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A Theory of Primitive Society with Special Reference to Law

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CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE

WORKING PAPER SERIES

A THEORY OF PRIMITIVE SOCIETY,
WITH SPECIAL REFERENCE TO LAW

Richard A. Posner*

Working Paper No. 007

CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE

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A THEORY OF PRIMITIVE SOCIETY, WITH SPECIAL REFERENCE TO LAW

Richard A. Posner*

Introduction

This paper uses economic theory in an attempt to explain 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" societies. 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 (if any) 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 taken up later.

* Lee and Brena Freeman Professor of Law, University of Chicago. I am indebted to Gary Becker both for comments on a previous draft and for discussions of the subject matter of this paper, and to Robert Bourgeois, Ronald Coase, Arthur DeVany, Anthony Kronman, Arthur Leff, Frederic Pryor, and George Stigler for comments.

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 The writings of economic historians on archaic 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

2. continued

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*, 62 *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. And for a recent review of the economic anthropology literature see George Dalton, *Economic Anthropology*, 20 *Am. Behavioral Scientist* 635 (1977). An outstanding 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.

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 economists' 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. . . ." Knight, *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).

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 an economic standpoint;⁸ Harold Demsetz 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 I have (independently of Geertz) discussed several nonlegal 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

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* (mimeo., Jan. 1979).

8. See Gary S. Becker, *supra* note 5, at 238-41; Gary S. Becker, *Marriage: Monogamy, Polygamy, and Assortative Mating* (mimeo, Oct. 1978); Amyra Grossbard, *Toward a Marriage Between Economics and Anthropology and a General Theory of Marriage*, 68 *Am. Econ. Rev. (Papers & Proceedings)* 33 (1978).

9. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev. (Papers & Proceedings)* 347, 351-53 (1967); David E. Ault & Gilbert L. Rutman, *The Development of Individual Rights to Property in Tribal Africa* (forthcoming in *Journal of Law & Economics*); Vernon L. Smith, *The Primitive Hunter Culture, Pleistocene Extinction, and the Rise of Agriculture*, 83 *J. Pol. Econ.* 727 (1975).

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 Studies* 83, 106-08 (1978); William M. Landes & Richard A. Posner, *Adjudication as a Private Good* (forthcoming in *Journal of Legal Studies*); David Friedman, *Private Creation and Enforcement of Law--A Historical Case* (forthcoming in *Journal of Legal Studies*).

11. See Richard A. Posner, *Homer's Version of the Minimal State* (forthcoming in *Ethics*); *The Right of Privacy*, 12 *Ga. L. Rev.* 393, 402 (1978); *Privacy, Secrecy, and Reputation* (forthcoming in *Buffalo Law Review*).

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 appears to be virtually universal among primitive peoples), have no system of writing and consequently no records,¹³ and lack modern communications technology—with all that these lacks imply—suggests that the costs of obtaining information are probably higher in primitive than in advanced societies in the sense 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 and more interestingly 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 witchcraft cannot be rejected out of hand), or the marginal product of a farm laborer's work. There is, in short, much greater uncertainty in primitive than in advanced societies.

An apparent exception to this generalization may, at a deeper level, be consistent with it. I refer to the fact that the inhabitants of primitive societies have fuller knowledge than modern people about what other people in the society are doing. No matter what the ratio of territory to inhabitants

13. 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).

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); presumably they are even higher in primitive societies.¹⁶

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.¹⁷ Among preliterate peoples government is generally

16. To be sure, one often finds property rights to a song, a spell, a crest, or a name (see e.g., Diamond, *supra* note 13, at 188; Harold E. Driver, *Indians of North America* 269, 285 (2d rev. ed. 1969); Herskovits, *supra* note 3, at 390-91)—but, so far as I know, never to a productive idea or invention.

17. The link between literacy and government is occasionally noted. See Diamond, *supra* note 13, 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 Block, *Astrology and Writing in Madagascar*, in *id.* at 277, 286.

these and other features, large and small, of social organization recur with great frequency (though not universally) in accounts of primitive and archaic societies.²¹ The existence of such uniformities suggests that a simple model of primitive society, one that abstracts from many of the particular features of specific societies, may nonetheless have some success in explaining the structure of primitive social institutions.

The 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, perhaps not critically. (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.) 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. For modeling purposes the difference between

21. 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 16, 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 Kinship Systems 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).

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 produced—are assumed to be zero, 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 above assumptions jointly imply the strong if somewhat mis-named "redistributive" ethic that has been noted in innumerable studies of primitive society.²³ We would expect insurance—specifically, against hunger—to be a very important product in such society. The conditions of production, in particular the difficulty of storing food, create considerable uncertainty with regard to the future adequacy of one's food supply and hence considerable variance in one's wealth.²⁴ In these circumstances a transaction whereby

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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.

23. Redistribution as used in economic and ethical discourse implies an effort, through the state, to bring about more 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 wealth beyond what the market would bring about 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.

24. 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 Tallensi of the Northern Territory of the Gold Coast*, in *African Political Systems*, supra note 19, at 239, 249.

In short, without assuming that primitive people are any more risk averse or less individualistic than modern people, it is nonetheless possible to 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 relative lack of alternative goods. However, we have yet to consider the institutional form in which the insurance will be provided. Assumption (1) 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 can be expected to gravely complicate the provision of any service on a formal market basis, lack of 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: there is no state to enforce the promise.²⁶ To be sure, even without formal

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Type of Society	Number of Societies	
	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.

26. 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.

The primitive concern with careful definition and determination of the kinship group is not based on some idle genealogical curiosity. The significance of the kinship group is 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. Primitive people have the same sorts of legal claims on the property of their kin, distant though they may be, as our minor children have on us. I attribute this to a lack of alternative insurance mechanisms in primitive society.

But the argument so far only establishes 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 provides a clue to the answer. Consider modern life insurance. If we assume asymmetrical information--specifically, that the individual knows his personal life expectancy better than the insurance company--there will be a tendency for the better 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.²⁸ 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.²⁹ 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

28. See George A. Akerloff, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 *Q. J. Econ.* 488 (1970).

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

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, 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.³²

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.³³ 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 scale³⁴) has been thought evidence of the

32. 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). And for an attempt at a formal analysis of the optimal size of the kinship sharing group see Appendix, pp. 79-85, *infra*.

33. Compare E. E. Evans-Pritchard, *supra* note 21, 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."

34. See Stuart Piddocke, *The Potlatch System of the Southern Kwakiutl: A New Perspective*, in LeClair & Schneider, *supra* note 1, at 283. See also text at note 73.

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 is also helpful in explaining why many (though by no means all) primitive societies do not allow interest to be charged on a loan. The typical "loan" in primitive society is the counterpart to the payment of an insurance claim in modern society: it is the insurer's fulfillment of his contractual undertaking. To allow interest would change the nature of the transaction. Of course, a lender may be reluctant to make the loan without interest; but custom may require him to make it.³⁸ The involuntary loan is just 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, the ordinary resistance that rich people would feel at being asked to make non-interest-bearing loans 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.³⁹

38. See R. F. Barton, *The Kalings* 132 (1949); Herskovits, *supra* note 3, at 373.

39. See, e.g., E. H. Winter, *Livestock Markets Among the Iraqw of Northern Tanganyika*, in *Markets in Africa*, *supra* note 21, 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.

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 suggest, rather, that the exchange of gifts in primitive society is not the sort of trade which arises in a more complex society out of the division of labor and resulting specialization in production. The purpose of gift exchange as discussed thus far 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, and frequently, 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:

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 of⁴⁴ one—is necessary if the recipient is to retain his self-respect.

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. Most transactions are mutually profitable or advantageous because they enable both parties to exploit the division of labor. Giving a gift

⁴⁴. Philip Grierson, *Commerce in the Dark Ages: A Critique of the Evidence*, in *Studies in Economic Anthropology* 74, 79 (George Dalton ed. 1971).

(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 in this sense is in fact quite limited 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.⁴⁷

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, non-interest-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. As he pointed out, consistently with the spirit of my model, 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.⁴⁸

⁴⁷. 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.

⁴⁸. 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; Paul Einzig, Primitive Money 338-400 (2d ed. 1966); Leonard Joy, One Economist's View of the Relationship Between Economics and

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 at least consistent with the view that this is an effect of the insurance arrangements of primitive society.⁵⁰ But equality of wealth should be viewed not only as a by-product of insurance (or of other aspects of primitive life or social institutions), but also as a precondition to the maintenance of a pregovernmental political equilibrium. A man who had a food surplus year after year--a wealthy man--might (especially given the limited variety of consumption goods) use that surplus to feed other men in exchange for their loyalty--in other words, to hire retainers. Initially his purpose might be to protect his wealth, but once his following had reached a point where it overawed the other individuals and families in the society, he might be tempted to use his power to redistribute their wealth to him--to become the state. Hence, when one observes 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 serve this incidental but important end by tending to dissipate surpluses.⁵¹

50. 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.

51. 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.

one man would have to be much wealthier than another to be willing and able to pay more for his second, third, or nth wife than a rival suitor seeking his first. The generally low incidence of polygyny even where it is freely permitted⁵⁴ thus indicates either that the inequality of wealth is not great (as appears to be true in most primitive societies) 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 common generally the bridegroom (or his kin) must pay a substantial brideprice to the bride's kin.⁵⁵ More important, polygyny actually has a tendency to reduce inequality by increasing the number of dependents (wives and children) who must be provided for when the husband dies.⁵⁶ Because his estate gets divided in more

54. See, e.g., A. S. Diamond, supra note 13, at 246 n.2.

55. 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, 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 13, at 57, 69. Diamond is here speaking of the "early codes," i.e., the laws of societies which have just become literate. Presumably these codes largely codify the preexisting body of oral law. For further discussion of primitive marriage customs see pp. 53-62 infra.

56. See M. Fortes, supra note 24, 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 Gusiland*, in *Markets in Africa*, supra note 3, at 520, 522-23; Frédéric 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.

Polygyny disperses political power in another way, by increasing the opportunity costs of retainers.⁶⁰ Wealth is thereby diverted into a politically harmless channel, women being worthless as fighters in primitive societies.⁶¹ (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.⁶²) 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 feared that if they did not use their wealth in that way, they would use it to feed the needy and thus undermine his position.⁶³

60. 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 102 *infra*.

61. 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 13, at 376. 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.

62. 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 Bohannon, *Some Principles of Exchange and Investment Among the Tiv*, in LeClair & Schneider, *supra* note 1, at 300): he is dissipating his capital.

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

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.⁶⁴ 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 response to the demand for insurance in primitive societies and the lack of the conventional modern mechanisms of supplying it. Another example of "functional superstition" is the belief of one tribe that misfortune will befall anyone who sells his goods on the way to the market.⁶⁵ This seems a silly belief—until it is remembered that the efficiency of a market 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.⁶⁶ These are methods of equalizing wealth in the next generation,⁶⁷ yielding benefits we have already discussed.⁶⁸

(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

⁶⁴. See, e.g., Driver, supra note 16, at 444.

⁶⁵. See Herskovits, supra note 3, at 205.

⁶⁶. See, e.g., Herskovits, supra note 3, at 491-92.

⁶⁷. See T. Scarlett Epstein, *Capitalism, Primitive and Modern* 31 (1968).

⁶⁸. Another example of the economic function of superstition is offered at p. ⁶⁹ infra. See also Smith, supra note 9, at 742.

abundance of other and cheaper substitutes in communication renders them less important than in primitive societies. Yet gift-giving remains prominent in visits between heads of state, for the lack of supra-national 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,⁷² it is probably motivated by the informational needs of the parties. (These betrothal gifts, it should be noted, are separate from the brideprice, which is not a gift but the purchase price.) Gifts are to be distinguished from trade in the ordinary sense of 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

⁷² See, e.g., Barton, *supra* note 38, at 40. The principle of exogamy (see pp. 61-62 *infra*), the size of the kinship group, and the likelihood that most of the people in the village are kin combine to create a situation in which a husband often must be sought in another village--which is likely to mean among strangers.

parties.⁷⁶ Customary prices do not change as quickly as the conditions of 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.⁷⁷ 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.⁷⁸ But to the extent that there is trade, it can be facilitated by customary prices, which reduce transaction costs by eliminating the need for a many-sided negotiation over price.⁷⁹

(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.⁸⁰ This "barter

⁷⁶. See examples in Herskovits, supra note 3, at 206-10; Sahlins, supra note 3, at 295, 299-300, 308-09, and Pospisil, supra note 21, 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.

⁷⁷. 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 38, at 107.

⁷⁸. See id. at 110-11; Maine, supra note 21, at 271 (Beacon ed. 1970); and Table 1, supra p. 26.

⁷⁹. For further analysis of the role of custom in reducing transaction costs see pp. 54-55 infra.

⁸⁰. 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 21, at 39-40 (1951 ed.); Goldschmidt, supra note 45, at 192-93. Nash, supra note 3, at 49, describes the use of an "idiom of fictive kinship" in market transactions.

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 societies⁸⁴ 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.⁸⁵

(6) The formality and decorum of primitive speech and manners have been documented and in other papers I have related these traits to the lack of privacy in primitive societies.⁸⁶ Briefly, the argument 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.

(7) Lack of privacy may also explain why primitive people are often more tolerant of certain forms of mendacity and (less consistently) of defamation than modern people.⁸⁷ 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 may know little about most of one's

⁸⁴. See, e.g., Gluckman, supra note 45, at 232; E. E. Evans-Pritchard, supra note 21, at 151; Mair, supra note 19, at 40. The locus classicus of touchiness in archaic society is Achilles' conduct in the Iliad.

⁸⁵. For some evidence see Robert A. Levine, supra note 51, 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 III.

⁸⁶. See privacy papers cited in note 11, supra.

⁸⁷. See Privacy, Secrecy, and Reputation, supra note 11.

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 nonobvious.

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 IIB). 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.⁹⁰ The alleged violator also has an incentive to submit to adjudication--or "arbitration" as we should probably call it in view of its

39. continued

supra note 27; 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, 169 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).

90. See, e.g., Maine, supra note 21, at 364 (Beacon ed. 1970).

rules of evidence designed to guide and control juries—among hearsay, circumstantial, direct, and other categories of evidence.⁹³ 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.⁹⁴

The remaining question is the sources of the norms applied in a primitive adjudication. Two of the common sources of legal norms, legislation and executive decree, are clearly 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. Apart from 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,⁹⁵ there is a problem of the arbitrator's incentive to issue opinions that stand as precedents. Even our society does not attempt to create property rights in rules or precedents and certainly primitive

93. 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 & Leo Kuper eds. 1965); Pospisil, *supra* note 89, at 236-38.

94. See pp. 72-74 *infra*.

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

some 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, however, the more quickly it is apt to become obsolete--the less adaptable it is, in other words, to changing circumstances.⁹⁷ We would therefore expect a system of exact rules to have some mechanism for changing the rules quickly. A system of customary law lacks such a mechanism, and would thus appear to be ill adapted to coping with change. But this is not a serious problem in a society that is largely static. For such a society to use a painfully incremental method of effecting legal change does not necessarily mean that legal change will lag behind social change and produce 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 generally not found in primitive legal systems.⁹⁸ Evidently Roman

97. See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J. Law & Econ.* 249, 268 (1976).

98. On legal fiction in Roman and English law see Maine, *supra* note 21, 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 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, the ground being that as a member of the clan he is entitled to a share in any composition which it receives. See Robert Redfield, *Primitive Law, in Law and Warfare*, *supra* note 39, 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. However, 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.

enforcement of a property right to such land be costly if it were a purely possessory right (a "usufruct") which allowed the possessor to exclude people from the land only so long as he was 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.¹⁰¹

The model of primitive society developed in Part I is helpful in explaining the pattern of primitive property rights. The man who has a good harvest is not permitted to use his surplus to buy another's land and reduce the other to 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.

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. This increases 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.

The benefits of a system of inalienable possessory land rights would be much smaller in an advanced society, and the costs in allocative efficiency 101. See, e.g., Herskovits, supra note 3, at 370; Barton, supra note 38, at 39-98; Schapera, supra note 27, at 201, 205, 207; and Maine, supra note 21, ch. 8.

Another cost of a purely possessory rights system is also absent, or largely so, in the conditions of primitive economy. I refer to the distortion which such a system creates in the temporal pattern of resource exploitation. If one can obtain ownership rights in a resource only by capture or use, there is a tendency to take too much too soon. This problem rarely arises in a simple society. It makes more sense for a band of hunters to move on when the game in an area is depleted than to try to regulate the game population by creating fee-simple rights to hunting territories. It makes more sense to abandon worn-out land for several years until its fertility is naturally restored than to grant fee-simple rights in the hope of encouraging the owners to regenerate the land more quickly, the techniques for doing so being unknown. Where investment preparatory to use is feasible in primitive society—the setting of traps would be an example—it is often protected by the grant of a nonpossessory property right. The man who sets the trap is entitled to the trapped animal even if someone else finds it in the trap and thus "possesses" it first.¹⁰⁵

Another advantage of a possessory system is that 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 latter is ruled out by the assumption of illiteracy, and the former could be quite costly in a

^{104.} continued

wealth is almost perfectly divisible (herds), we often find the rule of equal inheritance followed. 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 21, at 248-55; Charles Douglas, *The Organization and Laws of Some Bantu Tribes in East Africa*, 45 *J. Royal Anthropological Inst.* 234, 294 (1915).

^{105.} See, e.g., Diamond, *supra* note 13, at 189; Goldschmidt, *supra* note 45, at 157. Cf. Smith, *supra* note 9, at 742-43.

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, that is, 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--is often treated as a form of theft from the promisee. (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 the 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 which primitive contract law imposes. The reason is plain 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.¹⁰⁸ Such an interval opens up the possibility both that unforeseen events will

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

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.

Also, the seller is probably the superior insurer of a product defect because he can spread its costs over his entire output. This argument is also made in modern discussions of the relative merits of caveat venditor and caveat emptor, but 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 an extremely important branch of primitive law--the most important, judging by the number and detail of the rules.¹¹⁰ The rules governing relations within the household correspond in function and importance to the law of corporations and of agency in modern societies. And as 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 just 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. I also remind the reader of the earlier discussions of polygamy and of inheritance.¹¹¹

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

111. See pp. 28, 32, 48 supra.

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.¹¹⁴

The relationship between the communalizing of property rights and the fixing of price or shares by custom is, as already suggested, 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.¹¹⁵ It would also be avoided if each kin group or village had a chief who 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) Why is there normally in primitive society a positive brideprice (rather than no price, or a negative price--i.e., dowry) and why is it paid to the bride's kin rather than to the bride herself? There is some evidence for regarding the dominant method by which a wife is obtained as having undergone a three-stage historical evolution: from capture or stealing, to payment, to the modern system of promising to cherish and support.¹¹⁶ The reason

¹¹⁴. For a bit of evidence bearing on this point compare Radcliffe-Brown, supra note 26, at 17 (large kin group-fixed compensation and shares), with Max Gluckman, Kinship and Marriage Among the Lozi of Northern Rhodesia and the Zulu of Natal, in Markets in Africa, supra note 3, at 185, 194 (flexible brideprice-small number of involved kin), and Nadel, supra note 31, at 341-42. Cf. Wagner, supra note 66, at 222-23.

¹¹⁵. See Barton, supra note 38, at 85-86; Forde & Douglas, supra note 48, at 19.

¹¹⁶. For some evidence regarding the first, and least well established, stage see Mair, supra note 55, at 110-11. There are several forms of nonpecuniary exchange which 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.

related solution is "matrilocal" marriage: the husband remains with the wife's family without payment of brideprice.¹²⁰ The bride's family have less need to screen his fitness for the marriage since they are present to help protect the offspring; they do not leave the entire protective function to the husband and his kin, as in patrilocal marriage.

This analysis does not explain, however, 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, 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,¹²¹ 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.

120. See Schneider, *supra* note 1, at 145.

121. See note 72 *supra*.

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.¹²⁵

The frequency of divorce in primitive society presumably reflects both the low costs to the children (since if the parents are altruistic toward their children, the costs to the children of a divorce will enter into their decision whether or not to divorce) and the inferiority of brideprice as a sorting device relative to courtship of a mature woman who makes her own choice of husband. 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.¹²⁶ If such harmony is relatively unimportant in primitive society, so will be a sorting device designed to produce it, and a crude and cheap

125. See Barash, supra note 47, at 295, 308.

126. See Becker, supra note 5, at 225-26.

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. Notice also that stringent divorce laws reduce marital instability 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—i.e., 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. The rules of exogamy vary greatly across cultures—and some cultures encourage endogamy, whereas none to speak of encourage incest. Often the rules prohibit marriage with relatives who are quite remote in a genetic sense, and sometimes they prohibit marriage with complete nonrelatives (i.e., adopted members of the kinship group), while some incestuous unions (e.g., between a man and his sister's daughter) MAY not be forbidden by the rules of exogamy although they will be contrary to the tribe's incest taboo. Also, the incest taboo prohibits intercourse within or outside marriage; exogamy is a limitation on marriage rather than on intercourse as such.

A social or cultural explanation of exogamy thus seems indicated and the model developed in Part I of this paper is helpful in discovering it. 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

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. Again I attribute this transition not to growing rationality, diminishing bloodthirstiness, 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.¹³⁴

An intermediate stage between the feud and compensation is the duel, a means of redress that economizes on the expenditure of resources on fighting.¹³⁵ 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 A kills B, in the retaliation stage of social order B's kinsmen have a duty to B which they can discharge by killing either A or one or A's kinsmen. In the compensation stage A's kinsmen must come up with the required compensation if A himself cannot or will not do so. If neither A nor his kinsmen pay the required compensation, B's kinsmen then have a duty to retaliate against A—or his kinsmen—to punish them for their refusal to compensate.

134. Thus, occasionally an injurer who cannot afford the wergeld is allowed to give a child instead. See Diamond, *supra* note 13, at 265. The question of the deterrent adequacy of a purely monetary sanction is addressed below.

135. See Redfield, *supra* note 98, at 9.

responsibility is another ingenious device, like denying people privacy, by which a primitive society creates substitutes for the public investigatory machinery that it lacks.¹³⁷

(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?¹³⁸ There are several reasons. 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 problems 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 get along without a 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.

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

138. See Robert Nozick, *Anarchy, State, and Utopia* 118-19 (1974).

(5) The compensation due for killings and other injuries is normally 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.¹⁴² This pattern is 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—where payment, in other words, is a matter of voluntary agreement—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.

It may seem that exclusive reliance on monetary penalties would be unsound because many of the people in a primitive society would be too poor to pay a sum equal to the value of a life in such society, even if that value was 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. (The analogy to respondeat superior in modern tort law should be apparent.¹⁴³) This is one solution to the solvency problem that has been noted in connection with proposals to rely more heavily on private law enforcement in modern society.¹⁴⁴ And it is another reason for the large size of the primitive kinship group.

¹⁴². See, e.g., Diamond, supra note 13, at 58-59, 65, 66, 269-70; Howell, supra note 89, at 70; Dundas, supra note 104, at 279-83.

¹⁴³. See Richard A. Posner, A Theory of Negligence, 1 J. Legal Studies 29, 42-43 (1972).

¹⁴⁴. See A. Mitchell Polinsky, Private vs. Public Enforcement of Fines (mimeo., Harvard Law School, Feb. 1979).

are high,¹⁴⁸ and crime rates--where comparison is possible--seen to be similar to those found in advanced societies.¹⁴⁹ Four factors appear to compensate for the lack of a police force and related institutions of public law enforcement. The first three relate to the detection of wrongdoing. (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.¹⁵⁰ These institutions are reinforced by religious belief. 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. But 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.¹⁵¹ Devices for inducing the killer to reveal his identity are especially important because if the killer's identity is unknown there is

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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 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 55, 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 71, at 216. See also C. R. Moss, Nabaloi Law and Ritual, 15 Am. Archaeology & Ethnography 207, 263-65 & n.225 (1920).

148. See Gulliver, supra note 89, at 127-34.

149. See African Homicide and Suicide 237, 256 (Paul Bohannan ed. 1960).

150. See Diamond, supra note 13, at 63-64, 76.

151. See Barton, supra note 38, at 241; Gluckman, supra note 45, 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 45, at 97.

problems to one side, there is reason to believe that the low probability-high severity approach would 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 most modern people, are risk averse. This is true in general but 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, for they are liable for injuries inflicted in accidents that could not have been avoided even by the exercise of due care.

(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 virtually uniform 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.

The economic literature identifies four factors as bearing on the choice between a strict and a fault approach to liability questions: ¹⁵⁴

¹⁵⁴. See Posner, supra note 5, at 137-42, 441-42.

a professional judiciary and a clear idea of how the natural world works (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.¹⁵⁵ Suppose you and I are members of the same hunting party. We shoot our arrows at a wild boar but my arrow is deflected off the boar's back and hits you. It looks like an accident—but I may have procured this "accidental" result by casting a spell. The primitive arbitrator cannot reject such possibilities out of hand.

To be sure, uncertainty may bedevil the ascription of causal responsibility as well. This may explain one of the most curious rules of archaic law, that which makes the punishment more severe if the violator is caught in the act than if he is apprehended later on.¹⁵⁶ 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.¹⁵⁷ 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.

¹⁵⁵. See, e.g., J. Walker Jones, *The Law and Legal Theory of the Greeks* 261 (1956).

¹⁵⁶. See Diamond, *supra* note 13, at 78; Maine, *supra* note 21, at 366 (Beacon ed. 1970).

¹⁵⁷. See *id.* at 367.

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. The large proportion of deliberate injurers 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).

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, however; for then any additional costs involved in the fault determination 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 nonculpable in a fault sense, 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

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the other acts that we conventionally deem criminal.¹⁶⁴ 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 citizens 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 economics 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 a simple economic theory of primitive society and applied it to the principal 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 inevitably 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

¹⁶⁴. See *id.* at 74-75, 85, 92, 273, 293.

(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, by 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.

APPENDIX

SHARING IN PRIMITIVE SOCIETY¹⁶⁸

My object here is to show formally that the optimal size of the kinship group within which sharing occurs in the primitive society is likely to be larger than the nuclear family (two adults), or even the extended family (perhaps four to six adults), yet not so large as to exceed the size of the

¹⁶⁸ I am indebted to Dennis W. Carlton and A. Mitchell Polinsky for their suggestions with regard to my analysis.

Since

$$U'(n) = -\frac{c}{2} + \frac{3\sigma^2}{n^2} = 0 \quad , \quad [169] \quad (4)$$

the optimal n is given by

$$n = \sqrt{\frac{28\sigma^2}{c}} \quad \text{or} \quad \sigma \sqrt{\frac{28}{c}} \quad . \quad (5)$$

Thus, n is larger the larger the standard deviation of income and the degree of risk aversion, and smaller the lower the cost of a transaction.

To derive an actual value for n from (5) requires making assumptions not only about β , σ , and c , but also about μ since a plausible estimate for σ depends on the size of μ . I begin with an arbitrary value for μ --100. c is presumably related to μ ; and I shall assume, arbitrarily, that the cost to every member of the group of shouldering his part of the responsibility for preventing shirking is one percent of his income--i.e., $c = 1$. The standard deviation of an individual's income under the conditions prevailing in primitive society is presumably high, and I shall begin with the assumption that it is 50--i.e., that there is about a two-thirds probability that a man's income in any given year will fall within 50 to 150 percent of his average income and a 95 percent chance that it will fall within zero to 200 percent of it.

As for β , which determines the amount of risk aversion, I shall begin by choosing it such that the utility of the individual's expected income if the standard deviation is 50 is one-half as great as it would be if the standard deviation were zero. The form of (1) implied by this assumption is given in Figure A1.

169. The second-order condition for a maximum is satisfied since

$$U''(n) = \frac{-28\sigma^2}{n^3} < 0 \quad .$$

Solving (5) for the values mentioned above, one finds that the optimal size (n) of the kinship group is 10, a number that as expected is somewhere in between the extended family and the maximum-sized kinship group. It is interesting to see, however, what happens as the crucial parameters are allowed to vary within (barely) plausible limits. Table A1 gives values for σ between 1 and 100 and for β between 1 and 1/200.

Table A1

Optimal n ($\mu=100$, $c=1$) (rounded to nearest integer)

β	.005	.02	.01	.5	1
σ					
1	0	0	0	1	1
5	1	1	0	5	7
10	1	2	1	10	14
20	2	4	3	20	28
50	5	10	7	50	71
60	6	12	8	60	85
70	7	14	10	70	99
100	10	20	14	100	141

Note: For $c \geq 1$, divide above totals by \sqrt{c} .

Optimal groups larger than 50 are generated only by extreme assumptions regarding the degree of risk aversion. For example, a β of .5 implies that the utility of an income having a standard deviation of 10 (correlation of variation = .1) would be only 50 percent of the same income with a standard deviation of zero. Moreover, the assumption that only one percent of one's annual income is spent policing one's fellows

and if, for example, $k = 2$, then (with $c=1$, $\beta=.02$, and $\sigma=50$), $n = 11$.
 Or, if $\beta = .5$, $n = 11$, compared to 50 in Table 1 and to 116 using (6).¹⁷⁰

170. I obtained similar results using a slightly different form for the utility function. Rewriting (1) as

$$U = 1 - e^{-\lambda\mu} + 1/2\lambda^2\sigma^2 \quad (8)$$

and (2) as

$$U = 1 - e^{-\lambda[\mu - (\frac{n-1}{2})c]} + 1/2\lambda^2\frac{\sigma^2}{n} \quad (9)$$

(5) becomes

$$n = \sqrt{\frac{\lambda\sigma^2}{c}} \quad (10)$$

The choice of λ , corresponding to β in (1), is critical. In order to facilitate comparison with (1), I chose $\lambda = .072$ because, given this λ and $\sigma = 50$, the utility of income is again one-half that of an income with a zero coefficient of variation. Plugging these values into (10) yields $n = 13$, which is in the same ballpark as $n = 10$ in (5).