41] The involuntary loan is another dimension of the duty of generosity noted earlier. Since a man's surplus is assumed in my model to have relatively little value to him (because of storage problems and lack of goods for which to exchange a surplus), the ordinary resistance that rich people would feel at being required to make loans—perhaps without being allowed to charge interest—is attenuated.

The insurance function of loans in primitive society is especially pronounced in the cattle lending which is so prominent a feature of African tribal society. The main purpose of such "loans" is not to earn interest but to disperse one's cattle geographically so as to reduce the risk of catastrophic loss because of disease.[42]

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constructive. The society is better off if people conserve their energies (and hence food needs) rather than make investments whose fruits cannot be reaped.

[40] See E. Adamson Hoebel, The Law of Primitive Man 81 (1954). Little emphasis is placed on kinship in Eskimo culture, probably because their environment forces them to live in very small, widely scattered bands which have little regular contact with one another. See *id.* at 68. In these circumstances the emphasis placed on generosity (or its absence) to unrelated individuals within the band provides a substitute for kin insurance.

[41] See R. F. Barton, The Kalingas 132 (1949); Herskovits, *supra* note 3, at 373.

[42] See, e.g., E. H. Winter, Livestock Markets among the Iraqw of Northern Tanganyika, in Markets in Africa, *supra* note 3, at 457, 461; Elisabeth Colson, Trade and Wealth among the Tonga, in *id.* at 601, 607; Nash, *supra* note 3, at 50-51. The resemblance to the "open fields" policy in medieval English agriculture, discussed by McCloskey in similar terms, is evident. See Donald N. McCloskey, English Open Fields as Behavior Towards Risk, 1 Res. in Econ. Hist. 124 (1976), and The Persistence of English Common Fields, in European Peasants and Their Markets 73 (William N. Parker & Eric L. Jones eds. 1975). McCloskey remarks the presence of open-field policies in some primitive societies. See *id.* at 114. He also notes the possibility of the family as an insurance institution. See *id.* at 117.

A loan without interest resembles a gift, especially where (as is common) the society does not provide remedies for default.[43] Yet the moral duty to repay a loan is recognized in primitive societies and is enforced in various ways. Similarly, gifts in primitive society are explicitly reciprocal: a man is under a strong moral duty to repay a gift, when he can, with a gift of equivalent value.[44] In these circumstances the term "gift" is a misnomer. Gifts, non-interest-bearing loans (sometimes involuntary), feasts,[45] generosity, and the other "redistributive" mechanisms of primitive society are not the product of altruism; at least, it is not necessary to assume altruism in order to explain them. They are insurance payments.[46] The principle of reciprocity, which commands a man to repay a loan when he can or a gift when he can, or to feast his benefactors when he can, provides some protection against the free-riding or moral-hazard problems that so inclusive and informal a system of insurance as is found in primitive societies would otherwise create.

It is sometimes argued that the exchange of gifts in primitive society, however reciprocal, cannot be a form of trade because so often what is exchanged is the same sort of good and because there is no time limit on when reciprocation is due. But these points show only that the exchange of gifts in primitive society is not the same kind of trade that arises in a more complex society out of the division of labor and resulting specialization of production. Its purpose is to even out consumption over time rather than to exploit the division of labor. It would utterly defeat this purpose if the gifts were exchanged simultaneously. (The simultaneous exchange of gifts does occur in primitive societies but it has, as we shall see, a different function from either insurance or exploiting the division of labor.)

Nor is it correct to argue, as in the following passage from a discussion of gift exchange in early medieval society, that the absence of "profit motive" distinguishes such exchange from modern commercial transactions:

[43] The absence of such remedies appears to explain why, where interest is permitted, the interest rate is often very high: the probability of default is very high. See Herskovits, *supra* note 3, at 228.

[44] The literature on gift-giving in primitive and archaic societies is immense. For some examples see Finley, *supra* note 4, at 62; Herskovits, *supra* note 3, ch. 8; B. Malinowski, Tribal Economics in the Trobriands, in Tribal and Peasant Economies, *supra* note 3, at 185; Marcel Mauss, The Gift (Ian Cunnison trans. 1954); Valentin A. Riasanovsky, The Customary Law of the Nomadic Tribes of Siberia 144-45 (1965); Sahlins, *supra* note 3, at ch. 5.

[45] The feast is not only a means of providing food to many people; it is also a form of "forced saving"—the giver of the feast must accumulate food in order to give it. Of course, the feast may dissipate the accumulated food prematurely. See note 37 *supra*.

[46] Cyril S. Belshaw, Traditional Exchange and Modern Markets 38 (1965), describes a practice in one tribe which illustrates this point nicely. A creates a gift-exchange relationship by making a gift to B. B is not free to refuse the gift. Thereafter A can demand reciprocation of the gift from B at any time. This "on demand" reciprocity gives A a hedge against uncertainty.

This mutual exchange of gifts at first sight resembles commerce, but its objects and ethos are entirely different. Its object is not that of material and tangible "profit," derived from the difference between the value of what one parts with and what one receives in exchange; rather it is the social prestige attached to generosity, to one's ability and readiness to lavish one's wealth on one's neighbours and dependents. The "profit" consists in placing other people morally in one's debt, for a counter-gift—or services in lieu of one—is necessary if the recipient is to retain his self-respect.[47]

The author writes as if the typical modern commercial transaction were one-sided—A sells B a good or service knowing that it is worth less than B thinks. Rather, the usual transaction is mutually advantageous because it enables both parties to exploit the division of labor. Giving in the expectation that the gift will some day be reciprocated involves the same "profit motive" as the modern commercial transaction, although its basis is the desire for insurance rather than to exploit the division of labor. For reasons discussed earlier, the fact that the gift is not repaid with interest does not make the gift exchange a one-sided or commercially unreasonable one.

Another example of the insurance mechanisms of primitive society is the pair of principles that (a) debts never expire—there is no statute of limitations, though in an oral society it would be a considerable convenience—and (b) people inherit their fathers' debts even when the debts exceed the estate.[48] These principles increase the scope of the insurance principle. If you lend money to an old and poor man, you are not permanently out of pocket; his heirs remain obligated to you. Yet the inheritance of debts is not a crushing burden on them. They will be obligated to repay the loan only if and when they have a good year and so can afford to repay it without lowering their own consumption below its normal level.

The system of reciprocal exchange, as we may describe the network of institutions described above for allocating a food surplus in a primitive society, would appear to be a fragile one because there are no legal sanctions for failure to reciprocate promptly and adequately for benefits received.[49] Perhaps, therefore, a sixth assumption should be added to the model:

(6) The population is immobile, in the sense that the member of one village, band, or tribe cannot readily join another and distant unit. Mobility would make the incentive to free ride and the reluctance to share without an enforceable promise to reciprocate very great. Mobility is in fact quite lim-

[47] Philip Grierson, Commerce in the Dark Ages: A Critique of the Evidence, in Studies in Economic Anthropology 74, 79 (George Dalton ed. 1971).

[48] See, e.g., Barton, *supra* note 41, at 126; Max Gluckman, The Ideas in Barotse Jurisprudence 195 (1965); R. S. Rattray, Ashanti Law and Constitution 370-71 (1929). The saying is: "debts never rot." See Walter Goldschmidt, Sebei Law 62, 188, 204 (1967).

[49] For some examples of attempts to evade the obligations of reciprocal exchange see Sahlins, *supra* note 3, at 125, 128, and note 29 *supra*.

TABLE 1
RELATIVE FREQUENCY OF MODES OF DISTRIBUTION AT DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT

Type of Distribution	Relative Frequency in the Different Development Groups	
	The 15 societies at the lowest level	The 15 societies at the highest level
Goods		
Market exchange	7	14
Sharing	13	3
Reciprocal exchange	13	3
Centralized redistribution	3	10
Labor		
Market exchange	2	14
Reciprocal exchange	10	9
Centralized redistribution	0	5
Other types of distribution		
Presence of interest	2	9.5

Source: Pryor, *supra* note 3, at 309 (tab 11.1).

ited in most primitive societies, as the conditions of information in such societies would lead one to expect. Where it is great, the system of reciprocal exchange tends to break down.[50]

Some quantitative evidence bearing on the above analysis of primitive society is presented in Table 1, which is adapted from a table in Pryor's recent book. Table 1 shows that the less developed a primitive society is—and the more, therefore, its economy is likely to approximate the conditions of my model—the more likely it is to rely on gift exchange, noninterest-bearing loans, and sharing, and the less likely it is to rely on market exchange, for the distribution of goods. Pryor also found that reciprocal exchange is more important in hunting, fishing, and agricultural societies than in gathering and herding societies. Consistently with the spirit of my model, he noted that there is greater uncertainty of food supply in the first three types of society and this increases the demand for a principle of reciprocal exchange.[51]

[50] For evidence of this in an Eskimo village see Pryor, *supra* note 3, at 91. A similar point is made in the biological literature on reciprocal altruism. See David P. Barash, Sociobiology and Behavior 314 (1977). The biological concept of reciprocal altruism seems, in fact, indistinguishable from the economic concept of self-interested but reciprocal exchange that this paper uses to explain primitive social institutions.

[51] See Pryor, *supra* note 3, at 195. For other recognition in the literature of the insurance function of reciprocal exchange in primitive societies see Sahlins, *supra* note 3, at 211-17; Marguerite Dupire, Trade and Markets in the Economy of the Nomadic Fulani of Niger (Bororo), in Markets in Africa, *supra* note 3, at 335, 344; Paul Einzig, Primitive Money 338-88 (2d ed. 1966); Leonard Joy, One Economist's View of the Relationship between Economics and

The rows in Table 1 labeled "centralized redistribution" refer to redistribution by a public authority such as a chief or king. The paucity of centralized redistribution among the least developed societies is a clue to the weakness of government in those societies,[52] the subject to which I now turn.

3. *Political Aspects of Insurance and of Polygamy.* One effect of insurance is to tend to equalize the *ex post* distribution of wealth, and there is evidence that this is an effect of the insurance arrangements of primitive society.[53] But equality of wealth is not only a by-product of insurance; it is also a precondition of the maintenance of a pregovernmental political equilibrium. A man who had a food surplus year after year—a wealthy man—would be an inviting target to other members of the society. He could use his wealth to hire retainers to protect him, trading part of his surplus for their loyalty. But other members of society could try to undermine the retainers' loyalty by promising them more of his surplus if they turned against him. In the resulting struggle, either the wealthy man or someone else might emerge with such a following that he could overawe the other individuals and families in the society—that he could, in short, establish a state with himself as its head. Hence, observing a society that has little or no government despite the limited variety of consumption goods (and hence great incentive to use any surplus to hire thugs and henchmen), one may assume that there are institutions that limit the ability of the abler or more energetic people to use their surplus food for political ends. The insurance institutions of primitive society have this effect by tending to dissipate surpluses.[54]

In discussing the institutions that support a pregovernmental equilibrium

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Anthropology, in Themes in Economic Anthropology, *supra* note 3, at 29, 37; T. Scarlett Epstein, Production Efficiency and Customary Systems of Rewards in Rural South India, in *id.* at 229; Daryll Forde & Mary Douglas, Primitive Economics, in Tribal and Peasant Economies, *supra* note 3, at 13, 23; Henry J. Rutz, Ceremonial Exchange and Economic Development in Village Fiji, 26 Econ. Dev. & Cultural Change 777, 801-02, 805 (1978); and note 36 *supra*. Cf. Ralph L. Beals, Gifting, Reciprocity, Savings, and Credit in Peasant Oaxaca, 26 Sw. J. of Anthropology 231, 239 (1970); Allen W. Johnson, Security and Risk-Taking among Poor Peasants: A Brazilian Case, in Studies in Economic Anthropology, *supra* note 47, at 151; and James C. Scott, The Moral Economy of the Peasant, chs. 1-2 (1976).

[52] Pryor's sample includes peasant as well as primitive societies. The predominance of market exchange and public redistribution in the second column suggests that the columns are comparing primitive (column 1) with what in my terminology would be nonprimitive societies (column 2).

[53] Pryor finds reciprocal exchange to be positively correlated with socioeconomic equality. See Pryor, *supra* note 3, at 200-01. See also *id.* at 261, 276.

[54] Consistently with this analysis, Pryor, *supra* note 3, at 426-27, finds a negative correlation between socioeconomic equality and amount of government, as do several earlier studies referenced in Edwin E. Erickson, Cultural Evolution, 20 Am. Behavioral Scientist 669, 673 (1977). And Robert A. LeVine, The Internalization of Political Values in Stateless Societies, 19 Human Organization 51, 53 (1960), finds a negative correlation between equality and sharing on the one hand and the possession of political values on the other hand.

in primitive society, I make no judgment as to whether those institutions are efficient in an economic sense. Probably government is more efficient than alternative institutions of public order. I am interested simply in describing those institutions, and in particular in noting the dual economic-political functions of the pervasive insurance arrangements of primitive society. But I return in the conclusion of this paper to the issue of the efficiency of primitive social organization.

The political function of the insurance institutions in primitive societies is illuminated by comparison with the feudal system. Feudalism is one response to a situation in which some people are able to produce an agricultural surplus but there are few goods to buy with it. They use the surplus to hire retainers and thus enhance their political power.[55] Most primitive societies are not feudalistic. The poor man has rights to the goods of his (wealthy) kinsmen without corresponding duties to serve them. This one-sided relationship would be intolerable under conditions of great and persistent inequality of wealth—a class system. But the emergence of such a system is forestalled by the vagaries of the harvest and the hunt, which are extreme in the primitive economy, and by the difficulty of storing an agricultural surplus or an animal's carcass without decay, or of exchanging these things for durable goods. Because of these factors everyone in the society has a large variance in his expected wealth and is therefore willing to subscribe to an elaborate set of insurance arrangements despite his current wealth position. The result is to equalize wealth *ex post*.

Polygamy, superficially a source of great inequality, may actually promote the economic equality and resulting political stability of primitive society. To be sure, in its usual form, polygyny (many wives), polygamy presupposes some inequality of wealth.[56] For, given diminishing returns (not offset by opportunities for greater division of labor) from having additional wives, a supply of women more or less fixed at the number of men, and a strong desire of most men to have at least one wife, one man would have to be much wealthier than another to be willing and able to pay more for his second, third, or *n*th wife than a rival suitor seeking his first. The generally low incidence of polygyny even where it is freely permitted[57] thus indicates that the inequality of wealth is not great (as appears to be true in most primitive societies) and/or that the returns from having a second wife are indeed much lower than those from the first. In any event, while polygyny presupposes some inequality in wealth, it need not increase it, for where polygyny is

[55] This is (approximately) Adam Smith's theory of feudalism. See The Wealth of Nations Bk. III, ch. IV (1776). Cf. Mair, *supra* note 20, at ch. 4, especially p. 67. On the importance of armed retainers in at least the early stages of medieval European feudalism see 1 Marc Bloch, Feudal Society 154, 156, 169 (L. A. Manyon trans. 1961).

[56] See Becker, *supra* note 8, at 240.

[57] See, e.g., Diamond, *supra* note 14, at 246 n. 2.

common generally the bridegroom (or his kin) must pay a substantial brideprice to the bride's kin.[58] More important, polygyny actually has a tendency to reduce inequality over time by increasing the number of dependents (wives and children) who must be provided for when the husband dies.[59] Because his estate is divided in more ways than if he had one wife,[60] the inequality of wealth in the next generation is less. Where polygamy is not permitted, inheritance in accordance with the principle of primogeniture would tend to perpetuate inequalities of wealth across generations, so we would expect to find rules of equal inheritance or other equalizing departures from primogeniture in primitive societies where polygamy is forbidden. There is some evidence for such a correlation.[61]

To be sure, polygyny tends to increase inequality across families, assuming that the polygynous offspring remain within the father's family, as would be true of the male offspring in a patrilineal society. Because of the important role of the family in the maintenance of public order (discussed in Part II-B), such a disequalizing force could upset the political equilibrium of a primitive society. If, however, as seems generally the case in primitive societies, authority in kinship groups is not tightly centralized and, moreover, the groups tend to fission when they grow large,[62] beyond some point an

[58] Since the brideprice is divided among the bride's kin, this is a further example of the insurance principle at work. Lucy Mair, Marriage, ch. 4 (2d ed. 1977), is a good introduction to the complex subject of brideprice. Polygyny seems strongly associated with payment of substantial brideprice. See Grossbard, Toward a Marriage between Economics and Anthropology and a General Theory of Marriage, *supra* note 8, at 36; Pryor, *supra* note 3, at 364 (tab. B3). Incidentally, Pryor's statistical study of brideprices (see *id.* at 348-68) goes some way toward resolving the old debate over whether the payment of brideprice is a real exchange or merely some kind of symbolic gesture—in favor of the exchange model. On the prevalence of bride purchase in archaic societies see Diamond, *supra* note 14, at 57, 69. For further discussion of primitive marriage customs see pp. 36-42 *infra*.

[59] See M. Fortes, *supra* note 26, at 250; Jack Goody, Bridewealth and Dowry in Africa and Eurasia, in Jack Goody & S. J. Tambiah, Bridewealth and Dowry 1, 13, 17-18, 32 (1973); Robert A. LeVine, Wealth and Power in Gusiiland, in Markets in Africa, *supra* note 3, at 520, 522-23; Frederic L. Pryor, Simulation of the Impact of Social and Economic Institutions on the Size Distribution of Income and Wealth, 63 Am. Econ. Rev. 50, 54 (1973). See also Jack Goody, Production and Reproduction (1976), arguing for an association between polygamy, brideprice, equality of wealth, and weak government, on the one hand, and monogamy, dowry, inequality of wealth, and strong government, on the other. And for some evidence that monogamy is positively and polygamy negatively correlated with strong government see Mary Douglas, Lele Economy Compared with the Bushong, in Markets in Africa, *supra* note 3, at 211.

[60] See discussion of inheritance laws at note 109 *infra*.

[61] Of the 17 societies classified by Pryor, *supra* note 3, at 327-39, as ones in which a positive political orientation was lacking but in which polygyny was also uncommon, information contained in the Human Relations Area Files indicates that only one had primogeniture as the method of inheritance, one had no inheritance at all, and the other 15 divided property more or less equally on death (though sometimes only male offspring inherited). In contrast, primogeniture is common in primitive polygynous societies. See note 109 *infra*.

[62] See, e.g., Daryll Forde, Double Descent among the Yakö, in African Systems of Kinship and Marriage, *supra* note 22, at 285, 294.

increase in number of members may not significantly increase the group's power—the added strength may be offset by reduced cohesion. The contrast with the hierarchical structure of feudalism (or of the modern corporation) is evident.

Polygyny disperses political power in another way, by increasing the opportunity costs of retainers.[63] Wealth is thereby diverted into a politically harmless channel, because women are useless as fighters in primitive societies.[64] (The value of additional wives, it should be noted, is not only or mainly to provide sexual variety; it is also to provide additional insurance, especially by increasing the number of sons to whom, as members of his kin group, the father can look for support in his old age.[65]) Consistently with this analysis, Schapera reports that in one African tribe where government had emerged to the extent that the chief was claiming a monopoly of the right to redistribute the tribe's food surplus to the needy members of the tribe, the chief encouraged the wealthy men of the tribe to buy additional wives. He was concerned that if they did not use their wealth in that way they might use it to feed the needy and thus undermine his position.[66]

TABLE 2
POLITICAL ORIENTATION AND POLYGYNY

Type of Orientation	Number of Societies	
	Polygyny Common	Polygyny Uncommon
Positive Political Orientation*	4	12
Negative Political Orientation**	7	1

Source: Calculated from Pryor, *supra* note 3, at 318, 333-34 (variables 6, 69), 336-39
* Marked 1 in col. 61, p. 339 of Pryor.
** Marked −1 in *id.*

Table 2 cross-tabulates two of Pryor's variables: polygyny, and whether the society is "politically oriented." Table 2 shows that polygyny is more

[63] An alternative use of wealth would be to rent one's extra land or hire laborers to work it. But this alternative appears to encounter information costs greater than primitive society can cope with. See note 107 *infra*.

[64] Thus is it completely accidental that feudalism flourished in medieval Europe, which was strongly monogamous, and that an approximation to feudalism is found in the Greek society—also strongly monogamous—depicted in the Homeric poems? My analysis predicts that, other things being equal (obviously a vital qualification), feudalism is less likely to emerge in a society where polygamy is permitted than in one where it is forbidden. Diamond, *supra* note 14, at 376-77, states that brideprice diminished with the growth of feudalism. This finding makes sense because the opportunity cost of a wife is higher in a feudal than in a prefeudal system.

[65] Where women are the principal capital good in a society, it is understandable why a man who sells women for other goods should be despised—as he is among the Tiv, for example (see Paul Bohannan, Some Principles of Exchange and Investment among the Tiv, in LeClair & Schneider, *supra* note 1, at 300, 304): he is dissipating his capital.

[66] See I. Schapera, Economic Changes in South African Native Life, in Tribal and Peasant Economies, *supra* note 3, at 136, 142.

common in a society that is negatively politically oriented than in one that is positively so oriented. This evidence is consistent with the suggestion that polygamy operates to disperse political power and thus to support the pregovernmental political equilibrium of a primitive society.

4. *Other Primitive Adaptations to High Information Costs.* The model from which I have attempted to deduce the fundamental social institutions of primitive people is based, it will be recalled, on the high costs of information, and resulting uncertainty, in primitive society. I turn now to other ways in which primitive societies adapt to the costs of information.

(1) Concerning the most conspicuous primitive institution explicable by reference to the high costs of information—the belief in and practice of magic, sorcery, and witchcraft—I shall content myself with noting the frequency with which primitive superstitions appear to promote the economic well-being of the society. For example, in many societies a man who gets too wealthy—who fails, in other words, to carry out his social duty of sharing his surplus when he has one—is likely to be considered a witch.[67] This result may be thought an example of the primitive's envious resentment of anyone who lifts himself above the average—and envious resentment may in fact describe his feelings—but it can equally well be viewed as a rational[68] response to the demand for insurance in primitive societies and the lack of the conventional modern mechanisms of supplying it. Or consider the belief of one tribe that misfortune will befall anyone who sells his goods on the way to the market.[69] This seems a silly belief—until it is remembered that a market's efficiency is increased if as many buy and sell offers as possible can be pooled in it. Or consider the common practice in primitive and archaic societies of burying people with their personal possessions, or destroying those possessions at their death.[70] These are methods of equalizing wealth in the next generation,[71] yielding benefits already discussed.[72]

(2) Age grading—the assignment of tasks or roles on the basis of age—is more common in primitive than in modern societies. For example, all males 7-10 years of age in a primitive community might be assigned as herdsmen, all 11-14 year olds as junior warriors, all 15-30 year olds as senior warriors, and all those above 30 as tribal elders. Sex is also used more than in modern societies to determine work assignments.

One possible explanation for age and sex grading in primitive society is

[67] See, e.g., Driver, *supra* note 17, at 444.

[68] On the meaning of "rational" see text at note 13 *supra* & note 174 *infra*.

[69] See Herskovits, *supra* note 3, at 205.

[70] See, e.g., Herskovits, *supra* note 3, at 491-92.

[71] See T. Scarlett Epstein, Capitalism, Primitive and Modern 31 (1968).

[72] Another example of the economic function of superstition is offered at p. 47 *infra*. See also Smith, *supra* note 9, at 742.

simply that the tasks in such societies are so simple that individual differences are unimportant to the quality of performance. Another is that since many primitive societies do not have good data on ages, assignment to one or another age group may in fact reflect individual fitness rather than chronology. A third explanation draws on recent work in the economics of information. Age and sex are proxies for individual fitness for a particular job. They economize on information by avoiding an assessment of individual strength, skill, and character.[73] Despite the better knowledge of each other's character that primitive people possess because of their lack of privacy, difficulties of evaluation and supervision may make the measurement of an individual's marginal product more costly in primitive than in modern societies, leading the former to rely more heavily on crude but cheap proxies of individual capacity.[74]

(3) As mentioned earlier, gifts play a larger role in primitive than in advanced societies. While their role is partly to be explained in terms of mutual insurance, they also have a direct informational aspect.[75] A gift is a way of communicating information about one's wealth, tastes, and attitudes more credibly than by a statement, especially in circumstances where a statement would be difficult to verify and guarantees of its truth would not be enforceable. Gifts have this function today, though the abundance of other and cheaper substitutes in communication renders them less important than in primitive societies. Yet, gift-giving remains a custom in visits between heads of state; the lack of supranational government prevents the formal enforcement of promises and so makes the assessment of character and intentions more critical than in transactions enforceable by a public judiciary. Gifts in primitive society within the kin group or village are generally an aspect of the insurance system described earlier, for within the small group all is known about everyone's character and nothing remains to be communicated by gift. But where the gift is between strangers, as where an exchange of gifts accompanies betrothal to the member of another kin group living in another village,[76] it probably has an informational function

[73] See, e.g., Edmund S. Phelps, The Statistical Theory of Racism and Sexism, 62 Am. Econ. Rev. 659 (1972).

[74] This analysis suggests the general point, which cannot be pursued in this paper, that the apparent secular growth in tolerance in Western culture may result from a secular trend toward lower costs of measuring individual performance.

On the costs of labor markets in primitive societies see further note 107 *infra* and accompanying text.

[75] I discuss this aspect of gifts in the context of archaic society in The Homeric Version of the Minimal State, *supra* note 11, at 41-42. The distinction between gifts as assistance and as a means of "cementing a relationship" is of course not new. See, e.g., Günter Wagner, The Political Organization of the Bantu of Kanirondo, in African Political Systems, *supra* note 20, at 206-08.

[76] See, e.g., Barton, *supra* note 41, at 40. The principle of exogamy (see pp. 41-42 *infra*), the size of the kinship group, and the likelihood that most of the people in the village are kin combine to create a

instead. (These betrothal gifts, it should be noted, are distinct from the brideprice, which is not a gift but the purchase price.) Gifts are to be distinguished from trade in the ordinary sense of an exchange of unlike goods to take advantage of the division of labor. Gift exchange is not motivated by the division of labor and resulting opportunities to reduce the costs of production through specialization, but by either the costs of information in, or the insurance needs of, primitive society.

Notice that, viewed as a signaling device, a gift need not actually be received or enjoyed by the donee. The form of Northwest Indian potlatch, sometimes regarded as pathological, in which goods are destroyed rather than given away can be interpreted as an especially credible method of signaling the possession of wealth, and of whatever qualities are correlated with the possession of wealth.[77]

(4) With regard to trade in the ordinary sense—trade of unlike articles between strangers—in primitive society, transaction costs are presumably high because of the costs of information regarding the reliability of the seller, the quality of the product, and trading alternatives (that is, the market price). However, institutions have arisen which reduce these transaction costs.

(a) One is gift-exchange, viewed as a means of communicating information about one's character and intentions. The exchange of gifts is a common accompaniment to primitive trade.[78] For example, the *kula* ring of the Trobriand Islanders, an elaborate system of gift-exchange between members of different communities, although not trade in the usual sense (it consisted essentially of the exchange of like ornamental objects) facilitated trade. As Belshaw explains:

> The *kula* itself was not oriented to individual trade in its ceremonial activities. But alongside the *kula* persons visiting their partners took advantage of the opportunity to engage in trade. Malinowski makes the point that *kula* partners would exchange gifts of a trade character in addition to *vaygu'a* [the ornamental objects exchanged in the *kula* ring], and that the security afforded by the partnership would make it possible for the visitor to make contact with other persons in the village and trade with them.[79]

(b) Many primitive societies have "customary" prices for the goods involved in trade rather than prices determined by negotiation between the parties.[80] Customary prices do not change as quickly as the conditions of

situation in which a spouse often must be sought in another village—which is likely to mean among strangers.

[77] See Edward O. Wilson, Sociobiology 561 (1975).

[78] See, e.g., Herskovits, *supra* note 3, at 196. A related practice is the solemnization of a formal debt by the exchange of gifts. See Gluckman, *supra* note 48, at 197-98.

[79] Belshaw, *supra* note 46, at 16.

[80] See examples in Herskovits, *supra* note 3, at 206-10; Sahlins, *supra* note 3, at 295, 299-300,

demand and supply and are therefore a source of inefficiency. But given the high costs of markets in primitive societies, such prices may be less inefficient, on balance, than freely bargained prices. The efficiency of customary prices is reinforced by the fact, noted earlier, that people have claims on the goods of their kin.[81] Multi-party transactions are generally more costly than transactions between just two parties; this is presumably one reason why trade is relatively rare in primitive societies.[82] To the extent that there is trade, however, it can be facilitated by customary prices. These reduce transaction costs by eliminating the need for a many-sided negotiation over price.[83]

(c) Another response to market transaction costs is the transformation of an arms-length contract relationship into an intimate status relationship. In some primitive societies if you trade repeatedly with the same man he becomes your blood brother and you owe him the same duty of generous and fair dealing that you would owe a kinsman.[84] This "barter friendship" resembles the pairing of buyers and sellers in bazaars that Geertz noted. It is a way of bringing reciprocity into the exchange process and thereby increasing the likelihood that promises will be honored despite the absence of a public enforcement authority.[85]

(d) Sahlins has noted still another device by which security of primitive trade is enhanced—what he calls economic "good measure," that is, a buyer's deliberately overpaying a seller in order to induce the seller to deal fairly with him in the future.[86] The overpayment increases the cost to the seller of a breach of trust that would induce the buyer to withdraw his patronage.[87] Finally, the bazaar itself may be viewed as an adaptation to the

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308-09; and Pospisil, *supra* note 22, at 121-22. Notice that both haggling (see Geertz, *supra* note 6) and fixing of customary prices, though seemingly at opposite ends of the spectrum of price flexibility, are explicable in terms of the high information costs in primitive societies. Neither method of price setting is as common in advanced societies.

[81] This is the reason why, in at least one society, it is customary for the buyer of a good to give gifts to the seller's kin. See Barton, *supra* note 41, at 107.

[82] See *id.* at 110-11; Maine, *supra* note 22, at 271 (Beacon ed. 1970); and Table 1, *supra* p. 18.

[83] For further analysis of the role of custom in reducing transaction costs see pp. 37-38 *infra*.

[84] See Gluckman, *supra* note 48, at 174. Raymond Firth speaks of the "personalization" of economic relations in primitive society. Primitive Polynesian Economy 315 (1939). See also Malinowski, *supra* note 22, at 39-40 (1951 ed.); Goldschmidt, *supra* note 48, at 192-93. Nash, *supra* note 3, at 49, describes the use of an "idiom of fictive kinship" in market transactions.

[85] See Nash, *supra* note 3, at 31. On pairing, or reciprocal buying, as a modern response to high costs of formal contract enforcement see Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. Law & Econ. 297, 304-05 n. 18 (1978).

[86] See Sahlins, *supra* note 3, at 303. Cf. *id.* at 304.

[87] Cf. Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. Legal Stud. 1, 6-13 (1974).

high costs of information and communication. Those costs make it difficult to pool offers to buy and offers to sell other than by bringing all of the buyers and sellers face to face with each other.

(5) Certain behavioral traits of primitive man are illuminated by reference to the conditions of information in primitive society. Generosity, its connection with prestige, and the concomitant hostility toward people who accumulate rather than give away wealth have already been noted. The sense of honor—less grandly, touchiness—which is so pronounced a character trait in primitive and ancient societies[88] may be related to the importance of the threat to retaliate as a device for keeping order in a society lacking (for reasons based on information costs) formal institutions of law enforcement. The sense of honor increases the probability that a man will retaliate for a wrong to him or to his kin and it thereby increases the credibility of threatened retaliation as a deterrent to antisocial behavior.[89]

(6) The formality and decorum of primitive speech and manners are well documented, and in other papers I have related these traits to the lack of privacy in primitive societies.[90] The argument in those papers, briefly, is that people who lack conversational privacy must learn to express themselves very precisely and circumspectly since many of their conversations are bound to be overheard, creating all sorts of possibilities for recrimination and misunderstanding. The economic analysis of primitive rhetoric can be carried further, though in this paper I shall only sketch the argument.

The art of rhetoric, so highly developed in primitive and early cultures, so neglected (except by politicians) in modern ones, appears to be a response to high costs of information. In the words of one of the few modern textbooks on the subject:

> In dealing with contingent human affairs, we cannot always discover or confirm what is the truth. . . . But frequently, in the interests of getting on with the business of life, we have to make decisions on the basis of uncertainties or probabilities. The function of rhetoric is to persuade, where it cannot convince, an audience. And in matters where the truth cannot be readily ascertained, rhetoric can persuade an audience to adopt a point of view or a course of action on the basis of the merely probable. . . .[91]

Take the familiar rhetorical device known as the "ethical appeal." This

[88] See, e.g., Gluckman, *supra* note 48, at 232; Evans-Pritchard, *supra* note 22, at 151; Mair, *supra* note 20, at 40. The *locus classicus* of touchiness in archaic society is Achilles' conduct in the *Iliad*.

[89] For some evidence see LeVine, *supra* note 54, at 54, finding a negative correlation between possession of political values and of a strong sense of honor. The basis of public order in the primitive state is discussed further in Part II-B *infra*.

[90] See privacy papers cited in note 11 *supra*.

[91] Edward P. J. Corbett, Classical Rhetoric for the Modern Student 73 (2d ed. 1971).

refers to a speaker's trying to ingratiate himself with his audience. As Corbett points out, "All of an orator's skill in convincing the intellect and moving the will of an audience could prove futile if the audience did not esteem, could not trust, the speaker."[92] However, if the truth of the speaker's words were readily verifiable, there would be no interest in his character, no occasion for trust. Character is a proxy for credibility which becomes important only where the costs of information are high. Thus, I conjecture that the importance attached to rhetorical skill in primitive and early cultures reflects not only the absence of privacy in those cultures, but also the high costs of information, which make it necessary for speakers to use rhetorical techniques in order to make their utterances credible.

(7) Lack of privacy may explain why primitive people often seem more tolerant of certain forms of mendacity and (less consistently) of defamation than modern people.[93] Where everything is known about people's lives, the opportunity to use lies (including false aspersions) to mislead and manipulate the people with whom one transacts is more limited than in a modern impersonal society, where one is apt to know very little about most of one's transacting partners. The analysis is complicated in the case of defamation by (a) the emphasis on honor, which implies a high degree of sensitivity to slights, (b) the importance of reputation in a society that lacks effective sanctions for dishonoring promises, and (c) the costs of information that result from ignorance of scientific principles. These costs may exceed the reduction of information costs that is made possible by the lack of privacy. A false accusation that a person is a witch is a very serious charge in a primitive society. But many other forms of mendacity are harmless and are more likely to be adopted for dramatic or diplomatic effect than to mislead.

II. Legal Aspects of Primitive Society

A. *In General*

This part of the paper considers the extent to which the characteristic legal institutions of primitive and archaic societies are economically rational responses to the conditions of primitive life. I begin with brief examinations of the systems of procedure, property law, contract law, and family law in primitive society.[94] I then examine in somewhat greater detail the system of

[92] *Id.* at 35.

[93] See Posner, Privacy, Secrecy, and Reputation, *supra* note 11, at 31-32.

[94] For archaic societies my major sources are Maine, *supra* note 22; Diamond, *supra* note 14, at pt. I. See also Harold J. Berman, The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe, 45 U. Chi. L. Rev. 553 (1978). For primitive societies my major sources are Barton, *supra* note 41; Gluckman, *supra* note 48, and his Politics, Law, and Ritual in Tribal Society (1965); Goldschmidt, *supra* note 48; P. H. Gulliver, Social Control in an

strict liability in primitive society, covering the area which in our system is parcelled out between tort and criminal law.

1. *The Legal Process in Primitive Societies.* "Legal process" as I shall use the term has two broad aspects—the promulgation of substantive rules of law and the resolution of disputes arising under these laws. In a society that has no government worth speaking of—no legislature, executive branch, or public judiciary—the answer to the question how these functions are carried out is not obvious.

Let us begin with dispute resolution. Suppose there is a rule (we won't worry for the moment where it comes from) that a man may not take his neighbor's yams without the neighbor's permission, but he does so, or at least the neighbor alleges that he has done so. How is the dispute between them to be resolved and a sanction applied if the rule is found to have been violated? One possibility is simply retaliation by the neighbor for the theft. But that may be a costly procedure given the organization of primitive society into kin groups that provide mutual protection to their members (the "collective responsibility" of the kin group is examined in greater detail in Part II-B).[95] In these circumstances the aggrieved neighbor may wish to engage a passer-by, village elder or wise man, or other presumptively impartial and (perhaps) competent third party, to adjudicate his dispute.[96] The alleged violator also has an incentive to submit to adjudication—or "arbitration" as we should probably call it in view of its private nature—lest his refusal to do so trigger retaliation by the neighbor. To be sure, the alleged thief who is clearly guilty and expects to be so adjudged by an impartial arbitrator may prefer not to submit to arbitration at all or not to comply with the arbitrator's (adverse) judgment. But his kin group are a restraining influence here. They may urge him to submit to arbitration lest they get involved in a feud over his deed, as they are apt to do given the principle of collective responsibility. He will probably submit to their urging, for otherwise they may desert him when the neighbor or the neighbor's kin retaliate

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African Society (1963); Hoebel, *supra* note 40; P. P. Howell, A Manual of Nuer Law (1954); Leopold Pospisil, Anthropology of Law (1971); Riasanovsky, *supra* note 44; John Phillip Reid, A Law of Blood (1970); Schapera, *supra* note 30; Ideas and Procedures in African Customary Law (Max Gluckman ed. 1969); Law and Warfare (Paul Bohannan ed. 1967); Readings in African Law (E. Cotran & N. N. Rubin eds. 1970). For detailed literature reviews and bibliographies, unfortunately a bit out of date, see Sally Falk Moore, Law and Anthropology, 1969 Biennial Rev. Anthropology 252 (Bernard J. Siegel ed. 1970); Laura Nader, The Anthropological Study of Law, 67 Am. Anthropologist (Spec. Publication), no. 6, pt. 2, at 3 (1965); Laura Nader, Klaus F. Koch & Bruce Cox, The Ethnography of Law: A Bibliographical Survey, 7 Current Anthropology 267 (1966).

[95] On the limitations of retaliation as a means of maintaining order see Richard A. Posner, Retribution and Related Concepts of Punishment, *supra* note 11; also p. 43 *infra*.

[96] See, e.g., Maine, *supra* note 22, at 364 (Beacon ed. 1970).

for his refusal to submit to arbitration or to comply with the arbitrator's award.[97]

Turning briefly to the factfinding procedures used in primitive adjudication, we find high information costs reflected in the reliance on oaths, ordeals, and other dubious or irrational methods of factual determination that are sometimes used in primitive adjudication. Yet the superstitious element in primitive factfinding is easily exaggerated. There is less reliance in African tribal society than there was in medieval European adjudication on the ordeal, the wager of battle, and similarly bizarre methods of finding facts.[98] Observers of tribal justice have been generally well impressed by the competence of the tribunal and by the distinctions it makes—sometimes more intelligently than under modern American rules of evidence designed to guide and control juries—among hearsay, circumstantial, direct, and other categories of evidence.[99] Yet the ability of primitive tribunals to find the facts remains limited in many important respects because of the absence of police and other investigatory machinery and techniques (autopsies, etc.) and because of the possibility of assigning supernatural causes to natural phenomena (as where a death from natural causes is ascribed to the witchcraft of an enemy). These costs of information appear to have shaped primitive substantive law in important ways.[100]

The remaining question is the source of the norms applied in a primitive adjudication. Two of the common sources of legal norms, legislation and executive decree, are ruled out by the assumption of no state. Since the arbitrators, though private, are a sort of judge, it may seem that the third common source of law—judicial decisions viewed as precedents guiding future conduct—could operate in primitive society. But even putting aside the problems that illiteracy would create for any system of precedent similar to the Anglo-American common law (but that primitive man's ingenuity might be able to overcome[101]), one has still to ask what incentive the arbitrator has to issue opinions that will stand as precedents. Even our society does not attempt to create property rights in rules or precedents and certainly

[97] For a more detailed analysis of primitive arbitration see Landes & Posner, Adjudication as a Private Good, *supra* note 10, at 242-45.

[98] See Diamond, *supra* note 14, at ch. 21. Even the bizarre methods can perhaps be understood in a setting of transaction costs so high that people are unwilling to attempt factual determinations on their own, that is, without divine assistance.

[99] See Max Gluckman, The Judicial Process among the Barotse of Northern Rhodesia, ch. III, 107-08 (1955); Max Gluckman, Reasonableness and Responsibility in the Law of Segmentary Societies, in African Law: Adaptations and Development 120 (Hilda Kuper & Leo Kuper eds. 1965); Pospisil *supra* note 94, at 236-38.

[100] See pp. 49-50 *infra*.

[101] See discussion of "remembrancers" in I. Schapera, The Sources of Law in Tswana Tribal Courts: Legislation and Precedent, 1 Afr. Law 150 (1957).

primitive societies do not. Our judges receive salaries from the state and, if appellate judges, are expected to write opinions setting forth their grounds of decision; such opinions are precedents. But the typical primitive judge, like the modern arbitrator, must look to the disputants rather than to the society at large for his compensation, since he is a private citizen.[102] And just as modern arbitrators usually do not write opinions, because the parties to a dispute typically obtain only a trivial fraction of the benefits generated by a precedent (those benefits accruing to all whom the precedent enables to shape their future conduct better) and hence are unwilling to pay for the arbitrator's creating precedent, so primitive judges are unlikely to provide (oral) opinions usable as precedents.

The remaining source of law, and the one that dominates primitive law, is custom. It is custom that prescribes the compensation due for killing a man, the formalities for making a contract, the rules of inheritance, the obligations of kinship, the limitations on whom one may marry, and so forth. Custom (including customary law) resembles language in being a complex, slowly changing, highly decentralized system of highly exact rules. The exactness or detailedness of customary rules is a substitute for a system of broad standards particularized by judges through the creation of precedents. The exactness of those customary rules that are designed to price an act (like killing) can also be explained in terms of the high costs of negotiation where, as is typically the case, an entire kin group (or more likely two) is affected by the negotiation, thus making it a multi-party transaction.

The more exact a rule is, the less adaptable it is to changing circumstances. We would therefore expect a system of exact rules to have some method for changing the rules quickly. A system of customary law has none, but this is not a serious problem in a static society. In such a society there is little danger that legal change will lag behind social change, producing the sorts of anachronisms which in the case of English common law (as in that of Roman law) created the demand analyzed by Maine for legal fictions, equity, and legislation to keep the law up to date. These devices are found less often in primitive legal systems.[103] Evidently Roman and English society were

[102] See, e.g., Barton, *supra* note 41, at 164-67. A famous example is the "shield scene" in Book XVIII of the *Iliad*. Maine's interpretation that the two talents of gold referred to in the scene are a fee for the judges is now widely accepted. See Maine, *supra* note 22, at 364 (Beacon ed. 1970); Robert J. Bonner & Gertrude Smith, The Administration of Justice from Homer to Aristotle 38-40 (1930). Even where a primitive society has some rudimentary government, the judges tend to be at best quasi-official figures and to be paid, if at all, out of litigant fees. See, e.g., Riasanovsky, *supra* note 44, at 12.

[103] On legal fiction in Roman and English law see Maine, *supra* note 22, ch. 2. Equity and legislation require a more elaborate governmental structure than is found in the usual primitive society. Legal fictions, too, appear to be rare in primitive societies. For a good discussion see T. O. Beidelman, Kaguru Justice and the Concept of Legal Fictions, 5 J. Afr. Law 5 (1961). However, fictive kinship is sometimes found. See, e.g., note 80 *supra*. And one often finds

changing faster than a system of purely customary law (no fictions, no equity) could keep up with—which means faster than the typical primitive society changes.

2. *Property.* Demsetz's study of the property rights systems of North American Indians pointed out that the appropriateness of recognizing a property right in a resource is a function of the scarcity and hence market value of the resource relative to the costs of enforcing such a right.[104] Where land is so abundant relative to population that its market price would be less than the cost of fencing the land or otherwise enforcing a property right to it, individual rights will not be asserted to the land; it will be treated as common property. As land becomes scarcer—because of a rise in the ratio of population to land due to the introduction of Western medicine, or a rise in the demand for some crop or animal grown on the land due to access to Western markets—a system of individual property rights will tend to develop.[105] But even in a very primitive agricultural society, some land is bound to be much more valuable than other land because of superior fertility, workability, or location (for example, proximity to the camp or village, making it safer from enemy attack), and so would command a positive market value if it could be bought and sold. And enforcement of a property right to such land should not be costly if it is a purely possessory right (a "usufruct") which allows the possessor to exclude people from the land only so long as he is actually working it. In fact, such possessory rights are common in primitive law. They have two additional elements: (1) the possessor can transfer his right to members of his family or pass it to his heirs, but (2) he cannot sell the land and, of course, he cannot establish rights in land that he is not actually working—that is what a purely possessory right or usufruct means.[106]

The model of primitive society developed in Part I is helpful in explaining this structure of property rights. The benefits of such a system of rights are both political and narrowly economic. (1) The man who has a good harvest is not permitted to use his surplus to buy another's land and reduce the other to

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artificial, "legalistic" reasoning. For example, in one African tribe if a man kills a member of his clan he pays a smaller composition than if he kills a stranger, on the ground that as a member of the clan he is entitled to share in any composition which it receives. See Robert Redfield, Primitive Law, in Law and Warfare, *supra* note 94, at 3, 12. The reasoning is absurd but the rule makes economic sense. Where killer and victim are members of the same clan, the probability of detection is higher and hence the optimal penalty lower. But this is not an example of legal fiction in the sense, relevant to the discussion in the text, of a device for getting around an anachronistic, dysfunctional rule.

[104] See Demsetz, *supra* note 9.

[105] See, e.g., Ault & Rutman, *supra* note 9.

[106] See, e.g., Herskovits, *supra* note 3, at 68-70; Barton, *supra* note 41, at 89-98; Schapera, *supra* note 30, at 201, 205, 207; and Maine, *supra* note 22, at ch. 8.

dependency on him—which would be a politically destabilizing transaction in a pregovernmental society—but is led instead to give the surplus to the other. The effective demand for land is thereby reduced as well, making it more likely that a poor man will be able to find tolerably good land somewhere else in the community. (2) Possession, in the sense of actually working a piece of land or killing and seizing a wild animal, provides clear evidence of the fact and extent of ownership. The alternative is either fencing or a record system. The former could be quite costly in a society that has only simple tools. The latter is ruled out by the assumption of illiteracy.

Turning to the costs of a possessory system, we find they are lower than they would be in an advanced society. To begin with, the sale of land would be difficult in any event because of the network of kinship obligations. A man cannot sell land on whose output some kinsman may depend, or cows that are needed to buy his younger brother a wife, without consulting the affected kinsmen or at least allocating the proceeds of the sale among them. But either step would increase the effective number of transacting parties and so the costs of transacting. And all the other obstacles that plague the primitive market, discussed in Part I, likewise plague the market in land. Thus, the primitive land market would probably operate poorly even if land were in principle freely alienable.

Furthermore, while in an advanced society inalienability would prevent the concentration of land into holdings large enough to enable economies of large-scale production to be exploited, such exploitation is largely infeasible in primitive society in any event, because it entails a capacity for organization—for coordinating the work of many people under central direction—that is precluded by the high costs of information.[107] The social benefits of allowing a man to assemble more land than he could personally work would therefore be slight. Moreover, some opportunity for expanding one's holdings is created by polygamy, which enables a man to buy several wives to work a large estate.[108] The potentially destabilizing effect of

[107] Some empirical support for this proposition is provided by Pryor's findings that land-rental and labor contracts generally emerge late in the development of a society, relative to markets in goods. See Pryor, *supra* note 3, at 126-27, 141. And notice how strongly in Table 1, *supra* p. 18, reciprocal exchange of labor persists after reciprocal exchange of goods has largely given way to market exchange of goods. Presumably the costs of market transactions in the rental of land or the hiring of labor (to work the land or do any other work) are higher than the costs of simply selling goods, because of the difficulty of either determining the tenant's or worker's marginal product or monitoring his effort. Cf. M. I. Finley, The Ancient Economy 65 (1973).

[108] Consistently with this suggestion, Pryor found a negative correlation between the existence of land rentals and the presence of polygyny. See Pryor, *supra* note 3, at 137. Given the limitations on the sale of land, the question arises how one would obtain a large estate in the first place; one answer might be inheritance of several plots of land from different people. Another question is why the costs of supervising wives should be thought lower than those of supervising

polygamy on the equality of wealth and power is counteracted, as we have noted, by the increased number of children, which leads to a greater division of the land in the next generation.[109]

Another cost of a purely possessory rights system that is relatively unimportant in a primitive economy is the distortion that such a system creates in the temporal pattern of resource exploitation. When one can obtain ownership rights in a resource only by capture or use, there is a tendency to take too much too soon; but again this is not a frequent problem in a simple society. It is cheaper for a band of hunters to move on when the game in an area is depleted than to regulate the game population by creating fee-simple rights to hunting territories; and cheaper to abandon worn-out land for several years until its fertility is naturally restored than to enforce fee-simple rights in the hope of encouraging the owners to regenerate the land more quickly (the techniques for doing so are unknown). Where investment preparatory to use is feasible in primitive society—the setting of traps is an example—it is often protected by the grant of a nonpossessory property right. The man who sets a trap is entitled to the trapped animal even if someone else finds it in the trap and thus "possesses" it first.[110]

To summarize, analysis of the benefits and costs of a possessory system of rights in land indicates that it may well be the efficient system under the conditions prevailing in primitive society. As additional, admittedly oblique, evidence of this, notice that the modern appropriation system of water rights, a possessory system that has close counterparts in primitive law,[111] emerged in an area and time widely regarded as lawless, or at least lacking settled legal institutions—California, in the period immediately following the Gold Rush of 1849.[112]

(other) field hands. The answer is that the food that the wife grows in part to feed her son is a form of joint consumption of husband and wife; the feeding of his son is a benefit to the husband that the latter doesn't have to exert himself in supervising the wife to obtain.

[109] Under South African tribal law, for example, the land worked by each of a polygamist's wives is a separate estate which on his death passes to the eldest son of that marriage, so that his total holdings are broken up on his death. See A. J. Kerr, The Native Law of Succession in South Africa 35, 54 (1961); 4 N. J. van Warmelo, Venda Law 815, 899 (1949). Notice that the combination of polygamy and primogeniture achieves similar results to a rule of equal inheritance, which would be less efficient because it would often force the division of estates into inefficiently small units. However, where as among nomads the principal wealth is almost perfectly divisible (herds), a rule of equal inheritance is often found. See Austin Kennett, Bedouin Justice, ch. 10 (1925). Cf. Manning Nash, The Social Context of Economic Choice in a Small Society, in LeClair & Schneider, *supra* note 1, at 311, 320. On the equalizing tendencies of primitive inheritance law see also Lowie, *supra* note 22, at 248-55; Charles Douglas, The Organization and Laws of Some Bantu Tribes in East Africa, 45 J. Royal Anthropological Inst. 234, 294 (1915).

[110] See, e.g., Diamond, *supra* note 14, at 189; Goldschmidt, *supra* note 48, at 157. Cf. Smith, *supra* note 9, at 742-43.

[111] See Barton, *supra* note 41, at 103; Hoebel, *supra* note 40, at 108.

[112] See Charles W. McCurdy, Stephen J. Field and Public Land Development in California,

3. *Contracts.* In primitive as in modern law, exchange and contract are not synonymous. And because the formation of marriage, exchanges within the household or kin group, and gift-giving are the most important forms of exchange in primitive society (or, the same point, because the role of explicit markets in organizing production and distribution is smaller in primitive than in modern economies), the potential domain of the law of contracts in primitive society—the law, that is, governing trade with strangers—is limited.

Several features of primitive contract law recur with sufficient frequency to be regarded as typical: (1) executory contracts (contracts which neither party has begun to perform when the breach occurred) are not enforced; (2) damages are not awarded for loss of the expected profits of the transaction—the standard remedy is restitution; (3) a breach of contract where the other party has completed performance—that is, breach of a half-executed as distinct from an executory contract—will often be treated as a form of theft from the promise; and (4) the seller is liable for any defect in the product sold (*caveat venditor*).

These features taken together suggest that contract law barely exists even in the limited sphere in which it applies. A law of contracts is not needed to generate the rule that a buyer who refuses to pay for goods of which he has already taken possession must return them to the seller, yet apart from liability for defective products that seems to be the only important duty that primitive contract law imposes. The reason becomes apparent once it is realized that the economic function of modern contract law is to facilitate transactions in which the performance of one or both parties takes considerable time.[113] Such an interval opens up the possibility both that unforeseen events will disrupt performance and that one of the parties will be tempted to exploit the strategic opportunities that nonsimultaneous contractual performance may create. The interval over which contract performance occurs is presumably a positive function of the complexity of the economic activity being regulated by the contract. The economic activity of primitive societies is simple; and if therefore it can be assumed that the transactions governed

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1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America, 10 Law & Soc'y Rev. 235, 253-62 (1976); John Umbeck, *supra* note 35. The analysis in this section has been of land rights, with special reference to agricultural land. The position with respect to other kinds of property is closer to that of modern law—always subject to the "cloud over title" that is cast by the rights of kinsmen. One of the few goods to which a kinsman usually cannot assert a claim is a man's wives (though he may, if in need, be able to claim a share of her or her children's agricultural surplus which might otherwise go to the husband-father). Women's (comparative) immunity from the claims of kinsmen is another reason why they are such a highly valued good in primitive societies, as measured by the brideprice which they command.

[113] See The Economics of Contract Law 1, 3-4 (Anthony T. Kronman & Richard A. Posner eds. 1978).

by the law of contracts in primitive society usually involve simultaneous (or virtually simultaneous) performance, the scope for that law is reduced to assigning liability for defects that show up later. If we assume just one element of nonsimultaneity, namely that payment sometimes follows transfer of the good sold, then only a principle of restitution that will make the buyer return the good to the seller is needed. This would not be good enough in a modern economy, where prices may change rapidly and where an important purpose of contracts is to assign the risk of such changes to one party or the other.[114] But prices change slowly in primitive societies, partly because so many of the prices are customary.

The rule of *caveat venditor* in primitive sales law can be derived from Geertz's observation concerning the costs of information in primitive markets. To be sure, the products tend to be simple, and this fact in isolation would suggest that the costs of inspection to buyer and to seller would be the same. Such reasoning has been used to explain the rule of *caveat emptor* in nineteenth-century Anglo-American common law, a rule now giving way to *caveat venditor,* presumably under pressure of growing complexity of products and hence increasing costs of inspection to buyers relative to sellers. An important difference between nineteenth-century markets and primitive markets, however, is the infrequency of trading in the latter. Because exchange with strangers is exceptional, individuals may not develop the skills of the experienced and knowledgeable consumer. In these circumstances the relative costs of inspection to the buyer compared to the seller may be high despite the simplicity of the product. In addition, the seller is the superior insurer of a product defect because he can spread its costs over his entire output. Although this argument is also made in modern discussions of the relative merits of *caveat venditor* and *caveat emptor,* it is superficial in the modern context because the buyer has a variety of insurance options open to him which may be as good as or better than seller self-insurance or seller market insurance. The insurance options of the primitive consumer are more limited.

4. *Family Law.* The law relating to marriage and divorce, obligations within the family, and inheritance is, judging by the number and detail of the rules,[115] the most important branch of primitive law. This is not surprising. The rules governing relations within the household correspond in function and importance to the law of corporations and of agency in modern

[114] For example, if I agree to sell you widgets for $2 apiece, I make delivery as agreed, and you then refuse to pay me because immediately after delivery the price of widgets falls to $1, a purely restitutionary remedy (namely, I get my widgets back) would not carry out the risk-shifting function of the contract.

[115] For a sense of the complexity of primitive family law see N. J. van Warmelo, Venda Law (4 vols., 1948-1949).

societies; and since women are the principal goods exchanged in most primitive societies the rules governing marriage and divorce overshadow the contract law of these societies. I will discuss four general issues in primitive family law: (1) the level of detail in that law, (2) brideprice, (3) the liberality of primitive divorce law, and (4) exogamy.[116]

(1) One could imagine a system of primitive family law that consisted of a few fundamental principles (the right of kin to payment for giving a girl in marriage, the right to buy more than one wife, and so forth) but left the details to negotiation among the affected parties. That is not the typical pattern in primitive society. Commonly a vast number of family transactions are regulated by custom in minute detail, often including prices, and the scope for individual variation whether by testamentary will or by agreement is quite limited and sometimes nonexistent. Among the reasons suggested earlier for the characteristic exactness of primitive law the one that seems most important in the family-law context is the high costs of voluntary transactions where a large number of parties—often all of the members of two kinship groups—are involved. For example, since brideprice is the property of the bride's kinship group, if the price and its allocation among the kin were not specified by custom but were left to negotiations within the kin group the transaction with the bridegroom would be extremely costly. Protracted negotiations are in fact reported where the brideprice and its allocation are not fixed by custom.[117] Primitive family law often seeks to avoid these costs by specifying not only the brideprice but how it is to be split up among the bride's kin. My analysis predicts that, other things being equal, the level and allocation of brideprice among the bride's kin are more likely to be fixed by custom, rather than left to negotiation, the larger the average size of the kinship group that is entitled to share in the brideprice.[118]

The relationship between the communalizing of property rights and the fixing of price or shares by custom is a general one. For example, where hunting is done in groups, or (an even closer parallel to the brideprice case) where the insurance principles of the society require that the kill be shared among the kin group or in some cases the entire band or village, primitive law often prescribes the exact division, thus avoiding a multi-party negotiation.[119] It would also be avoided if each kin group or village had a chief who

[116] Polygamy and inheritance were discussed earlier. See pp. 21, 33-34 *supra*.

[117] See Mair, *supra* note 58, at 57.

[118] For some evidence bearing on this point compare Radcliffe-Brown, *supra* note 30, at 17 (large kin group and fixed compensation and shares), with Max Gluckman, Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal, in *id.* at 166, 194 (flexible brideprice and small number of involved kin), and Nadel, *supra* note 34, at 341-42. Cf. Wagner, *supra* note 75, at 222-23 (optimal clan size).

[119] See Barton, *supra* note 41, at 85-86; Forde & Douglas, *supra* note 51, at 19.

negotiated on behalf of the group and distributed the proceeds among the members. Such figures do emerge in primitive societies, but when this happens it may mean that the society is on its way to becoming a state. Where leadership is weak even on the kinship-group and village levels, customary prices and shares have an important allocative role to play.

(2) More often than not in primitive society one finds (*a*) a positive brideprice (rather than no price, or a negative price—dowry) (*b*) paid to the bride's kin rather than to the bride herself. This pattern may be related to the (conjectured) three-stage historical evolution in methods of obtaining a wife from capture or stealing to payment to the modern system of promising to cherish and support.[120] The reason why in each stage the male takes the initiative appears to be genetic.[121] Because of the female's limited reproductive capacity, submission to sexual intercourse imposes a substantial opportunity cost on her from the standpoint of perpetuating her genes. Male fecundity is so great that the corresponding opportunity cost to the male is trivial. Hence the woman tries to conserve her reproductive capacity through careful screening of eligible mates but the man does not try to conserve his. Where wives are obtained by capture, the woman's effort to elude capture operates to screen out the less enterprising males (who may also be less likely to produce numerous and viable offspring). Brideprice is an alternative screening device, less costly in real resources than fighting yet effective from the female's standpoint if there is a good correlation between willingness and ability to pay for a wife on the one hand and the likelihood of producing and protecting her children on the other.[122] Since this paper is premised on the assumption that human beings were rational throughout prehistory, I attribute the transition from capture to barter to growing wealth rather than to growing rationality: bride purchase requires production sufficiently beyond subsistence needs to yield a stock of goods that can be exchanged for women.

Consistently with this analysis, we find that the man who is too poor to raise the brideprice can in some societies obtain a bride by going to work for her father for a period of time.[123] The man demonstrates by his habits of work his fitness to marry the girl. One can see how brideprice might be the cheaper screening method when there is greater affluence. A related solution is "matrilocal" marriage, where the husband remains with the wife's family

[120] The first stage is speculative; for some evidence regarding it see Mair, *supra* note 58, at 110-11. Several forms of nonpecuniary exchange generally precede brideprice, including sister exchange, working for one's prospective father-in-law, and going to live with the bride's kin. And some marriages involve payment of dowry (generally a preinheritance distribution to the bride by her kin) without brideprice. Some of these variants will be taken up later.

[121] See, e.g., Barash, *supra* note 50, at 147-50; Edward O. Wilson, On Human Nature 125-26 (1978).

[122] Cf. Barash, *supra* note 50, at 294.

[123] See, e.g., Driver, *supra* note 17, at 225.

without payment of brideprice.[124] The bride's family have less need to screen his fitness for the marriage in this case; they are present to help protect the offspring and thus do not leave the entire protective function to the husband and his kin, as in patrilocal marriage.

This analysis does not explain why brideprice is used as a screening device rather than, as today, dating or courtship. Where, however, as is generally the case in primitive societies, girls are married at puberty—at an age when they lack mature judgment—dating may not be an efficient method of choosing among suitors. Of course, the marriage could instead be arranged by the girl's parents, without brideprice. But it may not be easy for the parents to inform themselves about the qualities of a stranger, often from a different village,[125] save as his capacity to make a substantial payment may convey information about his qualities.

Another way of interpreting brideprice, one also based on the costs of information, is as a device for compensating the wife in advance for her services in the household. A wife in a primitive society may have limited ability to enforce fair compensation by her husband for her services, so she demands payment for them in advance, in the form of brideprice. However, this explanation is plausible only where the brideprice is paid to the bride. More commonly it is paid to her kin. One possible reason why this is so is that girls are the slaves of their kinsmen, in the sense that the latter can appropriate a part of the product of their services while they are unmarried and hence demand compensation for giving up their rights. Two explanations that do not involve "sex discrimination" are also possible. One is that payment of brideprice to the bride's kin is a security device.[126] The bride's kin have an incentive to encourage her satisfactory performance as a wife (as by refusing to harbor her should she run away from her husband), because if she misbehaves the husband may have a claim to the return of the brideprice. He has an incentive to treat her well because if he mistreats her she may have a right to leave him without her kin being obliged to return the brideprice. Another explanation is that the brideprice compensates the girl's kin either (1) for the costs of administering the screening process for her, since, as mentioned, she will normally be a young girl not obviously competent to compare the offers she receives, or (2) for their investment in training her to be a good wife.

The payment of dowry, or negative brideprice, remains unexplained by this analysis. Perhaps dowry is often simply a gift to the bride by her (well-to-do) parents. This is consistent with the fact that payment of dowry is

[124] See Schneider, *supra* note 1, at 145.

[125] See note 76 *supra*.

[126] See Becker, Marriage: Monogamy, Polygamy, and Assortative Mating, *supra* note 8, at 33.

associated with wealthier societies than payment of brideprice is.[127] But much more work is needed on this question.

Notice, finally, that there is a tension between wanting to have a detailed and exact family law and wanting to use brideprice as a device for screening suitors. If brideprice is fixed by custom, the costs of the multi-party negotiation between the suitor and the girl's kin group are reduced but the use of brideprice as an allocative device is weakened because direct bidding of the suitors against one another is prevented.

(3) Primitive law is on the whole more liberal toward divorce by either husband or wife than Western law was until very recently,[128] and divorce is common in many primitive societies.[129] The liberality of primitive divorce law may reflect the fact that the cost of divorce to the children is less where, as in primitive society, there are alternative child-rearing institutions to the nuclear family. The children of primitive people grow up amidst numerous kin who have an interest (based on having common genes) in protecting the children to whom they are related. This ready-made "day-care center" reduces the importance of having both parents attend to the raising of the child.[130]

The frequency of divorce in primitive society may also reflect the inferiority of brideprice as a sorting device relative to courtship of a mature woman who makes her own choice of husband.[131] The costs of information may be so high in primitive society that there is no good way of sorting the females to the males, so that matching is poor and marital instability high. Alternatively, because the parents spend less time with their children (since other kin share in the rearing of the children) there is less demand for a sorting device that will mate people with similar genetic endowments (positive assortative mating). One value of positive assortative mating is in reducing the variance of traits between parent and child, thereby promoting a harmonious household.[132] If such harmony is relatively unimportant in primitive society, so will be a sorting device designed to produce it, and a crude and cheap sorting device such as brideprice may be an efficient substitute.[133]

[127] See Pryor, *supra* note 3, at 357, 364-66.

[128] See Diamond, *supra* note 14, at 183, 249; Mair, *supra* note 58, at ch. 11. It must be remembered that until well into the nineteenth century divorce was possible in England only by act of Parliament. In Roman Catholic countries divorce on any ground was traditionally impossible though annulment was sometimes available as a substitute.

[129] See, e.g., *id.* at 189; Pryor, *supra* note 3, at 430.

[130] See Barash, *supra* note 50, at 295, 308.

[131] Another factor is that since women in primitive societies usually do some work outside the home (especially agricultural work), they are in a better position to fend for themselves than many women in modern societies.

[132] See Becker, *supra* note 5, 225-26.

[133] Brideprice is not cheap to the groom's kinship group, of course, but it is cheap to society as

Furthermore, positive assortative mating fosters inequality between families,[134] which could undermine the primitive social equilibrium. Hence the fact that brideprice may not be a very efficient method of positive assortative mating may be, not a shortcoming, but an advantage.[135]

Another possible factor in the relative instability of primitive marriage is that the insurance function of marriage is less important than at later stages of social development. This insurance function arises from the fact that the correlation of spouses' health and other welfare factors is less than one, so given a mutual obligation of support and assistance, marriage serves as a form of health, hunger, and even life insurance (since if one spouse dies the other will take care of the children). The network of primitive kinship obligations makes this particular form of insurance less important, and hence marital dissolution less costly, than at a later stage of social development when kinship obligations have receded but market and social insurance is not yet common. In principle, the insurance function of marriage is compatible with consensual (though not with unilateral) divorce, because a spouse will agree to a divorce only if he or she is fully compensated for any forgone benefits, including insurance, of the marriage. However, if we assume that at this intermediate stage of social development the costs of monitoring the voluntariness of a woman's agreeing to a divorce are great, we can see why requiring grounds for divorce, or even forbidding divorce altogether, might be a rational social measure. Moreover, stringent divorce laws reduce marital instability, and hence increase the insurance function of marriage in another way. They increase the optimal level of investment in screening prospective marriage partners for compatibility, since the costs of incompatibility are greater than when divorce is easily available.

(4) Exogamy—requiring a man to marry outside his group, normally his kinship group—is practised in most primitive societies. Unlike the incest taboo, exogamy appears to be cultural rather than genetic. This is shown by the facts that (1) the rules of exogamy vary greatly across cultures—and some cultures encourage endogamy, whereas none to speak of encourage incest; (2) often the rules prohibit marriage with relatives who are quite remote in a genetic sense and sometimes with nonrelatives (namely, adopted members of

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a whole because it is simply a transfer payment between the two kinship groups—the loss to one is the gain to the other. Notice that brideprice, where it takes the form of cattle or some other edible food product, serves the incidental purpose of inducing the accumulation of such products, which in turn provides an important form of hunger insurance. See Dupire, *supra* note 51, at 338-39, 359 (cattle "hoarding" as insurance).

[134] See Becker, *supra* note 5, at 241.

[135] As a detail, there is no reason to expect brideprice to be the sole sorting device used in primitive marriage. A mixture of brideprice and courtship might be optimal, depending on the shape of the function that relates the costs of obtaining information through courtship to its benefits at various levels of inputs of time and other resources into courtship.

the kinship group), while some incestuous unions (for example, between a man and his sister's daughter) may not be forbidden by the rules of exogamy although contrary to the tribe's incest taboo; (3) the incest taboo prohibits sexual intercourse within or outside marriage, while exogamy is a limitation on marriage rather than on intercourse as such.

A cultural explanation of exogamy thus seems indicated. One explanation is that exogamy serves an insurance function in those cases, which are common, where kinship obligations cross the boundary between the intermarrying kinship groups. Thus, in a patrilineal kinship system, a man is not a member of his mother's kinship group but he may still have a claim for assistance from her relatives.[136] Exogamy thus broadens the insurance pool. This effect is particularly important where, as is again common, each kinship group resides in a compact area, so that exogamy enables geographical diversification of risk.[137] Exogamy also facilitates trade and alliances by creating personal relationships between families and villages. Finally, it may reduce the ferocity of retaliation for wrongs done by a member of one kinship group against a member of another.[138]

B. *The System of Strict Liability in Primitive Law*

1. *Tort Law.* The tort law of advanced societies embraces a variety of accidental and intentional injuries—killing, wounding, taking property, slandering, and so on. Generally, for liability to be imposed the injury must have been inflicted intentionally or negligently; if the accident could not have been avoided by the exercise of reasonable care there is no liability. The intentional injurer may be guilty of a crime as well as of a tort. Primitive law deals with this class of harms in a broadly uniform way that is quite unlike the approach of the advanced societies. It may be summarized in the following propositions:[139]

(1) *Virtually the entire burden of deterrence is placed on the tort (that is, private) law.* There is no criminal law to punish acts such as murder or

[136] See, e.g., Fox, *supra* note 30, at 132-33 ("complementary filiation"); Forde, *supra* note 62, at 329.

[137] See note 42 *supra* and accompanying text.

[138] This point is explored in Posner, Retribution and Related Concepts of Punishment, *supra* note 11, at 83.

[139] For sources, besides those listed in note 94 *supra*, see L. T. Hobhouse, Development of Justice, in 2 Evolution of Law 128 (Albert Kocourek & John W. Wigmore eds. 1915); Richard R. Cherry, Primitive Criminal Law, in *id.* at 122; Kennett, *supra* note 109, at ch. 6; T. P. Ellis, Welsh Tribal Law and Custom in the Middle Ages (1926); Friedman, *supra* note 10; 1 Bloch, *supra* note 55, at 123-30; The Lombard Laws 7-11 (Katherine Fischer Drew trans. 1973). Of course, not every primitive society has all of the features in my sketch of the system of strict liability in primitive law.

theft,[140] because there is no state. Criminal law as we know it is a branch of public law.

(2) *The remedy for a wrong evolves from retaliation to compensation.* The earliest remedy for tort—retaliation, often leading to a feud—yields in time to a system of compensation ("bloodwealth," "composition," "wergelds") paid to the victim or his kin by the injurer or his kin. Acceptance of compensation is at first optional and the right to refuse it and instead to retaliate against the injurer is recognized. But eventually it becomes customary to accept compensation and improper to retaliate. Compensation is a cheaper remedy from the standpoint of society as a whole than retaliation, because it involves simply a transfer payment rather than the destruction of a person or his property. As before, I attribute the transition from retaliation to compensation not to growing rationality, diminishing blood-thirstiness, or other factors that assume fundamental differences in intelligence or tastes between primitive and modern man, but simply to growing wealth. A system of compensation will not work unless injurers and their kin have a sufficient stock of goods in excess of their subsistence needs to be able to pay compensation for the injuries they inflict on others.[141]

An intermediate stage between the feud and compensation is the duel, a means of redress that economizes on the expenditure of resources on fighting.[142] The duel is to the feud in the liability law of primitive societies what matrilocal marriage is to marriage by capture in their family law.

(3) *Responsibility is collective.* If one person kills another, in the retaliation stage of social order the victim's kinsmen have a duty to him which they can discharge by killing either the killer or one of *his* kinsmen. In the compensation stage the killer's kinsmen must come up with the required compensation if the killer himself cannot or will not do so. If neither the killer nor his kinsmen pay the required compensation, the killer's kinsmen then have a duty to retaliate against the killer—or his kinsmen—to punish them for their refusal to compensate.

The importance of the kin group in the enforcement of primitive tort law derives, as suggested earlier, from the absence of effective government. Where threat of retaliation is the only deterrent to misconduct, it is important that the threat be credible and often it would not be if there were only one potential retaliator. Even after compensation is substituted for retaliation there must still be a credible threat of retaliation in the background to coerce payment of the compensation. The need to maintain a credible re-

[140] But see pp. 51-52 *infra*.

[141] Thus, in some societies an injurer who cannot afford the wergeld is allowed to give a child instead. See Diamond, *supra* note 14, at 265. The question of the deterrent adequacy of a purely monetary sanction is addressed below.

[142] See Redfield, *supra* note 103, at 9.

taliatory capability is another reason, besides the need for a risk pool discussed in Part I, why the (recognized) kin group is larger in primitive than in modern societies.

The principle of collective responsibility—so abhorrent to modern sensibilities—may be efficient in the conditions of primitive society. The fact that any of a killer's kinsmen is fair game to the victim's kinsmen avenging his death, or, in the later stage of development, that the killer's kinsmen are collectively liable to the victim's kinsmen should the killer fail to pay the compensation that is due from him, gives the killer's (or potential killer's) kinsmen an incentive to control his conduct. They may decide to kill him themselves to avert the danger to them. More generally, they have an interest in weeding out the potential killers in their midst in order to avoid the costs in retaliation or compensation should they be harboring a killer.[143] Thus the fact that the killer may not be the initial target of retaliation, rather than reducing the probability that the sanction will ultimately come to rest on him, increases it by giving his kinsmen an incentive to "turn him in."[144] Collective responsibility is another ingenious device, like denying people privacy, by which a primitive society creates substitutes for the public investigatory machinery that it lacks.[145]

(4) *The relevant collectivity is the kin group.* The preceding discussion simply assumed that the collective rights and duties in the primitive tort system should be kinship rights and duties. This assumption has now to be examined. Why do we not find instead of kinship groups voluntary groups—the protective associations discussed by Nozick?[146] First, the transaction costs of organizing a large group of people for common ends are presumably lower where the members are (*a*) relatively homogeneous and (*b*) already bound together in a system of reciprocal rights and duties by virtue of the insurance function of the kinship group; self-defense becomes just another one of these rights and duties. Second, use of kinship as the organizing principle limits the size of the self-defense group. A purely voluntary system of protective associations would be unstable because of the great advantages that would accrue to any association that, by overcoming the

[143] See, e.g., Barton, *supra* note 41, at 244; Diamond, *supra* note 14, at 264-65; Sally F. Moore, Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-Help, and Collective Responsibility, in The Allocation of Responsibility 51, 88-93 (Max Gluckman ed. 1972); Reid, *supra* note 94, at 83-84; Wagner, *supra* note 75, at 218-19.

[144] There are analogies in modern law. For example, under the doctrine of *respondeat superior,* an employer is liable for the torts committed by his employees in the furtherance of their employment. The economic explanation of this liability is that it will give the employer an incentive to monitor the employees' behavior carefully. See Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 42-43 (1972).

[145] Cf. J. C. Vergouwen, The Social Organization and Customary Law of the Toba-Batak of Northern Sumatra 365 (1964).

[146] See Robert Nozick, Anarchy, State, and Utopia 118-19 (1974).

problem of internal coordination and control, grew to where it overshadowed any other association. Such an association would become the state. This is a reason to expect self-defense to be a kinship obligation in a society that has managed to survive without effective government. Third, when an individual is injured or killed, all of the members of the kinship group within which a duty to share is recognized are injured, since they have a claim on his income which has now been reduced. They are therefore the proper parties plaintiff.

What form of kinship is optimal for law enforcement? Compare a unilineal kinship system, such as the patrilineal system, with an ambilineal or cognatic system. In a patrilineal system a man's kinship group includes his relatives in the male line for some designated number of generations. This system automatically assigns every individual to a nonoverlapping kin group. A cognatic kinship group, where a man is the kin of his relatives in both the male and female line, does not yield a neat pattern of nonoverlapping kinship groups. This creates problems in using the kinship group as a basis for assigning collective responsibility for law enforcement.[147] If A kills B, a relative of A's wife, in a patrilineal system B's kinship group would not include A and would have a duty to take action against A or A's kin. But in a cognatic system A and B would be kinsmen and there would be no clear basis for action against A. This point may conceivably be relevant in explaining the rise of feudalism (and later the state) in medieval Europe, where the compensation system was based on cognatic kin groups.[148] In tribal Africa, in contrast, the compensation system was based on patrilineal kin groups and was more stable.

But as noted in Part I a patrilineal kinship group is not ideal from the insurance standpoint. There is likely to be a high covariance in the wealth of the members where, as is common, they live in the same village. Exogamy with complementary filiation, or some similar concept of obligation to relatives by marriage,[149] provides a solution. The insurance principle is broadened to embrace groups living in different locales and therefore having a lower covariance of wealth, but the kinship groups remain distinct for purposes of law enforcement.

(5) *The compensation due for killings and other injuries is prescribed in an exact schedule.* The customary law will specify, for example, that 40 head of cattle is the compensation required for killing a freeman, 20 for killing a slave, two for putting out a man's eye, and so forth.[150] This pattern is

[147] See Fox, *supra* note 30, at 47-49, 150.

[148] See 1 Bloch, *supra* note 55, at 137-38, 142.

[149] See text at notes 136-37 *supra*.

[150] See, e.g., Diamond, *supra* note 14, at 58-59, 65, 66, 269-70; Howell, *supra* note 94, at 70; Douglas, *supra* note 109, at 279-83.

different from that of modern tort law, where damages are assessed on an individual basis in every case. At the stage of social development where acceptance of compensation by the victim's kin is optional, it is easy to see why a fixed, customary level of compensation would be preferred to a costly, multi-party transaction involving the membership of both kin groups. Even later, when acceptance of compensation becomes compulsory, the information costs of an individualized determination of damage may make adherence to the fixed-compensation approach optimal for the primitive society.

Exclusive reliance on monetary penalties may seem questionable because many of the people in a primitive society must be too poor to pay a sum equal to the value of a life in such a society, even if that value is rather low because of short life expectancy or other factors. However, the principle of collective responsibility enables the society to set a level of compensation higher than the average individual can pay since his kinsmen are liable for the judgment debt.[151] Moreover, even if solvency limitations make it inevitable that monetary punishments will be less severe than the physical punishments inflicted in the retaliation stage of primitive tort law, it does not follow that the expected cost of punishment to offenders will be lower. The severity of punishment is less but the probability that it will be imposed is greater, for compensation gives the kinsmen of the slain man (or the victim himself if he survives) an incentive besides revenge for seeking to punish the injurer.

Thus far I have assumed that the fine is adequate if it is equal to the cost of the violation. However, if the probability of punishment is less than one, the fine must be raised so that the expected cost of punishment will remain equal to the cost of the violation.[152] And since primitive societies have no police or other public investigatory agencies and since the costs of information in primitive society are generally high anyway, we might expect that the probability of punishment would be very low and hence the optimal "blood-wealth" very high. Yet, from what (little) evidence we have, penalties in primitive societies are not on average higher than in modern societies,[153]

[151] There is once again an analogy here to the modern tort principle of *respondeat superior*. See Posner, *supra* note 144.

[152] See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1976).

[153] Especially where compensation has replaced retaliation as the characteristic sanction. For some evidence see Friedman, *supra* note 10, at App. I. An unresolved question in my mind is the economic interpretation of those primitive liability systems, which are fairly common, in which the required compensation is less where the injury is accidental than where it is intentional. See, e.g., Howell, *supra* note 94, at 42. The most straightforward interpretation would be that the required compensation is raised in the intentional case in order to discourage people from substituting coercion for voluntary transactions. See Posner, *supra* note 5, at 120-22, 165-66. But this would imply that the compensation required in the unintentional case would be approximately equal to the value of the life taken, and in the intentional case higher. Some

probabilities of punishment are high,[154] and crime rates—where comparison is possible—seem comparable to those found in advanced societies.[155] A number of factors appear to compensate for the lack of a police force and related institutions of public law enforcement:

(*i*) The lack of privacy makes it difficult to conceal wrongdoing.

(*ii*) The principle of collective responsibility creates incentives for the kin group to identify and eliminate members of the group showing dangerous criminal proclivities.

(*iii*) Efforts to conceal a crime are often punished separately.[156]

(*iv*) Religious belief often discourages concealment of crime. For example, it may be considered unlucky to eat with either the kinsman of a man you have slain or the killer of one of your kinsmen. If you kill a stranger you will not know who his kin are. The only way to be sure of never eating with one of them is by announcing your deed so that the victim's kinsmen—who of course know who they are—will avoid eating with you.[157] Devices for inducing the killer to reveal his identity are especially important because if the killer's identity is unknown there is no basis for bringing the collective responsibility of his kin group into play—the identity of the responsible kin group is also unknown.

(*v*) The widespread "social insurance" of primitive society reduces the gains from acquisitive crimes and so presumably their incidence. If I am free to take the food I need from my kinsmen and forbidden to "hoard" more than I need, there is no purpose in stealing food unless none of my kinsmen, or anyone I might beg from, has any food to spare. Theft seems in fact an unimportant crime in many primitive societies.[158]

The interrelationship between primitive tort law and the model of primitive society sketched in Part I deserves emphasis. The lack of privacy in primitive life helps keep probabilities of punishment high and so the required level of compensation down to a level where offenders can afford to

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evidence to the contrary is that the required compensation in cases of deliberate homicide (the price from which discounts for unintentional homicide would be made) is often set equal to the customary brideprice. See, e.g., Mair, *supra* note 58, at 54. However, in at least one society, damages are doubled in the case of an intentional homicide as a deliberately punitive device. See Wagner, *supra* note 75, at 216. See also C. R. Moss, Nabaloi Law and Ritual, 15 Am. Archaeology & Ethnography 207, 263-65 & n. 225 (1920).

[154] See Gulliver, *supra* note 94, at 127-34.

[155] See African Homicide and Suicide 237, 256 (Paul Bohannan ed. 1960).

[156] See Diamond, *supra* note 14, at 63-64, 76.

[157] See Barton, *supra* note 41, at 241; Gluckman, *supra* note 48, at 219. In another society, it is believed that a person who does not submit to a (public) ritual cleansing after killing someone will develop an itch which he will scratch until he dies. See Goldschmidt, *supra* note 48, at 97.

[158] See Diamond, *supra* note 14, at 222. Of course, this appearance may be an artifact of the communal nature of much of the property in primitive societies: the loss to any one co-owner is too slight to move him to vigorous efforts to apprehend and punish the thief.

pay. The solvency problem is also reduced by the system of kinship obligation, and the demand for acquisitive crime by the communalization of property rights within the kinship group.

The combination of high probabilities of punishment with only moderately severe penalties makes economic sense, as a combination of high probabilities of punishment with very severe penalties would not. But whether it is the *optimal* combination is a different question. Economic analysis suggests that a combination of low probabilities with very severe penalties will frequently be optimal because, assuming the costs of collecting fines or damages are low, a reduction in the probability of punishment, which enables a saving of resources devoted to investigation and prosecution, can be offset at low cost by increasing the severity of the punishment for those (few) offenders who are caught.[159] However, solvency problems to one side, the low probability-high severity approach would probably not be optimal in the conditions of primitive society. Such an approach would increase the variance of punishment compared to systems which combined high probabilities of punishment with low severity. Variance or risk is a cost to people who are risk averse, and the prevalence of insurance arrangements in primitive societies suggests that primitive people, like modern people, are indeed risk averse. The risk factor in a high severity-low probability punishment scheme would be especially pronounced in a primitive society because, as we are about to see, primitive tort law rests on the principle of strict liability. This means that at least some of the people who are punished for torts bear a risk of punishment which they cannot eliminate simply by behaving carefully.

(6) *Liability is strict.* The term "strict liability" denotes attaching liability to the mere act of injuring another regardless of the state of mind of the injurer or the care he took to try to avoid the injury. Strict liability is the characteristic response of primitive society to acts causing death or injury. If a man kills another, even in an accident that could not have been prevented by the exercise of due care, he must pay compensation to the kin of the victim. In some primitive legal systems the specified compensation is lower if the killing or injuring is accidental, in others not, but invariably some compensation must be paid whether or not the injurer was "at fault" in the sense of modern tort law. One common explanation for the prevalence of strict liability in primitive law is the existence of an "irrational belief in the ubiquity of guilt, which presumed a will behind all causation."[160] The economist, however, asks whether strict liability might not have been the most efficient system in the conditions of primitive society.

[159] See Becker, *supra* note 152.

[160] Izhak Englard, The System Builders: A Critical Appraisal of Modern American Tort Theory, 9 J. Legal Stud. 27, 28 (1980).

The economic literature identifies four factors bearing on the choice between a strict and a fault approach to liability questions that might be important here:[161]

(*i*) *The costs of information.* The determination of fault is more costly—because it involves the consideration of more factors—than the determination simply whether the defendant injured the plaintiff.

(*ii*) *The ratio of avoidable to unavoidable injuries.*[162] If this ratio is very low, a rule of strict liability will be unattractive because it will require a lot of (costly) legal activity having no allocative effect. The threat of a judgment awarding damages to the victim of an unavoidable injury will not affect the conduct of potential injurers, because, by definition, the judgment cost is lower than the cost of accident avoidance in such a case.

(*iii*) *The cost of accident avoidance to the victim.* If we are confident that the injury could not have been avoided by the victim at lower cost than the injurer, then we need not worry that strict liability will create the wrong incentives or that it will have to be supplemented by a defense of contributory negligence to take care of cases where the victim is the cheaper accident avoider.

(*iv*) *The relative cost of insurance to injurer and injured.* Strict liability makes the injurer the insurer of the injured. This may or may not be a cheaper method of insurance than a scheme of liability under which the injured is induced to obtain insurance because he can claim against the injurer only if the latter is at fault.

All four factors suggest that strict liability is probably more efficient than fault liability in the conditions found in primitive society.

(*i*) The costs of adjudicating fault issues would be high in a society lacking both a professional judiciary and a clear idea of how the natural world works (though a factor pushing in the opposite direction is the simpler technologies in use in primitive societies). Lacking a clear understanding of natural phenomena, a primitive arbitrator would often have difficulty distinguishing intentional from accidental (let alone negligent from unavoidable) conduct.[163] Suppose A and B are members of the same hunting party. They shoot their arrows at a wild boar but A's arrow is deflected off the boar's back and hits B. It looks like an accident—but A may have procured this "accidental" result by casting a spell. The primitive arbitrator cannot reject such possibilities out of hand.

[161] See Posner, *supra* note 5, at 137-42, 441-42.

[162] By an "avoidable" injury I mean one that could have been prevented at lower cost than the expected cost of the injury. Either an intentionally or a negligently inflicted injury would be avoidable in this sense.

[163] See, e.g., J. Walker Jones, The Law and Legal Theory of the Greeks 261 (1956).

To be sure, uncertainty may bedevil the ascription of causal responsibility as well. This may explain the curious rule of archaic law that makes the punishment more severe if the violator is caught in the act than if he is apprehended later on.[164] The rule is usually explained in psychological terms: the victim or his relatives feel less vengeful after some time has elapsed from the commission of the offense.[165] However, an economic explanation is possible. The probability that the wrong man has been apprehended is greater where apprehension occurs as the result of an after-the-fact investigation, because of the difficulty in primitive society of determining causal relationships when the act and the injury are not observed at the same time. The reduction in the severity of the penalty when the offender is not caught in the act is thus a method of reducing the punishment costs borne by innocent people.

The widespread use of irrebuttable factual presumptions is further evidence that the costs of factual determination in primitive society are high. For example, in some tribes the fact that sexual intercourse occurred is conclusively presumed from proof that a man and woman were alone together for however brief a time.[166] In another tribe, if extramarital intercourse occurs in an inhabited area and the woman is not heard to scream, her rape complaint is conclusively presumed to be unfounded.[167] The reliance of primitive law on strict liability may likewise have an information-cost rationale.

This analysis may help to explain why, in some societies, if the person killed is a member of the killer's own kinship group there is no liability for the killing.[168] A rule of no liability resembles one of strict liability in dispensing with the need to determine nice questions of motive, duty, and care. There is a presumption that the intrafamilial killing is justifiable—for example, to weed out a killer in the family's midst who might subject the family to retaliation or liability—and a costly factual determination is avoided by making this presumption irrebuttable. And in an intrafamilial killing or wounding case liability is unnecessary for insurance. The victim and his family already have a claim for assistance on their kinsmen by virtue of the kin relation.

(*ii*) The second factor bearing on the choice between strict and fault liability, the ratio of avoidable to unavoidable injuries, also points toward strict

[164] See Diamond, *supra* note 14, at 78; Maine, *supra* note 22, at 366 (Beacon ed. 1970).

[165] See *id.* at 367.

[166] See Gluckman, *supra* note 48, at 223.

[167] See A. L. Epstein, Injury and Liability in African Customary Law in Zambia, in Ideas and Procedures in African Customary Law 292, 300-01 (Max Gluckman ed. 1969).

[168] See, e.g., Goldschmidt, *supra* note 48, at 91, 98, 107-08. This result may also follow simply from the kinship basis of primitive law enforcement.

liability in the primitive setting. Judging from the reports of anthropologists, most serious injuries in primitive society are avoidable in the economic sense—most in fact are deliberately inflicted. In these circumstances a rule of strict liability will rarely shift losses without an allocative gain, for rarely will the injurer's costs of avoidance exceed the expected injury costs.

(*iii*) The large proportion of deliberate injuries also suggests that avoidance costs are higher to victims than to injurers (though no doubt many of the fights that lead to injuries among primitive people involve an element of avoidable provocation). In these circumstances it is efficient to place all the costs on the injurer and strict liability does this.

(*iv*) The final factor, insurance, exists in some tension with the last two. If *all* of the accidents subject to a rule of strict liability were culpable in the sense that they would also give rise to liability under a fault system, strict liability would provide no additional insurance. The case for strict liability would still be compelling: the costs involved in making a determination of fault would be completely wasted from a social standpoint since they would not serve to screen out a set of accidents where imposing liability on the injurer would serve no allocative purpose. Assuming that a small but significant fraction of accidents in primitive society are not due to fault, the system of strict liability does perform a modest insurance function beyond what a fault system would provide. Whether it is an *efficient* insurance mechanism depends on whether the injurer is a better insurer than the victim. Under either of two plausible conditions, the answer is probably yes. First, if injurers are on average wealthier than victims, injurer liability will make sense from an insurance standpoint (provided that utility functions are uncorrelated with wealth). Probably injurers are on average wealthier than victims—the man who is stronger, more active, who owns more dogs and cattle and tools, is more likely to be an injurer than a victim (we are speaking of purely accidental injuries here). Second, if compensation is less than completely adequate, injurer liability serves in effect to divide the loss between the injurer and victim rather than shift it entirely from the victim to the injurer.[169] For serious injuries, which are the relevant ones from the insurance standpoint, the evidence from our society is that damage awards undercompensate victims.[170] The same thing is probably true in primitive society: a man is not indifferent between losing his life and gaining 40 head of cattle for his kin group.

2. *Criminal Law.* I said earlier that primitive peoples have no criminal

[169] One tribe splits the cost of an accident 50-50 between injurer and victim. See Riasanovsky, *supra* note 44, at 146-47.

[170] See U.S. Dep't of Transportation, Motor Vehicle Crash Losses and Their Compensation in the United States 90 (1971); Alfred F. Conard, *et al.*, Automobile Accident Costs and Payments 178-79 (1964).

law because there is no state. But this is an overstatement in two respects. First, even societies that do not have any governmental organs will often regard a few acts, principally witchcraft and incest, as offenses against the community to be punished even if the victim or his kin does not take action against the offender.[171] The reason for a public sanction seems clear in the case of incest, a "victimless" crime which is harmful to the community. Perhaps witchcraft is deemed a practice whose potential magnitude and difficulty of detection justify a sanction greater than the compensation remedy used in (ordinary) killing and wounding cases.

Second, with the rise of the state, the criminal law in the strict sense just referred to—that is, a system of punishments separate from the compensation system—tends to expand to embrace murder, assault, theft, and the other acts that we conventionally deem criminal.[172] Why does the sovereign consider acts of violence directed against private citizens an offense against him? A possible reason is that the sovereign in effect sells protection to the citizen in exchange for the taxes he collects from them, but this overlooks the fact that the citizens are already protected—not badly on the evidence of prepolitical societies—by the compensation system. A reason more solidly grounded in economic theory is that a killing or wounding imposes a cost on the sovereign by reducing the tax revenues he can collect from the victim. The sovereign "owns" an interest in his subjects which is impaired by acts that reduce their wealth. This economic interest is not taken into account by the purely private compensation system so the sovereign establishes a system of criminal punishment as a method of internalizing this externality.

Conclusion

This paper has developed an economic theory of primitive society and applied it to a number of the social, including legal, institutions commonly found in such societies. I have argued that these institutions are best understood as adaptations to the pervasive uncertainty and high information costs of primitive life, which create a demand for insurance that cannot be supplied through formal insurance markets and which in other ways directly and indirectly shape the values and institutions of primitive society. In focusing on social characteristics common to many societies, I have downplayed the many significant differences among primitive societies. A task for future research is to study whether these differences, too, are explicable in economic terms; some specific hypotheses (and in a few cases some confirming evidence) have been suggested in this paper. Another challenge

[171] See, e.g., Diamond, *supra* note 14, at 260.

[172] See *id.* at 74-75, 85, 92, 273, 293.

for future research is to integrate into the analysis important primitive social institutions such as religion, war,[173] and slavery ignored in my analysis.

Should further study confirm the suggestion in this paper that the legal and other social institutions of primitive society are economically rational,[174] the question would arise what mechanism drives primitive society to that surprising result. The same question has been discussed with regard to the finding that the Anglo-American judge-made law evinces an implicit concern with promoting efficiency, and no very satisfactory answer has thus far been offered.[175] However, it is actually easier to explain why efficiency would have great social survival value in the primitive world than to explain this for our world. The efficient society is wealthier than the inefficient—that is what efficiency means—and a wealthier society will support a larger population. This effect of greater wealth can be decisive in the competition among primitive societies, where the methods of warfare are simple and numbers of people count for much more than in modern warfare. Archaic societies sufficiently durable to have left substantial literary or archaeological remains and primitive societies sufficiently durable to have survived into the nineteenth century (when serious anthropological study began) are likely, therefore, to be societies whose customs are efficient.

An additional factor is that a primitive society is one that by definition has had a long time to adapt to its environment. The interval within which adaptation occurs is a function of the rate of change of the environment to which the society is adapting. If that rate of change is very slow, the society has plenty of time to evolve efficient adaptations to the environment.

Clearly, however, the primitive social equilibrium is less efficient, at least in the long run, than that of advanced societies: consider the very small proportion of the world's population that lives in primitive societies today. This situation is due in some part to coercion, rather than peaceful competition, from the advanced societies (dramatically so in the case of the North American Indians, for example), but in greater part to the adaptive responses of primitive society to its economic environment. These responses include practices, such as denying people privacy and preventing them from amassing wealth, which are inimical to economic progress and in turn to population growth. This is a point to give the romantic anarchist pause.

[173] Elsewhere I have stressed the importance of external security in explaining the rise of the state. See The Homeric Version of the Minimal State, *supra* note 11.

[174] The suggestion will not surprise all anthropologists. See, e.g., Nash, *supra* note 3, at 49. I emphasize once again that, in suggesting that primitive people are economically rational, I am not making any statement about their conscious states. Rational behavior to an economist is a matter of consequences rather than intentions, and in that respect resembles the concept of functionality in traditional anthropology. See, e.g., Radcliffe-Brown, *supra* note 30, at 62, 83; A. R. Radcliffe-Brown, Structure and Function in Primitive Society, ch. IX (1965).

[175] See discussion and references in Landes & Posner, Adjudication as a Private Good, *supra* note 10, at 259-84.