

## Articles

### EXCHANGE, CONTRACT AND LAW IN THE STONE AGE

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#### INTRODUCTION

Philosophers, economists, political scientists and lawyers have constructed many theories to explain the exchange process and the reasons why contracts are enforced. To understand the wellsprings of human behavior it is useful to start with the Stone Age. Fortunately, neolithic peoples existed well into the twentieth century, and data about contractual behavior in such societies as well as pre-literate societies in later stages of development have been collected. The quantity of data is enormous, although for the legal scholar, much of it stops at the point where it is about to become most germane; anthropologists, explorers and missionaries generally do not share the legal scholars' concerns. Sir Henry Maine's 1861 statement is probably truer today than when he wrote:

Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.<sup>1</sup>

Oliver Wendell Holmes spoke in a similar vein. In a lecture delivered in 1886 he stated "[i]f your subject is law, the roads are plain to anthropology, the science of man."<sup>2</sup> Although Maine and others, such as Sir Paul Vinogradoff,<sup>3</sup> followed this road to anthropology, they did so from sources dating to eras after the dawn of Western civilization. These sources reveal little about truly primitive society and almost nothing about non-western societies. For example, sociologist Emile Durkheim's lengthy discussion of prim-

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1. H. MAINE, *ANCIENT LAW* 3 (10th ed. 1884 & 1970 reprint).

2. O.W. HOLMES, *The Profession of the Law*, in *COLLECTED LEGAL PAPERS* 29, 30 (1921).

3. *E.g.*, P. VINOGRADOFF, *VILLAINAGE IN ENGLAND: ESSAYS IN ENGLISH MEDIEVAL HISTORY* (1892).

itive law focuses on the Hebrew Pentateuch, the Roman Twelve Tables and other *documents* showing a political and religious order more complex than generally prevails in neolithic societies.<sup>4</sup> Despite changes in technology that have occurred since these documents were originally composed, the societies that produced them probably bear a greater affinity to our own than to neolithic societies.

This Article organizes some of the data involving exchange in primitive societies. It seeks to avoid the construction of a grand theory. Readers may draw their own conclusions. Nonetheless, where facts clearly are at variance with speculations of such notables as legal philosopher John Austin, sociologists Emile Durkheim and Max Weber and historian Karl Polanyi, the writer could not resist highlighting such discrepancies.

Although the enforceability of contracts is a principal concern of this Article, most of the discussion addresses the context in which contracts are made and enforced in primitive society. It first considers the existence of law in stateless societies and then distinguishes law from custom, political action and instinctive behavior. This Article next discusses two kinds of exchanges, reciprocal gift and business-like exchange, and then examines several strategies for inter-group trade to protect the traders from the dangers of Stone Age society such as headhunting, cannibalism and slavery. At this point, the Article proceeds to contract law: the forms of contract, debt collection methods and dispute resolution. Finally, the Article considers why contracts are enforced and summarizes some of the themes raised in the paper.

## I. BEFORE THE STATE THERE IS LAW

In the mountains of northern Luzon, the principal island of the Philippines, dwell the Ifugao, agriculturalists and headhunters who have constructed, without the aid of metal tools, rice terraces which "still have a sweep and grandeur unequaled anywhere in the world."<sup>5</sup> "Of political organization the Ifugao has nothing—not even a suggestion."<sup>6</sup> The lack of political government is "absolute."<sup>7</sup> Yet, they have "a well-developed sys-

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4. E. DURKHEIM, 1 *THE DIVISION OF LABOR IN SOCIETY* 92-99 (1964).

5. Egan, *Foreword* to R. BARTON, IFUGAO LAW xvii (1919 & photo. reprint 1969) [hereinafter R. BARTON, IFUGAO LAW]. (This Foreword was written for the reprint.).

On these steep mountains that rise from sea level to heights of six to eight thousand feet—mountains as steep probably as any in the world—there have been carved out, with wooden spades and wooden crowbars, terraces that run like the crude but picturesque 'stairsteps' of a race of giants, from the bases almost to the summit. Some of these terrace walls are fifty feet high. More than half are walled with stone. Water to flood these terraces is retained by a little rim of earth at the outer margin. The soil is turned in preparation for planting with a wooden spade. No mountain is too steep to be terraced, if it affords an unfailling supply of water for irrigation.

R. BARTON, IFUGAO LAW, *supra*, at 2.

This description is quoted here to demonstrate that technological and agricultural sophistication can exist in a Neolithic culture that is not organized as a State.

6. R. BARTON, IFUGAO LAW, *supra* note 5, at 2. The quotation is in the present tense. The Ifugao were brought under governmental control during the American occupation and presumably are now under the control of the Philippine government. Throughout this Article, the historical present tense will sometimes be employed to describe ethnic groups whose ways may have since changed by the impact of colonization or other foreign contact.

7. *Id.*

tem of laws."<sup>8</sup> The ethnographer who reached these conclusions was able to describe their private law, there being no public law. For example, he noted the rule that an executory agreement for the sale of a rice field does not bind the buyer, but binds the seller, provided the seller initiated the transaction.<sup>9</sup> Yet there is no king, chief or court to order the payment of damages; there is only private dispute resolution.<sup>10</sup> Rich men lend generously and are repaid.<sup>11</sup> Farmers create and irrigate fields and appropriate them to private ownership. Property law and water law exist, are respected, and are of enormous importance in the economic and social life of the community.<sup>12</sup> Contracts with respect of these and other matters are an important part of their social and economic system and function without a State.

In the Klamath River Valley of the northern California redwood country live the Yoruks, a people whose "law is of the utmost refinement. A few simple and basic principles are projected into the most intricate subtleties; and there is no contingency which they do not cover."<sup>13</sup> Yet there is no government, no authority other than the head of the household.<sup>14</sup> Nonetheless, the acquisition of money (dentalium shells) and property is the foremost concern of the Yoruk.<sup>15</sup> All land is under private ownership.<sup>16</sup> As with the Ifugao, law and property exist without government.

The law of no Stone Age people has been better studied than the Kapauku Papuans of the highlands of what was formerly Netherlands New Guinea. Studies<sup>17</sup> were conducted by Leopold Pospisil,<sup>18</sup> an ethnographer with a law degree from Charles University,<sup>19</sup> Prague, of the Kapauku before the Dutch exerted effective control over them and before any but an insubstantial amount of western goods and influence entered the area.<sup>20</sup> He was

8. *Id.*

9. *Id.* at 52.

10. See *infra* text accompanying notes 222-27.

11. R. BARTON, IFUGAO LAW, *supra* note 5, at 3, 49-50.

12. *Id.* at 32-53.

13. 1 A. KROEBER, HANDBOOK OF THE INDIANS OF CALIFORNIA 2-3 (1925 & photo. reprint 1972).

14. *Id.* at 3. See also H. DRIVER, INDIANS OF NORTH AMERICA 294 (2d ed. 1969).

15. "The consequence is that the Yoruk concerns his life above all else with property. When he has leisure, he thinks of money; if in need he calls upon it. He schemes constantly for opportunity to lodge a claim or evade an obligation." 1 A. KROEBER, *supra* note 13, at 2; see also *id.* at 40-41. The Yoruk are not unique in their desire and respect for wealth. See R. LOWIE, PRIMITIVE SOCIETY 342-45 (1947). For a comparison of Yoruk attitudes and the protestant ethic, see Goldschmidt, *Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge*, 53 AM. ANTHROPOLOGIST 506 (1951).

16. See 1 A. KROEBER, *supra* note 13, at 34.

17. These studies include L. POSPISIL, THE ETHNOLOGY OF LAW (2d ed. 1978) [hereinafter L. POSPISIL, ETHNOLOGY]; L. POSPISIL, ANTHROPOLOGY OF LAW (1971) [hereinafter L. POSPISIL, ANTHROPOLOGY]; L. POSPISIL, THE KAPAUKU PAPUANS OF WEST NEW GUINEA (1963) [hereinafter L. POSPISIL, WEST NEW GUINEA]; Pospisil, *Structural Change and Primitive Law: Consequences of a Papuan Legal Case*, in LAW IN CULTURE AND SOCIETY 208 (L. Nader ed. 1969) [hereinafter Pospisil, *Structural Change*]; L. POSPISIL, KAPAUKU PAPUANS AND THEIR LAW (1958 & 1964 photo. reprint) [hereinafter L. POSPISIL, KAPAUKU PAPUANS].

18. His methodology was inspired by the case study of Cheyenne law by Karl Llewellyn and E. Adamson Hoebel. L. POSPISIL, WEST NEW GUINEA, *supra* note 17, at v.

19. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY (1941). See L. POSPISIL, ETHNOLOGY, *supra* note 17, at 24-25.

20. L. POSPISIL, WEST NEW GUINEA, *supra* note 17, at 3.

able to discover and explain exquisitely detailed rules of land tenure<sup>21</sup> and to formulate 119 rules governing behavior. Typical is the rule Pospisil numbered 110.

Property should be seized by force if a man refuses to meet his obligations which have their origin in contract or in an act causing damage to other people. The act of seizure precludes any further obligation on the part of the defendant irrespective of the possible low value of the property seized.<sup>22</sup>

Here, too, in the Kapauku Papuan society, law exists without government, but, as discussed below, there is an embryonic system of politics based upon the *de facto* leader of the village or other social group, called the "rich man"<sup>23</sup> or "big man."<sup>24</sup> Even this degree of political structure is, however, lacking among some other primitive peoples, such as the Tsembaga and other groups of Maring speakers in New Guinea, who have "no hereditary or elective chiefs nor . . . even 'big men' who can regularly coerce or command the support of their clansmen or co-residents in economic or forceful enterprises."<sup>25</sup>

In order to conclude that these peoples are living under a system of law without a State, it is first necessary to explain what is meant by a "State." This is difficult because among political scientists there seems to be no generally agreed upon definition of a State. Most of them would perhaps agree that if ten strangers are cast adrift in a life boat, one or more leaders would emerge, but the population of the boat would not be a State. The peoples described here resemble the population of the boat more than they resemble Leviathan, the State postulated by Hobbes as the necessary alternative to the war of all against all.

One could cite multiple examples of peoples who are stateless and ungoverned. The Eskimo and the Indians of the Great Basin of Utah, Nevada, and northeastern Mexico all have no political organization.<sup>26</sup> In Africa, the Hazda, Nuer and Luhya have minimal or no government.<sup>27</sup> These, however, are not peoples without law. For all these groups it can emphatically be said that law is not the command of the sovereign.<sup>28</sup> Charles Darwin in

21. L. POSPISIL, *ETHNOLOGY*, *supra* note 17, at 72-108 (a revision of L. POSPISIL, *KAPAUKU PAPUANS*, *supra* note 17, at 97-100, 176-84 and of L. POSPISIL, *WEST NEW GUINEA*, *supra* note 17, at 25-31).

22. L. POSPISIL, *KAPAUKU PAPUANS*, *supra* note 17, at 234.

23. L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 65-72.

24. Other ethnographers use this term, rather than "rich man," to describe similar leaders in other New Guinea groups, because wealth, although indispensable, is not the only condition of leadership. See P. BROWN, *HIGHLAND PEOPLES OF NEW GUINEA* 194-97 (1978); L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 16.

25. Rappaport, *Ritual Regulation of Environmental Relations Among a New Guinea People*, in *MELANESIA, READINGS ON A CULTURE AREA* 68, 69-70 (L. Langness & J. Wechsler eds. 1971).

26. H. DRIVER, *supra* note 14, at 288-90. Pospisil would disagree on the theory that although there is no government, there are, in every group, leaders. He would classify leadership as a form of political organization. L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 44-78, 91.

27. L. MAIR, *PRIMITIVE GOVERNMENT: A STUDY OF TRADITIONAL POLITICAL SYSTEMS IN EASTERN AFRICA* 56-61 (rev. ed. 1970).

28. A theorist who holds to the dogma that law is the command of the sovereign would argue that what I have described above is not law. J. AUSTIN, *LECTURES ON JURISPRUDENCE*, Lects. I, XXX (Campbell 5th ed. 1885 & photo. reprint 1972). For an effort to harmonize Austin's theory of positive law with the existence of stateless law, see Stoljar, *How Can Feud-law Be Properly So Called*,

his travels in Tierra del Fuego noted that "[t]he different tribes have no government or chief."<sup>29</sup> He connected their statelessness with one aspect of his not yet fully formulated theory of evolution, arguing that the absence of political organization retarded the development of civilization.<sup>30</sup>

### A. Law Versus Custom

Anthropologists and others have difficulty in discerning the dividing line between law and custom in stateless societies.<sup>31</sup> The problem can be understood by using a Western illustration. The laws of the Western world require that debts be paid. Yet many debts go unpaid. Western custom dictates that a guest at a wedding reception must bring or send a gift.<sup>32</sup> Paradoxically, there are few violations. One can prove that the debt rule is law and the wedding gift rule is custom by the affidavits of lawyers and the proffer of law books.

Do these same two strands exist in primitive societies? If they do exist, can an outsider separate the strands? Karl Llewellyn, the noted legal scholar, and anthropologist E. Adamson Hoebel devised a system to accomplish this analysis. They put together a casebook, by going among the Cheyenne, interviewing tribal elders concerning the handling of "trouble cases." Law was distinguished from social custom by four criteria. First, law has sanctions. "The legal has teeth. What it protects is *protected*; if its prohibitions be disregarded, somebody can *do* something about it."<sup>33</sup> Llewellyn and Hoebel recognized that law is not only a set of prohibitions but also offers channels for facilitating legal acts such as marriages, wills and contracts.<sup>34</sup> Second, the law is supreme. "You will know the legal by the fact that if

13 U.W. AUSTL. L. REV. 262, 265-69 (1977-78). The nature of "law" as used in this paper is discussed *infra* in part II.

29. C. DARWIN, THE VOYAGE OF THE BEAGLE 231 (1909) (first published in 1839).

30. He summarized his views thus:

The perfect equality among the individuals composing the Fuegian tribes must for a long time retard their civilization. As we see those animals, whose instinct compels them to live in society and obey a chief, are most capable of improvement, so is it with the races of mankind. Whether we look at it as a cause or a consequence, the more civilized always have the most artificial governments. For instance, the inhabitants of Otaheite, who, when first discovered, were governed by hereditary kings, had arrived at a far higher grade than another branch of the same people, the New Zealanders, who, although benefited by being compelled to turn their attention to agriculture, were republicans in the most absolute sense.

*Id.* at 245.

31. For discussions of the literature, see E. HOEBEL, THE LAW OF PRIMITIVE MAN 20-22 (1967); L. POSPISIL, ANTHROPOLOGY, *supra* note 17, at 11-28.

32. "Custom" is used here to mean rules of social behavior that are not legally binding and that are enforced or penalized only by social disapproval. At times such custom may consist of complex and detailed rules. See, e.g., J. WILSON, THE CODE OF HONOR; OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELING (1858). Legally binding "custom and usage" is excluded. Thus the discussion stands outside the British tradition of discussing custom and law in an Austinian framework, where the focus is not on extra-legal customs but on customary law that is not clearly the command of the sovereign. See, e.g., G. SADLER, THE RELATION OF CUSTOM TO LAW (1919 & 1986 reprint). For an attempt to escape the Austinian strait-jacket—the dogma that law is the command of the sovereign—while falling into the trap that all custom and law are undifferentiated, see E. HARTLAND, PRIMITIVE LAW 137-66 (1924 & 1970 reissue).

33. K. LLEWELLYN & E. HOEBEL, *supra* note 19, at 283 (1941) (emphasis in original).

34. *Id.*

appealed to, it *prevails*.”<sup>35</sup> Third, “[t]he legal is *part of the going order* . . . and violences which are outside the . . . going order are extra-legal, . . . even when successful.”<sup>36</sup> This thought can perhaps be subsumed under the rubric of “regularity of application.”<sup>37</sup> Fourth, “[t]he legal has an aspect of recognized *officialdom* about it . . . which ‘manners’ or ‘morals’ lack until they acquire ‘legal’ backing.”<sup>38</sup> This fourth criterion shows no recognition that some societies lack officials,<sup>39</sup> although it is probably true that all societies have leaders who are more powerful than others in the society.<sup>40</sup>

Pospisil, building on the analysis of the law-custom dichotomy made by Llewellyn and Hoebel, also delineated four criteria for determining whether a rule is “legal” rather than social or moral. First, what his predecessors called “officialdom” Pospisil describes as “authority.”<sup>41</sup> His stress is on the person or persons who have the power to compel or persuade compliance with the rule. This may be a chief, a village headman (the “rich man” or “big man”), a family head or the aggrieved party himself.<sup>42</sup> Second, in place of “regularity” he sets forth the idea of “intention of universal application.”<sup>43</sup> The difference is more than a nuance. “Regularity” implies an unchanging system. “Intention of universal application” implies that intentions may change and that law is changeable.<sup>44</sup> Third, in place of “supremacy” Pospisil utilizes the civil law concept of *obligatio*,<sup>45</sup> a term that roughly means a right-duty relationship recognized by law.<sup>46</sup> Somewhat confusingly he contends that the *obligatio* includes the facts as found by the authority whether or not the facts were correctly found. In so arguing Pospisil appears to inject the fact skepticism of certain American legal realists into the Roman concept of *obligatio*.<sup>47</sup> Pospisil observes that *obligatio* helps distinguish legal from religious rules.<sup>48</sup> Fourth, he agrees that law requires a sanction for a breach. Unlike many non-lawyers, neither Pospisil nor Llew-

35. *Id.* at 284 (emphasis in original).

36. *Id.* (emphasis in original).

37. E. HOEBEL, *supra* note 31, at 28.

38. K. LLEWELLYN & E. HOEBEL, *supra* note 19, at 284.

39. See *supra* text accompanying notes 6-10, 14 & 23-27. The Cheyenne are a politically organized society, with chiefs and military leaders. K. LLEWELLYN & E. HOEBEL, *supra* note 19, at 68-131.

40. See *infra* text accompanying notes 228-30.

41. L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 44-78; L. POSPISIL, *ETHNOLOGY*, *supra* note 17, at 30-43.

42. Twelve such cases are described in L. POSPISIL, *KAPAUKU PAPUANS*, *supra* note 17 (case nos. 32, 34, 59, 66, 67, 82, 84, 88, 90, 92, 126, 138).

43. L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 78-81.

44. *Id.*

45. L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 81-87; L. POSPISIL, *ETHNOGRAPHY*, *supra* note 17, at 46-48.

46. On *obligatio*, see in ascending order of complexity: B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 99-103, 158-59 (1962); J. THOMAS, *TEXTBOOK OF ROMAN LAW* 213-23 (1976); W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 405-12 (3d ed. 1966).

47. Although trained in the civil law tradition, he embraced American legal realism. See L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 31-37.

48. The interplay between law and religion is complex. As punishment for non-payment of a debt the creditor may resort to sorcery to cause the illness of his debtor. I. HOGGIN, *THE ISLAND OF MENSTRUATING MEN: RELIGION IN WOGEO, NEW GUINEA* 170 (1970) [hereinafter I. HOGGIN, *THE ISLAND*]. Supernatural and societal sanctions are treated indiscriminately in E. HARTLAND, *supra* note 32, at 137-66. See case no. 119 in L. POSPISIL, *KAPAUKU PAPUANS*, *supra* note 17, at 220-21, where the judgment is perceived as a legal judgment with some black magic thrown in.

elven restrict the notion of sanctions to physical force. Reprimands,<sup>49</sup> the Eskimo equivalent of the scarlet letter,<sup>50</sup> injunctions,<sup>51</sup> and money judgments<sup>52</sup> are among the sanctions known to Stone Age humanity.

Pospisil's refinements of Llewellyn-Hoebel's criteria for law are helpful but an element of tautology remains. If *obligatio*, a right-duty relationship recognized by law, is part of the definition of law, the reasoning is circular. Although law is difficult to define, Pospisil's criteria are helpful in focusing our sights. It is useful to examine the phenomenon from the point of view of remedies. If a person wishes to assert his rights against an offending party, will he be able to obtain an authoritative decision redressing his grievance, a decision made pursuant to a rule that is intended to be of universal application? If so, the rule is law. Custom is also powerful but has different sanctions than law.

### B. *Law Versus Political Action*

Decisions or conduct by the politically powerful are not necessarily pursuant to law. They may be acts of gangsterism or of corruption.<sup>53</sup> Or they may be *ad hoc* political determinations such as a decision to make war or refrain from warfare or whether to massacre or to welcome a boat full of shipwrecked sailors. For example, it is the custom on many Melanesian islands to kill shipwrecked strangers.<sup>54</sup> On Tikopia, one Paefakofe gained great authority and heroic status by singlehandedly killing the entire crew of a boat. Subsequently he intervened to "veto" the killing of another shipwrecked crew.<sup>55</sup> Accordingly, in that society, the decision to kill while not prohibited by law is also not required by law. In sum, much political activity may be illegal or legally irrelevant and should not be confused with law.

### C. *Law Versus Instinctive Behavior*

Species other than *homo sapiens* have social organization with rules respecting rank, territory, schooling (traveling in a pack), division of labor, and personal space.<sup>56</sup> Additionally, members of a species sometimes form

49. E. HARTLAND, *PRIMITIVE LAW*, *supra* note 32, at 161-64 (ridicule and contempt); L. POSPISIL, *KAPUAKU PAPUANS*, *supra* note 17, at 267-68 (discussing case 124, quoted *infra* at text accompanying note 238).

50. "A Nunamiut [Eskimo] who steals a Kayak is renamed Kayak . . . Every time the name is used the offender is reminded, in a public and shaming way, of his crime." L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 95.

51. R. BARTON, *supra* note 5, at 100; L. POSPISIL, *KAPUAKU PAPUANS*, *supra* note 17, at 181-82.

52. R. BARTON, *supra* note 5, at 71; L. POSPISIL, *KAPUAKU PAPUANS*, *supra* note 17, at 269-70.

53. See, e.g., L. POSPISIL, *ETHNOLOGY*, *supra* note 17, at 45 (summarizing cases analyzed in L. POSPISIL, *KAPUAKU PAPUANS*, *supra* note 17, at 207, 232-33, 242, cases 97, 139-42, 165).

54. 1 REPORTS OF THE CAMBRIDGE ANTHROPOLOGICAL EXPEDITION TO THE TORRES STRAIT 9, 84, 196, 349 (Johnson reprint 1971 of 1935 ed.) (based on observations made in 1898-1899) [hereinafter 1 TORRES STRAIT]; 5 REPORTS OF THE CAMBRIDGE ANTHROPOLOGICAL EXPEDITION TO THE TORRES STRAIT (Johnson reprint 1971 of 1904 ed.) (based on observations made in 1888-1889, 1898) [hereinafter 5 TORRES STRAIT]; 1 W. RIVERS, *THE HISTORY OF MELANESIAN SOCIETY* 322 (1914 & 1968 reprint).

55. 1 W. RIVERS, *supra* note 54, at 340-41.

56. D. ELLIS, *ANIMAL BEHAVIOR AND ITS APPLICATION* 81-87 (1985).

sympiotic relations with members of a different species.<sup>57</sup> These rules of social behavior often resemble law. For example, territoriality has certain attributes of law in that territorial rights are generally respected by other members of the species,<sup>58</sup> and even when territorial rights are violated, the trespass is often furtive.<sup>59</sup> When confronted, the trespassers may quickly withdraw even when faced with inferior force.<sup>60</sup>

Although it is clear that many kinds of animals can think and learn, there is no indication that a group of animals can consciously change its organizational rules.<sup>61</sup> While the rules of social control observed by territorial animals seem to fit the criteria developed by Llewellyn and Hoebel for distinguishing law from extra-legal rules of conduct, they do not satisfy Pospisil's more refined criteria. His substitution of "intention of universal application" for Llewellyn and Hoebel's criterion of "regularity" was designed to accommodate the central distinction between changeable human law and instinctual or other deterministic rules of conduct.<sup>62</sup> Although law is natural to humanity, its content is manmade. There are doubtless limitations on human inventiveness. Strikingly, certain patterns of exchange and methods of enforcing exchange obligations recur in diverse societies, but not always and not everywhere. As in so many other aspects of human behavior, it is clear that similarity of behavior among separated population groups has a genetic basis, but environmental or other factors such as idiosyncratic ingenuity contribute to the diversity of behavior.

## II. KINDS OF EXCHANGE: RECIPROCAL GIFT VERSUS BUSINESS-LIKE EXCHANGE

Economists who study primitive economies fall into at least two broad categories. The Formalists focus on exchanges and apply standard economic theories to analyze what they perceive. The Substantive Economists hold that economic theory, whether it be classical liberalism or another theory, has little or no role in analyzing and explaining primitive behavior.<sup>63</sup>

Anthropologists are similarly divided. Formalist Social Anthropology claims that cross-cultural analyses may be made. In this it is similar to Economic Formalism, although Formalist Anthropologists disagree amongst themselves in profound ways. Functional Anthropologists focus not on analyzing transactions that occur but on the social matrix within which they occur.<sup>64</sup> This Article does not participate in the debate between the schools of anthropologists and economists (although its title divulges a formalist viewpoint), but isolates two distinct types of exchanges and shows that, if the

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57. *Id.* at 96-98.

58. R. ARDREY, *THE TERRITORIAL IMPERATIVE* 248-53 (1966). This is not to say that all species are territorial. J. SCOTT, *ANIMAL BEHAVIOR* 187, 243-45 (2d ed. 1972).

59. R. ARDREY, *supra* note 58, at 251-52.

60. *Id.* at 248-49.

61. We do read, however, of alliances among male baboons (contracts?), D. ELLIS, *supra* note 56, at 245, and the invention of two cultural traits by one chimpanzee and their adoption by the entire band. *Id.* at 247-48.

62. See *supra* text accompanying notes 44-45.

63. H. SCHNEIDER, *ECONOMIC MAN: THE ANTHROPOLOGY OF ECONOMICS* 1-9 (1974).

64. *Id.* at 9-21.



observer focuses on either kind of exchange to the neglect of the other, that observer will be driven into the arms of one or the other of the schools of Economics and Anthropology.

### A. *Reciprocal Gift*

"Contract" usually connotes business-like exchange. Occasional binding agreements between close friends or family members are seen as peripheral to the core of contractual behavior. Therefore, observers have been curious about and sometimes mystified by various forms of gift-giving. The most mysterious is the reciprocal gift. Among the hunter-gatherer Andamanese islanders, "any object may be had for the asking and without pay, subject only to the expectancy of a reciprocal gift at a later date."<sup>65</sup> Similarly it is a rule of Kaupauku law that "[a]ll commodities given as gifts have to be repaid upon the donor's request."<sup>66</sup> In the Solomon Islands, a trading partner offers to trade a pig for ten pots. The offeree gives him twenty-two pots which he cannot properly refuse. This puts the offeror under an obligation to eventually deliver another pig.<sup>67</sup> In the Solomon Islands reciprocal exchanges are commonplace. X gives Y a dozen sweet potatoes. A short time later Y gives X a dozen sweet potatoes.<sup>68</sup> Thus, restitutionary obligations co-exist with and perhaps precede promise-based obligations.<sup>69</sup> In North America the derogatory phrase "Indian giver" was the Caucasian reaction to the Native American's expectation of receiving from the unsuspecting Caucasian donee the equivalent of the Native American's gift.<sup>70</sup>

Judge Posner has given an Economic Formalist explanation for the re-

65. E. HOEBEL, *supra* note 31, at 296. For reciprocal gifts among the Cheyenne, see K. LLEWELLYN & E. HOEBEL, *supra* note 19, at 248-51.

66. L. POSPISIL, KAUPAUKU PAPUANS, *supra* note 17, at 230.

67. Sahlins, *Exchange-Value and the Diplomacy of Primitive Trade*, in *ESSAYS IN ECONOMIC ANTHROPOLOGY* 95, 111 (J. Helm ed. 1965).

68. B. BLACKWOOD, BOTH SIDES OF THE BUKA PASSAGE 275, 452 (1935 & 1979 reprint). For similar exchange patterns elsewhere, see E. FERDON, EARLY TAHITI AS THE EXPLORERS SAW IT—1767-1797, at 221 (1981); I. HOGGIN, THE ISLAND, *supra* note 48, at 70-71; B. MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC 184 (1950).

69. For good illustrations, see Myers, *Ideology and Experience: The Cultural Basis of Politics in Pintupi Life*, in *ABORIGINAL POWER IN AUSTRALIAN SOCIETY* 79, 99-100 (M. Howard ed. 1982).

70. 1 M. MATTHEWS, A DICTIONARY OF AMERICANISMS 872 (1951) contains under the expression "Indian Gift" the following:

1764 Hutchinson *Hist. Mass.* I. 469 An Indian gift is a proverbial expression, signifying a present for which an equivalent return is expected. — (2) 1848 Bartlett 189 *Indian Giver*. When an Indian gives anything, he expects an equivalent in return, or that the same thing may be given back to him. This term is applied by children in New York and the vicinity to a child who, after having given away a thing, wishes to have it back again. 1949 *Chi. Tribune* 9 Jan. 6/i Those who use the term 'Indian Giver' slightly have never heard of Pokagon, wise and beloved chieftain of the Pottawatomies. — (3) 1837 Irving *Bonneville* II. 71 Captain Bonneville was suitably affected by this mark of friendship; but his experience in what is proverbially called 'Indian giving,' made him aware that a parting pledge was necessary on his own part, to prove that this friendship was reciprocated. 1911 Saunders *Col. Todhunter* 103 But you're sure about it, too, ain't you? She ain't doin' no Injun-giving in your case?

An early missionary wrote of the Indians in general that "[i]t is a maxim of civility among them, to make a return when you give anything." L. HENNEPIN, A DESCRIPTION OF LOUISIANA 306 (J. Shea trans. 1880 & 1966 Readex Microprint) (published in French in 1683).

ciprocal gift: insurance.<sup>71</sup> In case of want caused by typhoon, fire, disease, or other catastrophe, the member of the society in which reciprocal gift-giving is practiced can call upon his circle of reciprocal donors for succor until he or she is able to reciprocate. However, there is more to reciprocal gift-giving than insurance. There are also ritual gift-exchanges where the insurance factor is missing: for example, the exchange of Christmas gifts within the family and the exchange of gifts when Chiefs of State call upon each other. The function of such an exchange is to create or strengthen the social solidarity of the participants. Reciprocal gift among stone age humanity appears to have a similar function. Moreover, a phenomenon may have an economic analysis that differs from its sociological analysis. That they differ does not signify that they are contradictory.<sup>72</sup>

Reciprocal gift-giving is normally confined within groups: for example, the village, the clan, or some other group that envisions itself as "We." Anthropologists and economists have been fascinated with trading rings that exist among groups that go beyond the "We," especially the *Kula* ring of the Trobriand and nearby islands.<sup>73</sup> This ring is not within a close knit social group but is among participants from societies that are often hostile to each other. Annual, or more frequent, trades are made between trading partners on neighboring islands. Two kinds of valuables are exchanged—necklaces and armshells. A ring member will go to one of his trading partners to *receive*, say, a necklace. Perhaps a year later he will be revisited by the giver to whom he will give an armshell. A "big man"<sup>74</sup> will have many trading partners.

The necklaces travel throughout the islands in a clockwise direction. The armshells travel in a counter-clockwise direction. Perpetually. Why? In islands that possess minimal or no government, the existence of a ceremonial trade ring creates a sense of social solidarity among the "big men" who are dominant among the *Kula* traders.<sup>75</sup> The trade goods have an oral history. The name of the original owner and each former possessor is recited upon its transfer and the salient characteristics of the predecessors are described. As a result, diverse people, some of whom are headhunters and some of whom are cannibals, visit people whom, under normal circumstances, they would have reason to fear. Some 500 Dobuan headhunters

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71. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. & ECON. 1, 10-23 (1980).

72. See MacNeill, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567 (1986). See also I. HOGBIN, *THE LEADERS AND THE LED: SOCIAL CONTROL IN WOGEO, NEW GUINEA* 27-28 (1978) [hereinafter I. HOGBIN, *THE LEADERS*] ("[I]t sustains the network of consanguineous ties and helps to preserve it as a living reality.")

73. The *Kula* ring of the Trobriand Island Melanesia was first analyzed in B. MALINOWSKI, *supra* note 68, *passim*. It has been the subject of numerous papers and conferences. See Landa, *The Enigma of the Kula Ring: Gift-Exchanges and Primitive Law and Order*, 3 INT'L REV. L. & ECON. 137 (1983). Other exchange systems exist. See, e.g., P. BROWN, *supra* note 24, at 229-33; Bulmer, *Political Aspects of the Moka Ceremonial Exchange System Among the Kyaka People of the Western Highlands of New Guinea*, in MELANESIA: READINGS ON A CULTURE AREA 240 (L. Langness & J. Wechsler eds. 1971).

74. See *infra* text accompanying notes 226-28.

75. B. MALINOWSKI, *supra* note 68, at 274-81; see also Bulmer, *supra* note 73; MacNeill, *supra* note 72.

visited the island of Sinaketa in 1918 in one expedition.<sup>76</sup> Exchanges were made and no violence occurred.

An interesting thing happens during these expeditions. Much non-*Kula* trade (*Gimwali*) takes place, but never between trading partners. The *Kula* partners frequently act as middlemen in the non-*Kula* trade, which is conducted in a business-like fashion with profitable exchange being the goal of the parties.<sup>77</sup> It is here that a formalist economic analysis is most credible. Yet the social matrix is so complex that a formalist analysis hardly suffices to explain the rich complexity of a trading ring.

## B. Business-Like Exchange

The motivation for most non-ritual exchanges is too simple to require much elaboration. If a fisherman has a surplus of fish and his inland neighbor has a surplus of sweet potatoes, a trade of fish for sweet potatoes improves the diet and the enjoyment of life of both parties and their families. In some sense of the word, both are "enriched" by the exchange. It is, however, controversial whether stone age individuals trade for enrichment in another sense of the word—the making of a profit or the acquisition of wealth or even whether such individuals will sell their labor. Prominent theorists have proclaimed that the making of profits, the acquisition of wealth, and even compensation for one's labor are not goals of primitive humanity. Karl Polanyi's highly influential work, *The Great Transformation*, did much to propagate these conclusions.<sup>78</sup>

Grand generalizations such as these are difficult to accept when measured against concrete facts revealed by ethnographers or explorers. First, consider payment for services. In restating the law of the Kaupauku, Pospisil formulated Rule 106 as follows: "Unless the employer has not [sic] specified the reward prior to the start of the work the employee has a right to the customary price (in 1954: 2 Km [a type of seashell] for turning 900 square meters of forest into garden land)."<sup>79</sup> He also details two cases in which the employer attempted to pay the hired hand less than two Km and after the employee complained to the village "big man" the employer paid the customary amount.<sup>80</sup> In the Banks Islands, in the Torres Strait between New

76. B. MALINOWSKI, *supra* note 68, at 376-91.

77. *Id.* at 362-65.

78. For example, notes to this work read as follows:

(a) *The motive of gain is not "natural" to man.* "The characteristic feature of primitive economics is the absence of any desire to make profits from production or exchange." (Thurnwald, *Economics in Primitive Communities*, 1932, p. xiii).

(b) *To expect payment for labor is not "natural" to man.* "Gain, such as is often the stimulus for work in more civilized communities, never acts as an impulse to work under the original native conditions." (Malinowski, *op. cit.*, p. 156). "Nowhere in uninfluenced primitive society do we find labor associated with the idea of payment." (Lowie, "Social Organization," *Encyclopedia of the Social Sciences*, Vol. XIV, p. 14) "Nowhere is labor being leased or sold" (Thurnwald, *Die menschliche Gesellschaft*, Bk. III, 1932, p. 169).

K. POLANYI, *THE GREAT TRANSFORMATION* 269-70 (1964 & 1968 reprint).

79. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 229; see also A. JENKS, *THE BONTOC IGOROT* 136-37 (1905) (five handfuls of unthreshed rice is the daily wage of laborers who help in the fields).

80. L. POSPISIL, KAPAUKA PAPUANS, *supra* note 17, at 229.

Guinea and Australia, midwives receive a customary fee.<sup>81</sup> Young men earn enough to buy their membership into a secret society by helping others to build a house.<sup>82</sup>

Michael Leahy, making first contact with highlanders in Papua, had no difficulty in hiring scores of laborers for a gold mining operation on the clear understanding that no payment would be made unless and until six months of labor from 7:00 or 7:30 A.M. to 5:00 P.M., seven days a week, were rendered. Most of the laborers complied with this condition.<sup>83</sup> There seems little doubt that their motive was economic gain.<sup>84</sup> In the Northwest Solomons, a form of currency is the *imun* which "consists of a string of teeth, either of porpoise (or dolphin) or of flying fox (*Terapus*) but never both in the same string."<sup>85</sup> Among the transactions in which *imun* is used for payment are the purchase of handmade goods, compensation for surgical scarification and for presiding over rites of passage.<sup>86</sup> Similarly, an Eskimo woman who helped a blind neighbor commit suicide refused to accept compensation because although she was not a relative, "after all, she was a friend."<sup>87</sup> Presumably if she were not a friend, the compensation would have been expected and taken. Alexander Mackenzie, trailblazer in the Canadian West, was able to hire a guide for an axe, a knife and a few other articles.<sup>88</sup> Doubtless this was not a pre-contact transaction, only a first contact transaction. Yet it seemed a natural transaction for both parties. Among the Yoruks of California, doctors' (shamans') fees were high: one to two strings of dentalium shells, the price of a slave.<sup>89</sup> Among the Ifugao, go-betweens who mediate disputes and various contractual disputes are well paid.<sup>90</sup> Among the Kapauku Papuans, a rich man will enter into contracts

81. 1 W. RIVERS, *supra* note 54, at 50.

82. *Id.* at 65.

83. For some, the contract was for three months. B. CONNOLLY & R. ANDERSON, *FIRST CONTACT 222-30* (1987). For some observations on first contacts, see Diamond, *The Last First Contacts*, 97 NAT. HIST., Aug. 1988, at 28.

84. Upon completion of the six month period, few renewed their contracts. The laborer had acquired sufficient wealth to pay the bride price for marriage or to enter into the prestigious *moka* ceremonial exchange ring. B. CONNOLLY & R. ANDERSON, *supra* note 83, at 228-29.

85. B. BLACKWOOD, *supra* note 68, at 448.

1 fathom given to pay for making bull-roarer.

1 fathom given to old man for making *upi* or *wapi* ceremony [rites of passage into adolescence and adulthood].

1 fathom paid for making slit-gong, together with 10 bamboos of paint.

1 fathom given to old woman who performs the operation of cicatrization on *tsunaun* [hereditary leader] child.

86. *Id.* at 449.

87. E. HOEBEL, *supra* note 31, at 77 (citing Holm, *Ethnological Sketch of the Angmassalik Eskimos*, 39 MEDDELELSER OM GREENLAND 74 (1914)).

88. A. MACKENZIE, *VOYAGES FROM MONTREAL ON THE RIVER ST. LAURENCE THROUGH THE CONTINENT OF NORTH AMERICA TO THE FROZEN AND PACIFIC OCEANS; IN THE YEARS 1789-1793*, at 34 (1801 & 1966 Readex Microprint).

89. 1 A. KROEBER, *supra* note 13, at 27. See also *id.* at 35 ("Shaman's [doctor's] fees were very high. . . . Shamans are said to have frequently urged their female relatives to try to acquire 'pains'—shamanistic powers—because wealth was easily got thereby.").

90. See R. BARTON, IFUGAO LAW, *supra* note 5, at 50-51. Similarly, the ordeal-master in the Solomons who presides over an ordeal (e.g., swimming a defendant across a channel infested with alligators) gets a fee measured in porpoise teeth. R. CODRINGTON, *THE MELANESIANS: STUDIES IN THEIR ANTHROPOLOGY AND FOLK-LORE* 212-13 (1891 & 1969 reprint). Middlemen who acquire a canoe for a specific purchaser will take as a fee a year's free use of the canoe. 6 REPORTS OF THE CAMBRIDGE ANTHROPOLOGICAL EXPEDITIONS TO TORRES STRAIT 186 (1908 & 1971 reprint).

of agistment whereby others will raise some of his pigs for compensation. When the pig is about ninety kilograms in weight and is slaughtered the custodian is paid six kilograms of pork, the head and intestines of the animal or seven old Kapauku cowrie shells. The price is greater for a sow that would not be slaughtered.<sup>91</sup>

One could monotonously add to this list of situations in which primitive men and women expected and received payment for services. This is not to say that there is not among Stone Age peoples uncompensated services. Just as American farmers may have a barn raising party where the entire neighborhood joins in an uncompensated effort, primitives also cooperate without payment. To conclude that compensation is never expected would be erroneous both in the case of the American farmer and the Stone Age person. Moreover, even where such uncompensated services are rendered, it will generally be tacitly understood that, when the need arises, reciprocal services will be rendered.

But profit on the sale of goods? Interest on loans? The acquisition of wealth? According to Max Weber: "[a] man does not 'by nature' wish to earn more and more money, but simply to live as he is accustomed to live and to earn as much as is necessary for that purpose."<sup>92</sup> Again, such a generalization is rebutted by the facts. Malinowski, tracing trade among the Trobriand Islands, found that a Sinaketa trader would obtain a basket in Kobona for twelve coconuts and exchange it in Dobu for twelve coconuts plus sago plus one belt. He concludes: "[t]hus we see that there is in this transaction a definite gain obtained by the middleman."<sup>93</sup> The acquisition of wealth is the primary goal of achievers among Melanesians.<sup>94</sup> Wealth is a necessary prerequisite to attaining the status of a "big man," a community leader.<sup>95</sup> On the Solomons a medium of exchange is mat-money—long and narrow woven mats. A large mat is 100 fathoms long. "A middle sized mat will buy a tusked pig. A rich man will keep fifty mats and more in his house, hung up and decaying, a proof of ancient wealth. Mat money is also lent at interest, and so becomes a source of wealth."<sup>96</sup> Thousands of miles away "[m]oney is prized and establishes influence everywhere in California."<sup>97</sup> "The consequence is that the Yoruk concerns his life above all else with property. When he has leisure, he thinks of money."<sup>98</sup> When Alexander Mackenzie conferred with the Red-Knife Indians at Slave Lake in June 1789, they revealed that they had little incentive to trap beaver because the Chepewyans who acted as middlemen between them and the Canadians

91. L. POSPISIL, *WEST NEW GUINEA*, *supra* note 17, at 12.

92. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 60 (1958) (German original published in 1904-05).

93. B. MALINOWSKI, *supra* note 68, at 363-64.

94. See, e.g., P. BROWN, *supra* note 24, at 194-203; Finney, *Bigfellow Man Belong Business in New Guinea*, in *MELANESIA: READINGS ON A CULTURE AREA* 315, 319 (L. Langness & J. Wechsler eds. 1971) ("The Gorokans valued wealth highly, and sought the prestige that comes from accumulating and managing wealth."); Davenport, *Red Feather Money*, in *MELANESIA, READINGS ON A CULTURE AREA*, *supra*, at 83, 85 ("the islanders buy and sell for the express purpose of making money").

95. See *supra* text accompanying notes 28-30.

96. R. CODRINGTON, *supra* note 90, at 324.

97. I. A. KROEBER, *supra* note 13, at 2.

98. *Id.*

either pillaged them or gave them little in payment. They eagerly agreed to direct and profitable trade, cutting out the middleman.<sup>99</sup> Clearly, the Chepewyans had been marking up the price.

Of what use is wealth to Stone Age humanity? Clearly, it brings power and prestige.<sup>100</sup> In societies where a bride price must be paid in order to marry, a loan to a young man enables him to pay the bride price to the family of his intended spouse. Such a loan also creates a nexus between the lender and borrower whereby the latter has an incentive to follow the leadership of the lender. If he is displeased with the borrower, the "big man" will call in the loan.<sup>101</sup> Prestige in Melanesia is acquired by generous lending and the hosting of generous feasts at which a large number of the host's pigs are slaughtered and served.<sup>102</sup> It is common for the host to eat nothing at all at such a feast.<sup>103</sup> Sociologist Marshall Sahlins, building on redistribution theories advanced by Karl Polanyi and others, argues that the big man in essence acquires wealth on behalf of the community for redistribution in order to provide material substance of the entire population and additionally, or alternatively, to maintain the big man's power and authority over the group.<sup>104</sup>

This is undoubtedly correct, but does not constitute the whole truth. Consider the wealth of Ekajewaijokaipouga, the richest man in the southern Kamu Valley of New Guinea, an excellent speaker, a powerful shaman and a brave warrior who undoubtedly hosted many redistributionary feasts and whose generosity is well recognized. Nevertheless, his accumulated wealth, consisting of many wives and a fortune in necklaces, beads, pigs and credits, is formidable by any standard.<sup>105</sup> Thus, its acquisition is not merely to serve

99. A. MACKENZIE, *supra* note 88, at 18.

100. P. BROWN, *supra* note 24, at 194-97.

101. L. POSPISIL, WEST NEW GUINEA, *supra* note 17, at 27.

102. See, e.g., P. BROWN, *supra* note 24, at 215-18; I. HOGGIN, THE LEADERS, *supra* note 72, at 151-80; L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 47-52. For redistributive feasts in Tahiti, see E. FERDON, *supra* note 68, at 223-32.

103. L. POSPISIL, WEST NEW GUINEA, *supra* note 17, at 31.

104. Speaking more broadly, redistribution by powers-that-be serves two purposes, either of which may be dominant in a given instance. The practical, logistic function—redistribution—sustains the community, or community effort, in a material sense. At the same time, or alternatively, it has an instrumental function: as a ritual of communion and of subordination to central authority, redistribution sustains the corporate structure itself, that is in a social sense. The practical benefits may be critical, but, whatever the practical benefits, chiefly pooling generates the spirit of unity and centrality, codifies the structure, stipulates the centralized organization of social order and social action.

M. SAHLINS, STONE AGE ECONOMICS 190 (paperback ed. 1974) (first published 1972).

105. His fortune amounts of five wives, cash amounting to 2,400 Kapauku cowries (representing a buying power of 120 medium pigs, each weighing 90 kilograms), 3,600 imported cowries (equivalent to 18 medium pigs), 3,300 beads (equivalent to 5.5 medium pigs), 10 *dedege* necklaces and 10 *pagadau* necklaces (equivalent to one medium pig), and 5 axes (equivalent to one medium pig). In addition to this currency, he own 42 pigs. His credit is about as extensive as his cash. He bought wives for eleven people who have not yet returned the money. These loans total 1,040 Kapauku cowries (equivalent to 52 medium pigs), 365 imported cowries (equivalent to two pigs of 70 kilograms of weight each) and 420 beads (equivalent to a 45-kilogram pig). He has a credit with twenty other individuals amounting to 1,200 Kapauku cowries (equivalent to 60 medium pigs). His generosity is praised by all the people who know him. The large amount of cash mentioned above is not simply hoarded. 600 Kapauku cowrie shells and the same number of imported cowrie shells as well as 3,000 beads were set aside for the sons as their inheritance. Since this headman imposed a taboo upon this money, which prevents him from using it otherwise

the communitarian purpose of redistribution.

On the other hand, Charles Darwin noted that among the inhabitants of Tierra del Fuego "even a piece of cloth given to one is torn into shreds and distributed; and no one individual becomes richer than another."<sup>106</sup> Therefore, among Stone Age humanity more than one attitude toward wealth prevails. Yet, the following quotation seems to summarize the attitude of many Stone Age societies:

Only money enables a man to get married, to gain prestige and become an influential individual, to conclude best-friendship unions with respected individuals, and to achieve the highest status of the political leadership and legal authority. Without money one is called *daba*—poor, idle, a not respected individual, who has no standing in the native society. The closest translation of this word is 'tramp'.<sup>107</sup>

The enormous diversity between Stone Age attitudes toward compensation, profit and wealth, makes generalizations such as those propounded by noted scholars such as Karl Polanyi and Max Weber doubtful indeed.<sup>108</sup>

### III. STRATEGIES FOR INTERGROUP TRADE

Ten thousand years ago the inhabitants of Jericho were making tools of obsidian, a volcanic glass, which was somehow procured from an identified source in Anatolia.<sup>109</sup> Because beasts of burden—the horse, the jackass, the camel—were not domesticated until about five thousand years ago,<sup>110</sup> one archaeologist speculated that the obsidian was brought to Jericho and other early Middle Eastern settlements on foot.<sup>111</sup> This is doubtless mostly true but the thought that the obsidian trader might have safely walked the 1,000 kilometers or so from Jericho to the obsidian sites in Anatolia and returned strains credulity, if one considers the dangers awaiting the traveller. Slavery,<sup>112</sup> headhunting<sup>113</sup> and cannibalism<sup>114</sup> abound in Stone Age societies.

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than for the inheritance mentioned, these savings are considered most generous and give the man additional prestige. The rest of the cash is hidden, and other people do not know of its existence. I, as the best friend of this man, have been told the exact amount of the headman's property.

L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 71 n.4.

106. C. DARWIN, *supra* note 29, at 245.

107. L. POSPISIL, *WEST NEW GUINEA*, *supra* note 17, at 18.

108. *See supra* text accompanying notes 78, 92.

109. P. SINGH, *NEOLITHIC CULTURES OF WESTERN ASIA* 39 (1974). Similarly, obsidian which had its source in The Tetons of Wyoming is found in pre-Columbian mounds in the Ohio Valley. P. KOPPER, *THE SMITHSONIAN BOOK OF NORTH AMERICAN INDIANS* 23 (1986). Archaeologists have identified trade routes in prehistoric Europe. *See* J. CLARK, *PREHISTORIC EUROPE: THE ECONOMIC BASIS* 241 (1952 & 1968 reprint). However, processes and laws governing Stone Age exchange are largely beyond the reach of the archaeologist.

110. *See* D. ELLIS, *supra* note 56, at 131.

111. P. SINGH, *supra* note 109, at 39. Part of the transport could have been by boat. J. CLARK, *supra* note 109, at 282. Very likely, as in Australia, "[o]bjects were traded only between one tribe and the next, never from one tribe, through a second tribe's territory, to a third tribe." A. MASSOLA, *THE ABORIGINES OF SOUTH-EASTERN AUSTRALIA* 71 (1971). The same kind of trade brought goods from the coast to the highlands of New Guinea. B. CONNOLLY & R. ANDERSON, *supra* note 83, at 13. Nonetheless, one or more of the trading strategies discussed in the text *infra* at notes 116-43 were likely also applied.

112. As to slavery in Africa, *see infra* note 116. In North America, *see* P. DRUCKER, *CULTURES OF THE NORTH PACIFIC COAST* 51-52, 75-76, 169-70 (1965); Marquette, *Voyages of Marquette*, in *THE JESUIT RELATIONS* 25 (1900 & 1966 reprint) (slave raids by the Illinois); G. WOODCOCK,

Thefts from passing strangers are not necessarily deemed illegal.<sup>115</sup> While all of these evils exist, let it quickly be stated that they are not found everywhere. To minimize risks to the trader, various strategies have been employed by humanity.

### A. *Silent Trade*

Herodotus appears to be the first to have written about "silent" or "dumb" trade. Some 2,500 years ago he wrote:

The Carthaginians also relate the following: There is a country in Libya [Africa], and a nation, beyond the Pillars of Hercules, which they are wont to visit, where they no sooner arrive but forthwith they unlade their wares, and, having disposed them after an orderly fashion along the beach, leave them, and, returning aboard their ships, raise a great smoke. The natives, when they see the smoke, come down to the

PEOPLES OF THE COAST 17, 19, 27, 134, 181, 199 (1977). In New Zealand, see R. LOWIE, *supra* note 15, at 346-47. In Mexico, see the reference to the slave-market in Tenochtitlán in B. DÍAZ DEL CASTILLO, *THE DISCOVERY AND CONQUEST OF MEXICO 1517-1521*, at 215-16. (A. Maudslay trans. 1956); B. DE SAHAGÚN, *A HISTORY OF ANCIENT MEXICO* 43 (Bandalier trans. 1932 & 1971 republication) (written by 1569, published in the nineteenth century).

113. R. BARTON, *THE KALINGAS* 20, 154-57 (1949 & 1973 reprint); F. WILLIAMS, *PAPUANS OF THE TRANS-FLY* 262-91 (1936 & 1969 reprint). For a discussion of the motivation behind headhunting, see A. JENKS, *supra* note 79, at 172-83. For a special situation, see R. CODRINGTON, *supra* note 90, at 297 (to launch a canoe a fresh head must be taken to decorate the prow). Additional headhunting references are *infra* in note 131.

114. There is a school of thought that holds that the existence of cannibals (except where starvation is the alternative or in rare rituals) is a myth. The literature is reviewed in Kolata, *Are the Horrors of Cannibalism Fact—or Fiction?*, 17 *SMITHSONIAN* 151 (March 1987); Eckholm, *What is the Meaning of Cannibalism?*, N.Y. Times, Dec. 9, 1986, at C1. This thesis seems as valid as stating that slavery never existed in this country because there are no living eyewitnesses. Eyewitness quotations as to cannibalism appear in B. BLACKWOOD, *supra* note 68, at 502-03, and also in F. WILLIAMS, *OROKAIVA SOCIETY* 171-73 (1930 & 1969 reprint), where one of the witnesses is a Resident Magistrate. Williams reports: "[t]he reason for cannibalism itself has been given by natives as the simple desire for good food." *Id.* at 171. Bernal Díaz Del Castillo had no less a guide than Montezuma to the human slaughterhouse in Tenochtitlán to buttress his first hand reports on cannibalism. B. DÍAZ DEL CASTILLO, *supra* note 112, at 217-25. Human flesh was also fed to the animals of the Aztec zoo. *Id.* at 213. A very detailed account of Aztec human sacrifice and cannibalism is given in B. DE SAHAGÚN, *supra* note 112, at 52, 61-62, 76-77. Dr. Chanca, physician to Columbus on his second voyage to the Caribbean, writes as follows of the Caribs:

They say that man's flesh is so good, that there is nothing like it in the world; and this is pretty evident, for of the bones which we found in their houses, they had gnawed everything that could be gnawed, so that nothing remained of them, but what from its great hardness, could be eaten: in one of the houses we found the neck of a man, undergoing the process of cooking. When they take any boys prisoners, they dismember them, and make use of them until they grow up to manhood, and then when they wish to make a feast they kill and eat them; for they say that the flesh of boys and women is not good to eat. Three of these boys came fleeing to us thus mutilated.

Chanca, *Second Voyage of Columbus*, in C. COLUMBUS, *FOUR VOYAGES TO THE NEW WORLD* 18, 31 (1961 reprint of R. Major's 1857 translations originally entitled *SELECT LETTERS OF CHRISTOPHER COLUMBUS WITH OTHER ORIGINAL DOCUMENTS RELATING TO HIS FOUR VOYAGES TO THE NEW WORLD*). Japanese feasting on beheaded American airmen and others is documented in LORD RUSSELL OF LIVERPOOL, *THE KNIGHTS OF BUSHIDO: THE SHOCKING HISTORY OF JAPANESE WAR ATROCITIES* 235-40 (1958). A scholarly treatise describes this source as a "one-dimensional shocker but solidly based on IMTFF [International Military Tribunal for the Far East] evidence." 2 D. BERGAMINI, *JAPAN'S IMPERIAL CONSPIRACY 1566* (1971). See also Shepardson, *Pawns of Power*, in *THE ANTHROPOLOGY OF POWER* 109 (R. Fogelson & R. Adams eds. 1977). It is unclear whether Japanese cannibalism was related to food shortages among Japanese troops.

115. *E.g.*, E. FERDON, *supra* note 68, at 226. (Theft is punishable by death, but if strangers enter the waters of the Society Islands, they are immediately raided and their goods taken with impunity. Also, it is not deemed improper to steal goods from traders and explorers on land.)



shore, and, laying out to view so much gold as they think the worth of the wares, withdraw to a distance. The Carthaginians upon this come ashore and look. If they think the gold enough, they take it and go their way; but if it does not seem to them sufficient, they go aboard ship once more, and wait patiently. Then the others approach and add to their gold, till the Carthaginians are content. Neither party deals unfairly by the other: for they themselves never touch the gold till it comes up to the worth of their goods, nor do the natives ever carry off the goods till the gold is taken away.<sup>116</sup>

This strategy, seemingly so strange, so mysterious, was also employed in the fur trade between the Vikings and their neighbors to the north and there are similar reports from Ceylon, the Himalayas and New Mexico,<sup>117</sup> as well as the Australian interior,<sup>118</sup> and in diverse islands of the Philippines.<sup>119</sup>

Verrazano found a variation of the silent trade strategy on the shores of Maine in 1524. The natives stood on the tops of the cliffs, lowering their goods by ropes and raising the European wares the same way, all the while insisting that the Europeans keep their distance.<sup>120</sup> One wonders about the identity of their prior trading partners, who may have come to Maine by sea.

### B. *Blood Brotherhood*

Strangers may be distrusted and may themselves have cause to distrust potential trading partners. Kinship, however, normally engenders trust. Where kinship is absent, it may symbolically be created. Dr. Livingstone reported from south central Africa concerning the *Kasendi*, a ceremony for creating a fictional blood relationship:

The hands of the parties are joined . . . ; small incisions are made on the clasped hands, on the pits of the stomach of each, and on the right cheeks and foreheads. A small quantity of blood is taken off from these points in both parties by means of a stalk of grass. The blood from one person is put into a pot of beer, and that of a second into another; each then drinks the other's blood . . . . The principals in the performance of "*Kasendi*" are henceforth considered blood-relations . . . .<sup>121</sup>

Livingstone thus discusses how a fictional blood relationship may be

116. 3 HERODOTUS, HISTORY, book IV, ch. 196 (G. Rawlinson trans. 1862) (footnote omitted). In a footnote, the nineteenth century translator of Herodotus indicates that this kind of trade is still practiced in the interior of Africa. That this should be so is comprehensible, as slavery was endemic in Africa well into the twentieth century. Internal African slavery preceded the Western slave trade (E. HARTLAND, *supra* note 32, at 158; W. PHILLIPS, SLAVERY FROM ROMAN TIMES TO THE EARLY TRANSATLANTIC TRADE 114-27 (1985)), was present in diverse parts of the continent (SOURCE BOOK FOR AFRICAN ANTHROPOLOGY, Part I, at 534-40 (Publication 394, Field Museum 1937 & 1968 reprint)) and continued into the twentieth century (R. RATTRAY, ASHANTI LAW AND CONSTITUTION 33-55 (1929 & 1969 reprint); G. SCHWAB, TRIBES OF THE LIBERIAN HINTERLAND 163-64, 439, 441-42 (1947 & 1974 reprint)).

117. E. OXENSTIERNA, THE NORSEMEN 120 (C. Hutter trans. 1965).

118. A. MASSOLA, *supra* note 111, at 63.

119. A. JENKS, *supra* note 79, at 159.

120. Verrazano, *The relation of John Verarzanus a Florentine, of the lande by him discovered in the name of his Maiestie, written in Diepe the eighth of July 1524*, in R. HAKLUYT, *DIVERS VOYAGES TOUCHING THE DISCOVERIE OF AMERICA* 6 (1582 & 1966 reprint).

121. D. LIVINGSTONE, *MISSIONARY TRAVELS AND RESEARCHES IN SOUTH AFRICA* 525 (1860).

formed in Africa but he gives us no information as to how this relationship may relate to trade. This omission is surprising given the relationship between blood brotherhood and trade in other societies. In Melanesia, blood brothers—a relationship that is usually inherited<sup>122</sup>—are those who participate in inter-group trade. This is the area where headhunting and cannibalism survived well into modern times. The fictionally related trading partner in a hostile group provides a certain guarantee of safety while travelling into its territory. Interestingly, in New York in 1930, Joseph Valachi was made a member of the Bonanno family by a ceremony resembling the *Kasendi* described by Livingstone.<sup>123</sup> Herodotus<sup>124</sup> and Tacitus report similar ceremonies among the Scythians,<sup>125</sup> the Arabs<sup>126</sup> and in the Caucasus.<sup>127</sup> Magellan underwent a similar ceremony with a Filipino chieftain.<sup>128</sup> Not all of these ceremonies seem to create a fictive family relation. Instead, some appear merely to pledge faith in a discrete transaction.<sup>129</sup>

Judge Posner, one of the few legal theorists who has taken primitive law into consideration, has concluded that blood brotherhood between trading partners reduces information costs because the trader may be confident that he will receive fair and generous treatment.<sup>130</sup> Clearly, the realization that one can trade with a particular partner without endangering one's life represents a significant savings of market transaction costs. To summarize blood brotherhood in these terms, however, underrates the significance of this breakthrough in human affairs whereby life is secured, peace attained and exchange facilitated.

### C. *The Professional Trader*

The Torres Strait, which separates New Guinea from Australia, is dotted with inhabited islands. These islanders are dependent on New Guinea for many products including arrows, bird of paradise feathers, drums, stone-headed clubs and especially canoes. The situs of the trade is

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122. On all these islands and at the villages on the [New Guinea] mainland that they visited every Eastern man had a friend, *tebud le*, who regarded him as a brother. These friendships once formed were never broken; they were hereditary, having come down from past ages from father to son. A man may never have seen his *tebud le*, but his name and family history were as well known to him as his own, and he passed on the pedigree to each of his own sons. On visiting the islands the *tebud le* would be welcomed and entertained.

1 TORRES STRAIT, *supra* note 54, at 183. See also I. Hogbin, A Guadalcanal Society: The Kaoka Speakers 49 (1914 & 1964 reprint); I. HOGBIN, THE LEADERS, *supra* note 72, at 29-30 (1978) (Wogeo Island—generally the sons of trading partners became trading partners themselves); B. MALINOWSKI, *supra* note 68, at 275-81 (young men buy into the Kula partnerships, usually financed by their fathers); Gallin & Gallin, *Sociopolitical Power and Sworn Brother Groups in Chinese Society*, in THE ANTHROPOLOGY OF POWER 89 (R. Fogelson & R. Adams eds. 1977).

123. P. MAAS, THE VALACHI PAPERS 97 (paperback ed. 1969).

124. HERODOTUS, HISTORY, book I, ch. 74 (G. Rawlinson trans. 1862) (Lydians and the Medes make an oath of peace by making a flesh wound in their arms and each sucks a portion of the other's blood.).

125. TACITUS, THE ANNALS OF IMPERIAL ROME, book XII, ch. 48.

126. HERODOTUS, HISTORY, book III, ch. 87 (G. Rawlinson trans. 1862).

127. TACITUS, *supra* note 125, at book XII, ch. 47.

128. I. A. PIGAFETTA, MAGELLAN'S VOYAGE AROUND THE WORLD 137 (1906) (J. Robertson translation of eyewitness account of Magellan's 1519-21 voyage).

129. See Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 65-66 (1974).

130. Posner, *supra* note 71, at 26.

the delta of Fly River where the inhabitants are headhunters. The Torres Strait islanders are also headhunters.<sup>131</sup> Thus, there are obvious diplomatic problems. The solution is that almost all trade to the Western islands is in the hands of the residents of one island, Saibai.<sup>132</sup> Trade with the eastern islanders is through one island, Erub.<sup>133</sup> Both the Saibai and Erub islanders are permitted by their trading partners on the coast of New Guinea to pass through their territory to go on headhunting expeditions into the interior.<sup>134</sup> Thus, presumably the Saibai and Erub traders trade under a grant of immunity and likely deal with blood brothers in New Guinea.<sup>135</sup>

Such grants of immunity to traders seem to be common. The Comanches were an Indian tribe that, unlike many others, had minimal or no government. They generally sought to massacre or enslave every non-Comanche with whom they came into contact.<sup>136</sup> Josiah Gregg, a businessman and trader, wrote:

The Santa Fe caravans have generally avoided every manner of trade with the wild Indians [Comanches] for fear of being treacherously dealt with during the familiar intercourse which necessarily ensues. This I am convinced is an erroneous impression; for I have always found, that savages are much less hostile to those with whom they trade, than to any other people. They are emphatically fond of traffic; and being anxious to encourage the whites to come among them, instead of committing depredations upon those with whom they trade, they are generally ready to defend them against every enemy.<sup>137</sup>

Similarly, a Sioux war party seized Father Louis Hennepin, a missionary on an exploration expedition of the upper reaches of the Mississippi, and two French canoemen. Hennepin describes the debate among the Sioux warriors on the question of whether the three captives should be killed. One chief urged execution, "but those who liked European goods were much disposed to preserve us, so as to attract other Frenchmen there and get iron, which is extremely precious in their eyes."<sup>138</sup> They were not killed but were "adopted."<sup>139</sup>

131. 5 TORRES STRAIT, *supra* note 54, at 295, 298-307; 6 TORRES STRAIT, *supra* note 90, at 189-91; see also F. WILLIAMS, *supra* note 113, at 11, 26, 41, 55, 169, 243, 262-91.

132. 5 TORRES STRAIT, *supra* note 54, at 295.

133. 6 TORRES STRAIT, *supra* note 90, at 185.

134. 5 TORRES STRAIT, *supra* note 54, at 295.

135. See *supra* text accompanying note 122.

136. The Comanches whipped and drove the Apaches from the southern Plains. They stalemated the Spanish. They decimated the pueblo of Pecos. They ranged far below the Rio Grande on slave- and booty-taking raids into Old Mexico. They blocked the westward expansion of the Texas frontier for several decades. They became 'The Spartans of the Prairies.' They were rough, tough, aggressive and militant individualists. They gave trouble to all their enemies and to themselves.

E. HOEBEL, *supra* note 31, at 129 (This summary was based on E. WALLACE & E. HOEBEL, *THE COMANCHES: LORDS OF THE SOUTH PLAINS* (1952)).

137. 2 J. GREGG, *COMMERCE ON THE PRAIRIES* 46 (1844 & 1966 Readex Microprint); *accord* Appendix, Z. PIKE, *SOURCES OF THE MISSISSIPPI AND THE WESTERN LOUISIANA TERRITORY* 62 (1810 & 1966 Readex Microprint) (Sioux are the most warlike in their area but traders feel secure in their territory.).

138. L. HENNEPIN, *supra* note 70, at 211.

139. *Id.* at 224-25. One finds many references to the adoption by American Indians of those of their captives whom they did not slay. Yet, in the reports of those who were "adopted," it seems clear that the adoptee was not deemed to be an equal of the adoptor's own progeny. Hennepin was

In 1527, Alvar Nuñez Cabeza de Vaca embarked as an officer of an expedition that was dispatched to conquer Florida. The expedition was unsuccessful. He and a few other survivors made their way to Texas where they were enslaved. After much suffering and privation he carved out a role for himself as a trader which led to his freedom. The bands of Indians in the area were all at war with each other. As a member of no tribe, he was feared by no one. He wrote:

The Indians would beg me to go from one quarter to another for things of which they have need; for in consequence of incessant hostilities, they cannot traverse the country nor make many exchanges. With my merchandise and trade, I went into the interior as far as I pleased, and travelled along the coast forty or fifty leagues.<sup>140</sup>

Cabeza de Vaca invented a role for himself as a professional trader. It would seem that others have created the same role. The evidence is, however, elusive. For example, trade in interior areas of Northern Luzon is often conducted in the language of a coastal people, the Ilokano, although at a time when an ethnographer noticed this phenomenon, native Ilokano speakers were afraid to penetrate the interior. Nevertheless, he also noted that at an earlier time Ilokano and Chinese who spoke Ilokano used to enter the interior, bringing with them iron, brass, cloth, cotton and other trade goods.<sup>141</sup> One suspects that Ilokano speaking traders had been made welcome but that some traumatic violation of the immunity later accorded professional traders had occurred. Headhunting, an indigenous practice,<sup>142</sup> was a possible cause of the violation. For example, among the Ibalao, a neighboring people, "no man may marry who has not first taken a head."<sup>143</sup> In such a society, an undefended trader is a tempting target.

#### D. Openness

Not all primitive peoples are afraid of foreign contact. Verrazano, who found fear and discourtesy on the shores of Maine,<sup>144</sup> had recently been greeted with joy in New York.<sup>145</sup> On July 8, 1534, Jacques Cartier approached the St. Lawrence River. The Indians came to greet him in such large numbers that *he* was afraid. He shot off cannons to scare the Indians away, but such was their friendly curiosity that they quickly returned.<sup>146</sup> When a party from the ship went on land, the natives literally traded the

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assigned women's work—barbering. L. HENNEPIN, *supra* note 70, at 223. Isaac Joques was assigned menial work—gathering firewood. THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE, 1610-1791, at 196-98 (E. Kenton ed. 1954). Cabeza de Vaca and his colleagues were clearly and cruelly treated as slaves. A. CABEZA DE VACA, *RELATION OF ALVAR NUÑEZ CABEZA DE VACA* 101-05 (Smith trans. 1871 & 1966 Readex Microprint).

140. A. CABEZA DE VACA, *supra* note 139, at 85 (Objects of trade were shells for cutting tools and decorations, peyote, skins, ochre, canes to make arrows, flint for arrowheads, and deer tassels presumably for fish bait.).

141. A. JENKS, *supra* note 79, at 157-58.

142. See *supra* text accompanying note 114. The unprovoked killing of traders is recorded in R. BARTON, *THE KALINGAS*, *supra* note 113, at 154.

143. A. JENKS, *supra* note 79, at 174.

144. See *supra* text accompanying note 121.

145. Verrazano, *supra* note 120, at A5, B.

146. J. CARTIER, *A SHORTE AND BRIEF NARRATION OF THE TWO NAVIGATIONS AND DIS-*

clothes off their backs for hatchets, knives, beads and the like.<sup>147</sup> Similarly Jean Ribault's reception in 1562 at the mouth of Florida's St. John's River can best be described as a celebration.<sup>148</sup> It is interesting that while strategies of "silent trade," "blood-brotherhood" and professional trading have been invented in very diverse geographical areas, they were not in use in most of the Atlantic Coast of North America. Indeed, the Indians assisted the Pilgrims in making their settlement.<sup>149</sup> This openness to the visitors from the East undoubtedly contributed to the destruction of Native American societies. Montezuma in fear and trembling saw Cortez and his men as gods and treated them accordingly,<sup>150</sup> thus unwittingly assisting the destruction of the Aztec state and its culture.

### E. Confusion

When in the 1930s Michael Leahy and his entourage of coastal people entered the densely populated highlands of New Guinea in areas where no white man had been seen or heard of, the reaction of the highlands' inhabitants was that of total confusion. Some groups welcomed them as returning ancestors;<sup>151</sup> others did not know whether to treat them as good or bad spirits or as invasive intruders.<sup>152</sup> All soon learned the power of the gun.<sup>153</sup> Most were willing to exchange food,<sup>154</sup> sexual favors<sup>155</sup> and labor for trade goods.

In 1822, a British exploratory expedition joined an Arab trading caravan departing from Tripoli and heading for the vicinity of Lake Tchad. When nearing their destination, the English witnessed a system of mutual plunder between the caravan and the natives. On the one hand, animals straying from the caravan were instantly carried off and messengers to the inhabitants was stripped and tied to a tree. On the other hand, when the caravan came in sight of a village the inhabitants fled with their possessions. Major Denham reported that when the Arabs caught up with one fleeing group, "[i]n a few seconds the camels were eased of their loads, and the poor women and girls stripped to the skin."<sup>156</sup>

Although neither the Arabs nor the natives of Tchad were in the Stone Age, this episode is reported here to illustrate the confusion and mistrust shown between peoples who have not established a strategy for trading with others whom they have reason to fear.

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COVERIES TO THE NORTHWEST PARTES CALLED NEWE FRAUNCE 15-16 (1580 & 1966 reprint sub nom. NAVIGATIONS TO NEWE FRAUNCE).

147. *Id.* at 16-17.

148. J. RIBAUT, *The true and last discoverie of Florida made by Captaine John Ribault in the Yeere 1562*, in R. HAKLUYT, *supra* note 120, at F-F5.

149. 1 W. BRADFORD, *HISTORY OF PLYMOUTH PLANTATION 1620-47*, at 198-213, 215, 219 (1912) (manuscript completed in 1650).

150. C. BURLAND, *MONTEZUMA: LORD OF THE AZTECS 179-226* (1973).

151. B. CONNOLLY & R. ANDERSON, *supra* note 83, at 23-29, 34-43.

152. *Id.* at 197-98. A similar disordered reception greeted Mackenzie's party by Deguthee Dinees just south of Eskimo country. A. MACKENZIE *supra* note 88, at 51.

153. B. CONNOLLY & R. ANDERSON, *supra* note 83, at 69-72, 100-02, 188-89, 191, 196, 197-200, and 205-14.

154. See *id.* at 120-22 for one of many trading episodes recounted in this book.

155. *Id.* at 142, 235-47. This kind of trade may have been introduced by Leahy's men. *Id.*

156. W. TAYLOR, *THE FLAMING TORCH IN DARKEST AFRICA 135-36* (1896).

## IV. LEGAL ASPECTS OF TRADE

A. *Forms of Contract*

Barter is a common form of exchange in primitive societies. In the Solomons there is a regular trade between coastal villagers and inland residents, the former supplying fish and the latter taro, an edible root. The exchanges are contemporaneous.<sup>157</sup> This typifies much of primitive exchange.<sup>158</sup> There are, however, more complex bartering systems. For example, an early twentieth century observer in the Solomons noted an intricate web of bartering transactions:

A chain of exchanges which came to my notice is interesting as showing the ramifications of the system. The people of Petats obtained some pots at Malasang in exchange for women's hoods. The pots they bartered to the people of Lontis in exchange for taro. The Lontis people used the pots to pay for pigs, which they intended to sell, as opportunity offered for ceremonial currency made of shell disks (*beroan*), which was destined eventually to form part of the property changing hands in respect of a marriage.<sup>159</sup>

Similar systems are recorded elsewhere.<sup>160</sup>

Necessities are not the only subject of trade.<sup>161</sup> The aesthetic impulse is strong. Decorative jewelry and cosmetics are often objects of exchange.<sup>162</sup> There is a surprisingly extensive trade in intellectual property. Songs, poems, magical incantations, and choreography are frequently deemed to be private property which can be sold or licensed.<sup>163</sup>

157. B. BLACKWOOD, *supra* note 68, at 440-41.

158. *E.g.*, fish for bananas. E. FERDON, *supra* note 68, at 221. "In the morning the dancing ground turns into a trading ground. The items most frequently exchanged include axes, bird plumes, shell ornaments, an occasional baby pig, and in former times, native salt." Rappaport, *supra* note 25, at 79.

159. B. BLACKWOOD, *supra* note 68, at 445-46.

160. *E.g.*, R. CORDRINGTON, *supra* note 90, at 297-98; B. MALINOWSKI, *supra* note 68, at 166-194.

161. Some of these objects of trade are mentioned *supra* at note 140. The importance of trade to primitive man is illustrated by the myth of Mafofo, a culture hero whose principal accomplishment was the inauguration of trading voyages. I. HOGGIN, *THE ISLAND*, *supra* note 48, at 42-49. The importance of trade in this society is shown by the following passage:

The chief [imported] items are pots, . . . and large garden-baskets woven from grasses . . . . Other articles . . . include shell scrapers, lime spoons of cassowary bone, tobacco and yams. Practically all the ornaments worn . . . — shell rings, usually too small for bracelets, worn in armlets and leg-bands, fibre shoulder straps sewn over either with shell discs or ground cowries, hair ornaments of dogs' teeth and ground cowries, loose ground cowries for sewing to fibre petticoats, dyed rattan, bird of paradise plumes, crests of *Goura* (or "guria") pigeons and cockatoo feathers, as well as cosmetics, such as red and white paint (red ochre and pipeclay?). . . .

The exports of Wogeo in greatest demand are fishing nets and nuts. . . . Canoes are occasionally bartered away, and on a couple of occasions villages on the mainland have "bought" Wogeo dances. I understand that amongst themselves the mainlanders trade regularly in dances. Magic too is sometimes exchanged for material goods. Wogeo love magic is said to be better than that from any other place, while the islanders themselves have obtained a good many spells to cause diseases from elsewhere.

Hogbin, *Trading Expeditions in Northern New Guinea*, in 5 OCEANIA 375 (1935) (footnote omitted).

162. *E.g.*, red paint (B. BLACKWOOD, *supra* note 68, at 444-45); red ochre (A. CABEZA DE VACA, *supra* note 139, at 85-86).

163. R. LOWIE, *supra* note 15, at 235-43; A. MASSOLA, *supra* note 111, at 64; *see also supra* note 161.

Although barter is common, unilateral contracts also pervade Stone Age societies.<sup>164</sup> Canoes are commonly sold on credit with payments stretched out over a period of three<sup>165</sup> or more months.<sup>166</sup> Pigs are sold on credit.<sup>167</sup> Loans at interest are common.<sup>168</sup> Real property is mortgaged.<sup>169</sup> Leases of cultivable land are made.<sup>170</sup> Land is sold in installments.<sup>171</sup> Water rights are sold.<sup>172</sup> Indeed, debt is an organizing principle of many Stone Age societies.<sup>173</sup>

Bilateral contracts—those requiring the future performance of obligations on both sides—appear to be less common. Pigs are let out on contracts to be raised and fattened for the owner with executory duties on both sides.<sup>174</sup> Sales of canoes frequently involve canoes made to order under what would appear to be bilateral contracts, but the observers of these transactions do not inform us of the consequences of non-performance of the agreement by the seller or of the buyer's refusal to take delivery. The consequences of the refusal to pay after delivery are well documented.<sup>175</sup> In all the literature this author perused—excepting for engagements to marry<sup>176</sup>—only one report of damages awarded for breach of an agreement that is entirely executory on both sides surfaced. R.F. Barton reports that among the Ifugao, “[t]he breaking of a contract to sell renders the breaker of the contract liable for damages *only in case he took the initiative* in making the contract. Damages paid for the breaking of a contract to sell, are called *hogop*.”<sup>177</sup> Moreover, only the seller and never the buyer is liable for these damages which, depending on the magnitude of the transaction, will be a large or small pig, a blanket or a chicken.<sup>178</sup> The suspicion is strong that

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164. A unilateral contract is a binding agreement which obligates only one party. For example, X states to Y, “if you lend me \$100, I will repay it within thirty days.” Y hands X \$100. X is obligated by his promise. Y was never under any obligation. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 1-10, 2-10 (3d ed. 1987).

165. 1 TORRES STRAIT, *supra* note 54, at 296.

166. R. LOWIE, *supra* note 15, at 348-49 (five payments in Samoa).

167. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 211-17.

168. R. BARTON, IFUGAO LAW, *supra* note 5, at 49-50; P. DRUCKER, *CULTURES OF THE NORTH PACIFIC COAST* 61 (1965). Surprisingly under Kapauku law, “it depends upon the will of the debtor whether interest will be paid. Although immoral, non-payment of promised interest is not punishable.” L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 224.

169. R. BARTON, IFUGAO LAW, *supra* note 5, at 37-38.

170. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 218-19.

171. R. BARTON, IFUGAO LAW, *supra* note 5, at 38-39.

172. *Id.* at 53.

173. “Where there is no debt, there are no relationships. Debts must be allowed to run between groups, for it is this which creates obligations and perpetuates social relationships.” Peters, *Some Structural Aspects of the Feud Among the Camel-herding Bedouin in Cyrenaica*, 37 AFRICA 267 (July 1967), quoted in Stoljar, *supra* note 28, at 270 n.9; see L. POSPISIL, ANTHROPOLOGY, *supra* note 17, at 69.

174. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 217-18.

175. *E.g.*, R. BARTON, IFUGAO LAW, *supra* note 5, at 92-100; A. KROEBER, *supra* note 13, at 32-33; L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 209-29.

176. This discussion deliberately avoids the subjects of bride price and sister exchange. The family law aspects of such transactions require specialized treatment. Others, however, disagree. At least one observer indicates that the people she studied regard the bride price “as a financial transaction exactly on the same lines as any other purchase. . . .” B. BLACKWOOD, *supra* note 68, at 97. For an instance where damages for breach of contract to marry are payable, see R. BARTON, IFUGAO LAW, *supra* note 5, at 97 (Gumangan's Case).

177. R. BARTON, IFUGAO LAW, *supra* note 5, at 52 (emphasis in original).

178. *Id.*

non-lawyer observers of neolithic peoples have not been terribly interested in the question of the availability of damages for breach of an agreement that is entirely executory on both sides. We do know that primitives make and keep promises,<sup>179</sup> but we do not know whether they are binding in law prior to the promisee's performance of his side of the bargain.

Among the Kapauku, a sale of personal property may be rescinded at will on the day of the sale or the next day subject to mutual duties of restitution.<sup>180</sup> Contracts not fully performed on both sides may be rescinded until performance is complete subject to mutual duties of restitution.<sup>181</sup> *A fortiori*, among this group a wholly executory contract would not be deemed binding.

The Kapauku have developed rules for risk of loss, as have the Kalinga.<sup>182</sup> It is almost certainly true that other agricultural peoples have developed rules governing the life and death of crops and farm animals. For example, among the Kapauku the seller of a pig assumes the risk of loss of its premature death, but is entitled to its carcass and must make restitution of the price.<sup>183</sup> The buyer of land assumes the risk of the destruction of a growing crop,<sup>184</sup> but if the subject matter of the sale is not land, but the crop, the risk of destruction by weather or invading pigs is on the vendor.<sup>185</sup> Among the Kalingas of Luzon, the risk of loss by the destruction of a field by landslide or the like is on the seller until delivery of possession.<sup>186</sup> In sales of water buffaloes (carabaos) it is customary for the parties to agree to "a point beyond which, should the animal fall over a cliff . . . , the buyer will bear the loss and inside of which the purchase price will be refunded."<sup>187</sup> These rules on risk of loss are not presented as a study of the subject but to point out that Neolithic humanity is capable of subtlety and precision in coping with recurring problems in the performance of contracts.

Liability for breach normally results in a duty to make restitution or to pay the agreed price. In common law terms, *indebitatus assumpsit* in both its contractual and quasi-contractual garbs dominates remedies for breach. But protection of the reliance interest by elongation of the chain of causation is also evident. Consider two incidents recorded among the Yoruk Indians. The first involved a ferryman. A Yoruk of Kenek was ferrying an acquaintance. While thus engaged, the ferryman's house was destroyed by fire. The acquaintance was required to pay for the entire loss. If the owner had not been engaged in ferrying, he might have been at home and probably could

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179. K. LLEWELLYN & E. HOEBEL, *supra* note 19, at 4 ("Say yes, and we will promise you to go to war against the Crows, wherever they may be'. . . 'I accept' the bereaved old man finally answered." The promised war took place.); *see also id.* at 13-15; Mackenzie, reporting on his travels in Saskatchewan, states "[i]f a contract is entered into and solemnized by the ceremony of smoking, it never fails of being faithfully fulfilled." A. MACKENZIE, *supra* note 88, at ciii. The nature of these contracts is not revealed, but Mackenzie was engaged in opening up fur trading relations with previously uncontacted tribes.

180. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 208, 215 (rule 89).

181. *Id.* at 208.

182. R. BARTON, IFUGAO LAW, *supra* note 5, at 51 (discusses risk of loss as between principal and agent).

183. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 208.

184. *Id.* at 210.

185. *Id.* at 211.

186. R. BARTON, THE KALINGAS, *supra* note 113, at 114.

187. *Id.* at 113.



have extinguished the blaze.<sup>188</sup>

Note that in the conceptual framework of the common law there was no breach of contract. Nonetheless, *but for* the ferryman's performance of the agreement, his house might not have burned down. Perhaps, however, it is wrong to look at this as a contract case at all because, despite the generally acquisitive nature of their society, it is an imperative of Yoruk law that "[f]ree ferriage must at all times be rendered."<sup>189</sup>

The second case is clearly contractual. The anthropologist's full report of the case follows:

An American at Rekwoi engaged a number of Indians to transport stores from Crescent City. In the surf and rocks at the dangerous entrance to the Klamath a canoe was lost and four natives drowned. Compensation was of course demanded; when it was not forthcoming, the American was ambushed and killed by the brother of one of the dead men. According to one version, the goods were Government property, and the trader responsible only for their transport. The Indians' claims are said to have been forwarded to the Government, but while officials pondered or refused, the Indians, losing hope of a settlement, fell back on the revenge which alone remained to them.<sup>190</sup>

Once again, no contractual breach occurred. However, the men would not have died but for their labor in performance of the contract. The other contracting party must pay blood money or suffer death.

The Kapauku also employ a similar stretched-out sense of the chain of causation. A contract case will be discussed later,<sup>191</sup> but a homicide case perhaps will better illustrate this notion of causation. By way of preface to the case, in Kapauku thinking an unmarried woman is under the control of her father or eldest brother.<sup>192</sup> The family head, often the eldest son when the father retires, determines whom she will marry and is entitled to an agreed bride price from her spouse. In the case reported below an older brother had instructed his sister and the "defendant" to refrain from courting each other as he disliked the "defendant." They both disobeyed.

Her brother became so enraged by her disobedience that he shot her in the thigh, without intending to hurt her seriously. However, the arrow severed an artery and the girl bled to death. . . .

*Outcome:* Public opinion condemned the brutal act of the brother. However, the authority [a village big man], complying with law, sentenced the courting boy to pay 120 [cowries], one pig, one *dedege* necklace, and some beads to the brother. The latter's right to control the courting of his sister, her disobedience, as well as the lover's interference over the protests of the brother were the reasons behind the decision.<sup>193</sup>

188. 1 A. KROEBER, *supra* note 13, at 35.

189. *Id.*

190. *Id.* at 28. A similar case is reported in R. BARTON, IFUGAO LAW, *supra* note 5, at 73, but there strict liability for the drownings applies only because hosts of "glorified general welfare feasts to which great numbers of people come are responsible for wounds or deaths that occur at these feasts." *Id.* at 72-73.

191. See *infra* text accompanying notes 237-41.

192. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 132-35.

193. *Id.* at 151.

The brother who mortally wounded his sister is under no liability, because he is the only party legally aggrieved by her loss. Although the "courting boy" was made to pay a heavy indemnity for the woman's death, there was no talk of the death penalty being exacted. The Kapauku distinguish between intentional and unintentional homicide on the question of remedies and penalties.<sup>194</sup>

There is some evidence that, among the Kapauku, intention to breach or the lack thereof, plays a role in determining remedy in contract cases. Here are two cases as reported by Pospisil.<sup>195</sup> In each of them the breach was unintentional and the aggrieved party therefore refrained from insisting upon full legal redress.

Case #1:

*Facts:* Pigs destroyed a crop of sweet potatoes which had been sold.

*Outcome:* The seller had to return only 3 Km of the 5 Km originally paid because the plaintiff felt sorry for the vendor.

Case #2:

*Facts:* The defendant sold a crop of sweet potatoes to the plaintiff. Shortly afterwards, pigs invaded the garden and completely destroyed the crop which had been purchased for 3 Km.

*Outcome:* The authority decided on the return of the price. The buyer, however, was satisfied with just 2 Km and left 1 Km to the seller because he felt sorry for the man's loss.

Although the law required restitution in full, the breaches were unintentional and, thus, engendered no feeling of outrage. Therefore, the claimants did not take full advantage of their remedies. If these cases are representative of community sentiment as to the no-fault liability of a seller, it likely presages a change in law.

## B. Collection Methods

When it is determined that a debt or damages must be paid, or restitution must be made, it sometimes happens that the debtor does not have the means of payment. In such circumstances primitive humanity has developed various strategies. A common rule holds the kinship group, the residential group, or both, collectively responsible.<sup>196</sup> A second strategy is corporal punishment. Aspects of both appear in the following Kapauku case:

*Facts:* The defendant [Ko Wed] frequently borrowed quantities of currency and failed to pay his debts. Also, he killed a male pig and

194. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 149-52. As did the Cheyenne, K. LLEWELLYN & E. HOEBEL, *supra* note 19, at 137-39.

195. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 211 (The case reported as Case 1 in the text is Case 5 in the original.) Although intention plays a role in Kapauku law, it plays none in the law of the Yoruk. As illustrated by both of the Yoruk cases discussed above, see *supra* text accompanying notes 188-90. "Intent or ignorance, malice or negligence are never a factor. The fact and amount of damage are alone considered." 1 A. KROEBER, *supra* note 13, at 20. At the other end of the spectrum, Ifugao law recognizes no liability for a homicide unless the killer acted intentionally or carelessly. R. BARTON, IFUGAO LAW, *supra* note 5, at 58; but see the Ifugao exception stated *supra* in note 190; see also R. BARTON, THE KALINGAS, *supra* note 113, at 220-26.

196. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 223-24, 231-32; R. BARTON, IFUGAO LAW, *supra* note 5, at 94.

promised to pay 15 Km for it. When the creditor came to collect the debt, however, Ko Wed tried again to avoid payment by making promises. This time the creditor insisted on immediate payment. To avoid intervillage disputes, Kug, the village authority, paid the debt.

*Outcome:* To stop this irresponsible behavior of the culprit, Kug decided to use a public reprimand and beating as a means of correction. The first paternal parallel cousins of the defendant became the executioners of the corporal punishment and beat Ko Wed with sticks for three days. During this period the authority helped with the public reprimand.<sup>197</sup>

Because the village is collectively responsible for its resident's debts, failure to pay the creditor could result in a foray by the creditor's kin, armed with bows and arrows, to levy execution on property of anyone in the village.<sup>198</sup> To avoid this, Kug, the village "big man," paid the debt. He caused Ko Wed's cousins to administer corporal punishment, thus avoiding retaliation by Ko Wed's kin against the kin of the "executioners." Worse for the defendant, Kug propelled the villagers into three days of public shaming of the culprit.<sup>199</sup> This is not the end of the story because Ko Wed now owes fifteen cowries to Kug.<sup>200</sup>

Another alternative is a physical attack upon the debtor. At least among the Kapauku such an attack discharges the debt.<sup>201</sup> Among the Ifugao "non-payment of a debt when there is the ability to pay it, and after many and repeated demands have been made in the proper manner for it, justifies infliction of the death penalty."<sup>202</sup> The death penalty is decreed by the creditor and his kin and not by the State, because there is no State,<sup>203</sup> nor are there "big men." It is a solution of last resort because it may be the starting point of a feud between families.<sup>204</sup>

Similarly, among the Ifugao, seizure of property by the creditor is a recognized right. The following is a list of items usually seized: gongs, rice-wine jars, carabaos, gold beads, rice fields, children, wives.<sup>205</sup> For debts and minor torts, the property seized may be that of a neighbor of the debtor. A case will illustrate how the neighbor may profit by such a seizure of his goods:

Bahni of Tuplak spoke scornfully of Bumidang of Palao. Some time subsequently he sent a man to buy carabaos in Nueva Vizcaya. The man bought two, and returned on the homeward journey, traveling through Palao. Bumidang took one of the carabaos away from him there, and with his kin, killed it and ate it. Bahni with his kin shortly afterward went to the house of Dulauwan of Bangauwan, a neighboring village, and stole away with Dulauwan's carabao. Du-

197. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 222-23 (In this quotation the name of the defendant has been changed to correct a probable clerical error.).

198. See *id.* at 223 (Case 124), discussed *infra* in text accompanying notes 237-41.

199. On the severity of this punishment, see *infra* text accompanying note 239.

200. See L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 225 (Case 126).

201. *Id.* at 219 (Rule 99); but see *id.* at 220 (Case 118).

202. R. BARTON, IFUGAO LAW, *supra* note 5, at 93.

203. See *supra* notes 6-7 and accompanying text.

204. R. BARTON, IFUGAO LAW, *supra* note 5, at 93.

205. *Id.* at 93.

lauwan followed after them, hotfoot, and was given as *patang* [interest paid in advance] three pigs, and told to collect his carabao from Bumidang. Dulauwan gathered together a great host of kinsmen and neighbors, descended on Bumidang's house, and camped there demanding three carabaos. To show that they meant to get them, they helped themselves to rice needed for their daily food from Bumidang's granary. Bumidang was unable to get together a sufficient force to frighten away his guests, and accordingly he paid the three carabaos.<sup>206</sup>

If a wife or child is seized she or he is held for ransom until the debt is paid.<sup>207</sup>

Another option, in some societies, is enslavement of the debtor. This was the practice among the Yoruks, as illustrated by the following case:

A bastard, in burning over a hillside, once set fire to certain valuables which a rich man of Sregon had concealed in the vicinity. He was unable to compensate and became the other's slave. Subsequently the Sregonite killed a Tolowa, and transferred the slave as part of the blood money. This was long after the American was in the land; but the slave knew that if he attempted to avail himself of the protection of the white man's law, he would be liable under the native code and probably ambushed and killed by his master. He therefore arranged with him to purchase his liberty, apparently with money earned by services to Americans.<sup>208</sup>

Debt slavery, often called pawning of a human, has been a common phenomenon in various parts of Europe and Africa.<sup>209</sup> Slavery of this kind, however, appears alien to the Melanesian region.<sup>210</sup>

Death does not appear to be an appropriate penalty for debt or breach of contract<sup>211</sup> unless the contract or its breach causes death.<sup>212</sup> As indicated above, the Yuroks employ shamans as physicians at very high fees.<sup>213</sup> So do other California Indians. The fees may be justified by the risks of the profession. If the patient dies, the survivors may deem the physician to be responsible for the death. Therefore, "[m]any a central and south California doctor has met this fate [retribution]," being "waylaid in the brush and choked to death."<sup>214</sup>

The remedy of "homesitting," attributed by legal historian Sir Henry Maine to ancient Aryan law, the assumed common heritage of Indo-European peoples, has its cognates elsewhere as well. He describes the well-known ancient Irish practice whereby the debtor would sit on the doorstep

206. *Id.* at 97.

207. *Id.* at 99-100.

208. 1 A. KROEBER, *supra* note 13, at 33.

209. It is not necessarily the debtor who is pawned. Frequently it is the son or daughter of the debtor who is pawned to the creditor. R. RATTRAY, *supra* note 116, at 47-55; G. SCHWAB, *supra* note 116, at 163-64, 439. The ancient Irish law allowed for the pawning of a son. H. MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 282 (1888). For analogous rules under Germanic Law, see Berger, *From Hostage to Contract*, 35 ILL. L. REV. 154, 157-58 (1940).

210. See, e.g., L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 77-78.

211. But see *supra* text accompanying note 202 and *infra* text accompanying notes 235-37.

212. See *supra* text accompanying notes 190, 202.

213. See *supra* text accompanying note 89.

214. 1 A. KROEBER, *supra* note 13, at 36.

of his creditor while fasting (a precursor of the hunger strike) and which had a counterpart in Saxon England where the debtor would sit on the doorstep to imprison the owner or members of his family until the debt was paid. Closer to the Irish practice were practices in Persia and India.<sup>215</sup> Outside of the Indo-European family of peoples, similar strategies are also employed. The following incident took place in Luzon and is a common form of debt collection there. Pedro sold a gong to Tobagon for the promised payment of three carabaos.

Two years later, the debt was still unpaid, so one day Pedro called five companions and went to . . . Tobagon's house and informed him that they intended to stay until they led that carabao away.

After a day or two, Tobagon's wife told him that he would better borrow from his relatives and pay because she never saw anybody eat like Pedro and his companions, and if they should stay much longer all their rice would have been used up, since they had only 3 *uyons* left for the rest of the year. Accordingly, Tobagon went to his eldest brother, Andomang, and explained the situation saying that, unless Andomang should lend him his carabao, he, Tobagon and family, would be doomed to starvation soon, because their rice was vanishing fast. So Andomang "was convinced."

On the fourth day of their stay, Pedro and his companions led away their carabao, praising their host's hospitality highly. Tobagon paid Andomang later.

*Comment by informant (Pangat Gasatan):* "But the best method of sit-down collection is to stop at the house of an influential man among the debtor's relatives, so that you will be helped by him. In such cases the debtor is ashamed before his influential kinsman, so he is obliged to borrow from his brothers and sisters."<sup>216</sup>

While it is conceivable that housesitting whether in its Irish, Filipino or other form is the common inheritance of all those peoples that utilize it, or has diffused from a center where it was invented, it seems probable that it has been reinvented at various times by different individuals in different societies.

## V. DISPUTE RESOLUTION

Many Stone Age societies are organized into States with State-run institutions of dispute resolution. However, as indicated at the beginning of this Article, some societies are stateless.<sup>217</sup> The varieties of dispute resolution methods in the latter kind of societies are the focus of this part of the Article.

A.L. Kroeber, one of our foremost anthropologists, succinctly described dispute resolution among the Yoruks as follows:

It may be asked how the Yurok executed their law without political authority being in existence. The question is legitimate; but a profounder one is why we insist on thinking of law only as a function

215. H. MAINE, *supra* note 209, at 295-305.

216. R. BARTON, *THE KALINGAS*, *supra* note 113, at 131. For a similar practice in the Solomons, see R. CODRINGTON, *supra* note 90, at 326-27.

217. See *supra* text accompanying notes 6-30.

of the state when the example of the Yurok, and of many other nations, proves that there is no inherent connection between legal and political institutions. The Yurok procedure is simplicity itself. Each side to an issue presses and resists vigorously, exacts all it can, yields when it has to, continues the controversy when continuance promises to be profitable or settlement is clearly suicidal, and usually ends in compromising more or less. Power, resolution, and wealth give great advantages; justice is not always done; but what people can say otherwise of its practices?<sup>218</sup>

Reflection on the Yurok method of dispute resolution reveals that it is also an apt description of international law.<sup>219</sup> As in international controversies when each side "presses and resists vigorously," bloodshed sometimes ensues. The feud begins and is ultimately settled.<sup>220</sup> From the purely economic point of view the result may be "woe to the victors,"<sup>221</sup> as settlement may necessitate compensation for the deaths or wounds of the vanquished.

The Ifugao, another stateless group, have more complex dispute resolution machinery. As noted earlier,<sup>222</sup> retaliation or self-help may be an acceptable means of enforcing one's rights. Instead, the claimant may hire a *monkalun* to mediate the claim. This mediator must not be closely related to either party or he will have no credibility. His role is well-established and strongly defined:

To the end of peaceful settlement he exhausts every art of Ifugao diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, insinuates. He beats down the demands of the plaintiffs or prosecution, and bolsters up the proposals of the defendants until a point be reached at which the two parties may compromise. If the culprit or accused be not disposed to listen to reason and runs away or "shows fight" when approached, the *monkalun* waits till the former ascends into his house, follows him, and, *war-knife in hand*, sits in front of him and compels him to listen.<sup>223</sup>

The ethnographer describing the role of the *Monkalun* in the Ifugao system notes that behind his persuasive powers, as in the compulsory processes of State organizations, "[the] lance is back of every demand of importance . . ."<sup>224</sup> For the aggrieved creditor, satisfaction of his claim is essential to the maintenance of his pride, reputation and, indeed, his self-preservation. Forbearance towards his debtors would be regarded as cowardly and would subject him to the rapacity of his fellows. These dangers also beset the debtor who must not allow himself to be perceived as an easy target for a claim. On the other hand, his life is at risk. "It is the part of the

218. 1 A. KROEBER, *supra* note 13, at 22.

219. See the collection of materials in L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 10-35 (1980); see also McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968), reprinted in M. MCDUGAL & W. REISMAN, *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 43 (1981).

220. 1 A. KROEBER, *supra* note 13, at 49-52.

221. *Id.* at 49.

222. See *supra* text accompanying notes 203-07.

223. R. BARTON, *IFUGAO LAW*, *supra* note 5, at 87 (emphasis in original). For a comparison with international mediation, see E. HOEBEL, *supra* note 31, at 121-22.

224. R. BARTON, *IFUGAO LAW*, *supra* note 5, at 87.

accused to dally with danger for a time, however, and at last to accede to the best terms he can get, if they be within reason."<sup>225</sup>

If the facts are disputed, the *monkalun* may administer an ordeal; boiling water or a hot knife is used to determine guilt.<sup>226</sup> Duels are used to settle some disputes and wrestling matches settle boundary disputes.<sup>227</sup>

A distinctly different method of dispute resolution exists among the Kapauku. Here, recognized "big men" take charge of controversies. The role is neither inherited nor elected. "Big men" seem to be chosen by consensus and have no formal authority but nonetheless exert leadership and power. Hogbin thoroughly and succinctly describes the characteristics of the "big man" on the island of Wogeo that seem apt for a description of the "big man" throughout much of Melanesia:

Headmanship goes with generosity. To win approbation the leader must be open-handed to all. He keeps a free house and distributes food, betelnut, and tobacco not only to his own villagers but to visitors from further afield; he inaugurates the bigger feasts and provides the bulk of the supplies; and he is ready with a contribution when his followers arrange small gatherings for a family celebration. Of necessity therefore his gardens and coconut and areca-palm groves are extensive, a good deal larger than those of other people, and he owns many pigs. This means that he has to spend much of his time tilling the soil and erecting fences to prevent destruction of the crops by domestic or wild animals. His followers are willing to help if called upon—on occasion too when he has made no specific request—but he is there toiling almost every day. A traditional saying runs that a stranger can easily discover who is the headman by looking for the person with dirty hands and muddied feet or, alternatively, the one who smells of sweat.

It is said that at a feast he should leave the most succulent taro, the slabs of lean pork, and the strips of white fat and be content with bones . . . 'The host should see that ordinary folk depart with full bellies; he himself holds back and tightens his belt.'<sup>228</sup>

While self-help and retaliation are available as methods of resolving disputes,<sup>229</sup> many disputes are resolved by the "big man." When he comes upon the scene of a dispute, usually summoned by the sound of loud angry voices, he listens patiently to the disputants' charges and counter-charges, questions the parties and the witnesses and often elicits a confession from the

225. *Id.* at 88. For similar mediators elsewhere, see R. BARTON, *THE KALINGAS*, *supra* note 113, at 164-67; Gulliver, *On Mediators*, in *SOCIAL ANTHROPOLOGY AND THE LAW* 15 (I. Hammett ed. 1977).

226. R. BARTON, *IFUGAO LAW*, *supra* note 5, at 89-90.

227. *Id.* at 90-92. For duels in Australia, see C. HART & A. PILLING, *THE TIWI OF NORTH AUSTRALIA* 80-82 (1960).

228. I. HOGBIN, *THE LEADERS*, *supra* note 72, at 40. On Wogeo, the title "headman" or "big man" is hereditary in the sense that the titleholder's father must have had this title. The title does not necessarily pass to the eldest son. On New Guinea, the title is generally acquired rather than inherited. *Id.* at 42. Compare the description of the "big man" in L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 67-68. See also Errington, *Order and Power in Karavar*, in *THE ANTHROPOLOGY OF POWER* 23, 37 (R. Fogelson & R. Adams eds. 1977).

229. See *supra* text accompanying note 203.

culprit or otherwise comes to a factual conclusion. He then makes a determination of what should be done.<sup>230</sup>

## VI. WHY ARE CONTRACTS ENFORCED?

There is no easy answer to this question, perhaps because the answer may be too deep in the human psyche to discover. Why is a person outraged if he or she is slapped in the face, spat upon or mugged? The appealing answer is that the feeling of outrage is "human nature," a genetic trait, much like hunger or fatigue. The difficulty with this conclusion is that not all peoples agree as to what constitutes offensive behavior or what constitutes a contract. The acquisitive Kapauku do not regard an exchange of promises as binding, implying that for them, a breach of an executory contract is not outrageous.<sup>231</sup> Yet many societies deem such promises to be morally and legally binding and a breach of promise to be outrageous.<sup>232</sup> When a person is outraged, there is a serious possibility that he or she will resort to violence if there is no other avenue of redress.

Every society about which this author has found information is outraged by the non-payment of debt. In a debt collection case the restitution and expectation interests normally coincide<sup>233</sup> and a violation of this combination seems to provoke the most outrage. In 1805, the United States Government dispatched Zebulon Pike to explore the headwaters of the Mississippi and to make contact with the indigenous population. He found the chiefs in possession of British flags and medals which they regarded as insignia of office.<sup>234</sup> He induced them to part with these in exchange for his

230. L. POSPISIL, *ANTHROPOLOGY*, *supra* note 17, at 236-38.

231. See *supra* text accompanying notes 180-81.

232. A compilation of old Irish law believed to date to 438 A.D. contains this somewhat surprising sentence: "There are three periods at which the world dies: the period of a plague, of a general war, of the dissolution of verbal contracts." INTRODUCTION TO SENCHUS MOR 51 (Engl. trans. 1865 & 1983 photo. reprint). An anonymous commentator indicates that these calamities cause the departure of people, cattle and worthiness, respectively. *Id.*

Harry Truman was asked by an interviewer, "Mr. President, Judge Ridge says that in this part of the country a man's word was very important when you were a boy. A man had to stand by his word, and that's the way you were brought up." Mr. Truman's reply was:

That's true. Unless you were a man who stood by what he said, you were not well thought of around here and you never got very far, never got anywhere at all in this part of the country.

And you never had to sign a piece of paper when you made a bargain. If you made a trade with a man, if you said you'd take so much for so many head of cattle, why, that was what you agreed on, and if the fella you'd made the bargain with came along later, it never did matter how much time had passed or if the price might have changed in the meantime, you just live up to what you had agreed on at that earlier time. That's what your word meant.

In those days, in the time I was growing up and when I was a young man, people thought more of an honest man than any one thing, and if a man wasn't honest, he wouldn't stay long in the neighborhood. They would run him out.

And I have never changed my mind since. You have to stick by your word. Trust is . . . why, it has always seemed to me that unless you can trust a man and he can trust you, why, everything breaks down.

M. MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 47-48 (1974).

233. For an exceptional case, Kapaukuan real property must be sold for its customary price. If sold for less, the seller or his heirs may, after conveyance, recover the difference between the customary price and the agreed price. Clearly, in this case the restitution interest supersedes the expectation interest. L. POSPISIL, *KAPAUKU PAPUANS*, *supra* note 17, at 209-10.

234. Z. PIKE, *supra* note 137, at 70-71, 87, 101.



promises of American flags and medals. Federal agents failed to honor his promises. His own assessment of the breach was:<sup>235</sup>

This has left a number of the Sioux and Sauteur chiefs without their distinguishing marks of dignity, and has induced them to look on my conduct toward them as a premeditated fraud, and would render my life in danger, should I ever return amongst them, and the situation of any other officer who should presume to make a similar demand extremely delicate; besides it has compromitted the *faith* of our government with those savage warriors, which, to enable any government ever to do good, should be held inviolate.

Anyone who has read Pike's journal recognizes him as an understated and brave man. That he should fear for his life shows his recognition of the depth of outrage felt by the disappointed chiefs.

An examination of two reasons for contract enforcement—the venting of outrage and preservation of public peace—can profit from an analysis of the case of Ij Bun of Botu, a Kapaukuan.<sup>236</sup> Bun lived a prosperous life. He had three wives, twelve children and did no work other than the buying and selling of pigs. He borrowed heavily and also bought pigs on credit. Residents of his village were bothered by the incessant complaints of his unpaid creditors. In March 1955, in a distant village, Bun made a deal to deliver three large pigs and was given a down payment in beads and shells. Four months later the purchasers went to Bun's village to accept delivery of the pigs. They discovered that he had none and that, moreover, he had no money to repay them and was in a distant village. The purchasers threatened that they would return to forcibly seize pigs belonging to his cousins and co-villagers. They in fact reappeared, armed with bows and arrows, together with many other armed men, presumably kin and other creditors. The village "big man" and Bun's kin assured the war party that they would see to it that they would receive satisfaction in three days.

Meanwhile five "big men" presided over a public meeting that lasted a week—a week of oratory during which Bun's fate was discussed. Some of the villagers called for the death penalty. The final outcome was that his kin took up a collection to make satisfaction. During the week of oratory, Bun, squatting, looking on the ground, was constantly reprimanded. Part of one of the reprimands shows the gist of the oratory:

You simply travel and think how to steal something. You have forgotten how to make gardens, and how to make houses. You simply exploit all of us by eating from our shelves. You raise no pigs, you make no garden, you have no cowries, no beads, no houses. The creditors will take our pigs away and burn our houses. You are really a burden to us all, a bad man in our community. If the creditors take our pigs or burn our houses, we are going to kill you with *pogo* arrows.<sup>237</sup>

One can note several things about this case. There had been many complaints from Bun's creditors. None had previously taken action which indi-

235. *Id.* at *Appendix to Part I*, 31 (emphasis in original).

236. L. POSPISIL, KAPAUKU PAPUANS, *supra* note 17, at 223-24.

237. *Id.* at 224.

cates that not all claimants promptly seek a remedy. Nonetheless, his conduct endangered the welfare of his village and of his kin wherever residing. This was a source of serious public concern. Although there is no Kapauku government, the public makes its voice heard. Bun's co-villagers were outraged and they understood the outrage of his creditors. That law was implicated seems clear. Bun does not contest that he is indebted and neither his co-villagers nor kin contest their liability. Is a week of reprimanding a sufficient penalty for a deadbeat and con-man who endangers the lives and property of others? Pospisil indicates that it is indeed a severe penalty.<sup>238</sup> It was followed by social ostracism. Bun's own conclusion was "[i]f they would beat me and take away all my belongings it would be better than this."<sup>239</sup>

One can infer certain notions of causation, consequential damages and the reliance interest from a minor part of Bun's case. Jik, an old man, injured his leg while escaping from the village with his pigs when the war party appeared. He was permitted during Bun's "trial" to hit Bun with a stick in retaliation for his injury. In the concluding reprimand, the village "big man" stated: "[i]f Jik had sons, they would have beaten you or shot you to death because Jik injured himself so badly while escaping with his pigs for fear of your creditors."<sup>240</sup> To speak of a reliance interest may seem far-fetched because there was no contract between Bun and Jik, much less a breach. However, the injury was caused by a chain of events stemming from a breach of contract to deliver pigs to third parties. Jik, as a co-villager, was an involuntary co-obligor and he both expected and relied on Bun's keeping his creditors from his door. In a case such as this, Jik's reliance and expectation interests coalesce.<sup>241</sup>

Fundamentally, the solution in stateless societies of contractual disputes reflects the essential continuity of human nature. The complainant appeals to his debtor: the debtor usually heeds or compromises the claim. If not, the creditor may resort to violence. Consider, by way of analogy, the enforcement today of claims among drug dealers who operate beyond the pale of the State and whose law is supplied by an underculture administered by big men. Mediators may instead be employed. Until very recently, duels and ordeals were employed, as an alternative, throughout the world. An ultimate solution is the authoritative decision of a community leader that the debtor render performance, pay damages, make restitution, be punished or be absolved. Not all of these solutions are in place in all societies. Certain patterns recur in diverse societies. Maitland was only partly right when he stated "[t]he law of one rude folk will always be somewhat like the law of another."<sup>242</sup> Rather, there seem to be various predispositions toward solutions of human problems, "blue prints, codes or instructions" that allow certain behavioral norms to be invented.<sup>243</sup>

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238. *Id.* at 267-68.

239. *Id.* at 268.

240. *Id.* at 224.

241. Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 75 (1936).

242. F.W. MAITLAND, *SELECTED LEGAL ESSAYS OF F.W. MAITLAND* 99 (Cambridge ed. 1957).

243. J. LOPREATO, *HUMAN NATURE & BIO-CULTURAL EVOLUTION* 70 (1984).

All groups possess law. In this sense, law can be analogized to language. All peoples speak, but languages are diverse. A two-year-old child who has heard only a fraction of the language can compose new sentences, even poetry, that no one has composed before. Law is omnipresent, but laws are diverse. Trade is equally natural to humanity. The similarity of behavior in trading relations and in the law pertaining to trade, debt collection, and dispute resolution that recur in diverse cultures reveals something about the nature of humankind and both the flexibility of and limitations on its inventiveness. It is startling to see the strategy of trading with blood brothers arising in various parts of the world. Alternative strategies such as the silent trade and the professional trader also have a scattered but worldwide distribution. Remedies for debt such as attack on the debtor, seizure of property, housesitting and debt slavery also recur in diverse societies. Not all societies adopt or invent the same trading strategies or substantive law and procedure, but the range of choices appears small.

